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Bill to Regulate Independent Political Committees Introduced in Congress

The "527 Reform Act of 2004", introduced on September 22, would limit soft money for independent political groups, but does not clearly exempt advocacy groups exempt under Section 501(c) of the tax code.

The Congressional sponsors of the Bipartisan Campaign Reform Act of 2002 (BCRA) announced a bill meant to regulate any group "described in" Section 527 of the tax code whose "major purpose" is to influence federal elections. The bill does not define "major purpose". There is no exemption for charities, social welfare groups or other organizations exempt under Section 501(c). There is concern that 501(c) groups could said to be "described in" Section 527 as a result of their electoral activities.

The proposal would apply to major purpose groups that receive more than $25,000 per year, prohibit corporate or union contributions and limit individual contributions to $25,000 per year. Groups focused solely on state and local elections would not be covered. These include campaign committees of state or local candidates and state or local party committee. Groups that work exclusively on elections with no federal candidates, ballot measures and influencing appointments, nominations and such would be exempt.

The exemptions would not apply if a covered organization spent money on a public communication that "promotes, supports, attacks or opposes" a federal candidate within two years of a federal election. The bill does not distinguish between statements made about federal officeholders in relation to their official duties and candidates. As a result, it could effectively ban any criticism of a member of the House of Representatives by a covered organization, since elections for House seats are held every two years.

At a press conference announcing the bill the sponsors said 501(c) groups would not be impacted and abuse would be prevented by adequate enforcement of existing laws. This position is at odds with their challenge to the FEC's rule exempting 501(c)(3) organizations from the electioneering communications rule.

The Senate version, S. 2828, is sponsored by Senators Russ Feingold (D-WI) and John McCain (R-AZ) and co-sponsored by Senators Joe Lieberman (D-CT) and Charles Schumer (D-NY). The House version, HR 5127 is sponsored by Reps. Christopher Shays (R-T) and Martin Meehan (D-MA).

This article revised October 8, 2004.

House Committee Drops Balanced Budget Amendment -- for Now

The House Judiciary Committee convened in mid-September to consider a constitutional amendment to balance the budget but failed to make headway on the proposal. When the committee met Sept. 22 to debate and vote on the measure, Democrats clearly demonstrated their opposition and offered several amendments, including one by John Conyers (D-MI) to exempt Social Security. The committee adjourned before voting on the amendment, and upon reconvening did not have a quorum, and thus could not complete the vote. There was brief speculation that the amendment would go straight to the House floor; however, it appears House Republicans have dropped their work on the amendment for now.

This amendment has been brought up in the House several times and was part of the Republicans' "Contract With America" in the early 1990's. Rep. Ernest J. Istook Jr. (R-OK) pushed for the amendment, hoping the House would vote on it before adjourning for the elections.

The policies put forth in the Balanced Budget Amendment are fiscally and economically irresponsible. According to OMB Watch Economist and Senior Budget Policy Analyst John Irons, the amendment could "destabilize the economy by amplifying downturns in the business cycle. It would also restrict the nation's ability to invest in projects that would yield significant benefits in the future." (See press release.) In 1997, over 1,000 economists, including 11 Nobel Prize winners, signed a statement opposing the policies laid out in the Balanced Budget Amendment.

Max B. Sawicky, an Economic Policy Institute budget and fiscal policy expert, registered his opposition to the proposed policy in a letter to House Judiciary Committee Chairman James Sensenbrenner (R-WI). Sawicky points out that the growth seen in the recent recovery, weak as that growth has been, would probably not have occurred if the amendment had been in place.

The Balanced Budget Amendment was likely floated for its political value with constituents, even though well-designed budget rules and responsible legislation are more effective for preserving a healthy economy. For now, House Republicans have dropped work on the amendment; we hope that the issue is not picked up again in a post-election lame-duck session.

For more information on House proceedings concerning the amendment, see a Sept. 30 *Washington Post* article, "GOP Drops Work on Balanced Budget."

Economy and Jobs Watch: The Lost Years -- by the Numbers

Over the past 4 years there has been a dramatic shift in the nation's fiscal policy. Has the new strategy worked? The numbers indicate it has not.

Employment:

January 2001: 132,388,000
August 2004: 131,475,000
Decline of 913,000

Note: Data seasonally adjusted.
Source: Bureau of Labor Statistics.

Real Gross Domestic Product:

2001 Q1: $9,875 billion
2004 Q2: 10,784 billion
Average annual increase 2.6%*

*Over the same period in his term, President Jimmy Carter had a better growth rate (2.9%).
Source: Bureau of Economic Analysis.

Stock Market -- Dow Jones Average:

Jan. 2, 2001: 10,646
Oct. 1, 2004: 10,193
Decline: 4.3%*

* The poor stock market performance over the past several years cannot be explained simply by pointing to the events on 9/11. The Dow Jones Average on Sept. 10, 2001 was 9,431. When the market reopened on the 17th, the Dow fell 675 points by the close of the day. Less than 2 months later, the Dow had already recovered all of its ground and more, and by the end of that year it reached 10,000.

Source: Yahoo! Finance

Deficit

Fiscal year 2000: +$236 billion -- Surplus
Fiscal year 2004: - $422 billion -- Deficit
Decline of $658 billion

Source: OMB and Congressional Budget Office

Poverty Rate

2000: 11.3%
2003: 12.5%
Increase 1.2 percentage points

Source: Census Bureau

Median Household Income (in inflation adjusted 2003 dollars)

2000: $44,853
2003: $43,318
Decline $1,535

Source: Census Bureau

Congress Spends $146 Billion To Extend Certain Tax Cuts Without Offsets

Congress voted to extend so-called "middle-class" tax reductions last week, and chose not to offset any of the cost of the $146 billion measure. In addition, the bill also includes $13 billion in tax cuts for businesses. When factoring in the additional interest costs, the bill will increase the deficit by over $200 billion.

Despite the "middle-class" label, the tax cuts still benefit upper income individuals more than the middle class. The Center on Budget and Policy Priorities estimates that the bill means a typical family would see a tax benefit of just $162 in 2005. Those in the top 20% of income earners would, on average, see a much larger tax benefit of $1,317, and those with incomes between $200,000 and $500,000 will receive an average of $2,390.

Since the costs are not offset, these changes must eventually be paid for, and most of the population will likely come up losers -- see "The Ultimate Burden of the Tax Cuts" by William G. Gale, Peter R. Orszag, and Isaac Shapiro for more details.

Much of the cost of the bill could have been paid for with revenue increases that are part of the FSC/ETI bill now under consideration. Rather than choosing to use increased revenue from corporations to pay for the income tax measures, some in congress and the Bush administration are instead likely to opt to reduce corporate taxation by approximately $50 billion. For more on this matter, see "Large Corporations May Receive More Tax Breaks" in this issue.

Large Corporations May Receive More Tax Breaks

The House and Senate continue to move forward on a substantial corporate tax bill. The Foreign Sales Corporation and Extraterritorial Income Exclusion (FSC/ETI) bill is designed to remove certain corporate tax subsidies that were ruled illegal by the World Trade Organization. Repealing the subsidies would increase federal revenue by approximately $50 billion over the next 10 years. (The bill is currently in conference. See a summary of the differences between the House and Senate version.)

Rather than using the revenue to reduce the massive $422 billion deficit, or to offset some of the $146 billion price tag of the tax-cut extensions passed last week (see "Congress Spends $146 Billion to Extend Certain Tax Provisions Without Offsets" in this issue), some in Congress and the Bush administration are seeking instead to replace the banned subsidies with $50 billion in new corporate tax breaks. This would be on top of the $13 billion in tax breaks for corporations already passed as part of the "middle-class" tax package.

The additional cuts would come at a time when corporate tax revenue is at historic lows and when many of the largest and most profitable corporations currently do not pay their fair share of taxes. The latter is confirmed by a new study recently released by Citizens for Tax Justice and the Institute on Taxation and Economic Policy. The study by Bob McIntyre and T. D. Coo Nguyen looks at federal income taxes paid by 275 of the nation's more profitable Fortune 500 companies from 2001-2003 and reveals that:

- Eighty-two of the 275 companies paid zero or less in federal income taxes in at least one year from 2001-2003.
- The companies who paid "less" experienced multiple tax-free years. In the years they paid no income taxes, these companies earned approximately $102 billion in pretax U.S. profits. Due to excessive tax breaks, the firms were handed tax rebate checks from the U.S. Treasury totaling $12.6 billion.
- Loopholes and other tax subsidies enjoyed by the 275 companies reduced federal revenues by $43.4 billion in

2001, $60.8 billion in 2002, and $71 billion in 2003.
- In three years, these companies received $175.2 billion dollars worth of tax breaks. Half of these tax break dollars went to just 25 of the companies.

The report, "Corporate Income Taxes in the Bush Years," also includes other findings highlighting how U.S. tax policies are currently geared toward business interests. Federal income taxes pay for many important programs and services, so when corporations get special advantages, it both increases the deficit and reduces government spending for services most Americans rely upon.

Continuing Resolution Passes, Omnibus Bill Expected

After much speculation, and on the final day of the fiscal year, the House and Senate passed a continuing resolution (CR) (H.J. Res. 107) to fund non-defense government programs and agencies, and other expiring programs, at current levels through Nov. 20. The CR was needed because Congress failed to perform one of its key duties on time -- the appropriation of funds for government programs. Democratic Whip Steny Hoyer (MD) observed, "The Republicans' failure to pass appropriation bills on time has real-world consequences to real people, to states, localities, municipalities, and every individual."

The Sept. 30 passage precedes a lame-duck session likely to begin the week of Nov. 15, in which Congress will have to complete unfinished legislation, including:

- The Defense Reauthorization bill
- The Foreign Sales Corporation and Extraterritorial Income Exclusion (FSC/ETI) bill
- The Intelligence Reform bill
- A bill to raise the debt ceiling.

Besides the continuing resolution, it appears an omnibus spending bill will be necessary to pass all of the appropriations bills before the end of the fiscal year. To date, the House has passed 12 bills, and the Senate, only six. Only one bill -- the defense appropriations bill -- has made it through conference committee.

House Appropriations Chairman Don Young (R-AK) and Senate Appropriations Chairman Ted Stevens (R-AK) would each like to report out of committee four of the FY 2005 appropriations measures as stand-alone bills. This would leave eight, instead of 12, to be passed through an omnibus. The four they are considering are Foreign Operations, Homeland Security, Military Construction, and Washington, DC.

The House is expected to officially appoint conferees to the Homeland Security measure (H.R. 4567) sometime this week. Movement on that bill has been stalled because of continuing negotiations concerning hurricane and drought relief. While Senate Majority leaders are pushing to make sure there is drought aid, Minority Leader Tom Daschle and other Democrats are accusing the Bush administration of ignoring the needs of farm states.

Congressional Report on Data Quality Act Supports OMB Watch Findings

The Congressional Research Service (CRS) recently updated a report on the Data Quality Act (DQA) entitled The Information Quality Act: OMB's Guidance and Initial Implementation." The report summarizes the history of the DQA from its passage as an appropriations rider, through development of information quality guidelines, to the Office of Management and Budget's (OMB) annual report to Congress. Several of the report's conclusions coincide with observations and recommendations made by OMB Watch in an analysis of OMB's annual DQA report to Congress.

The CRS report strongly implies that the DQA, passed without debate or hearing as an appropriations rider, was duplicative and unnecessary. The Paperwork Reduction Act (PRA), amended in 1995, already required OMB to oversee agencies' policies on dissemination of information to the public. The PRA also already required agencies to manage their information to improve the quality of the data. Therefore it is unclear exactly what Congress meant to accomplish with the DQA.

The CRS report points out that because the DQA lacked any significant legislative history OMB, not Congress, played the definitive role shaping this program. OMB defined the key terms, established the scope of the guidelines and instructed agencies on how the administrative mechanism for correction process should operate.

The report also summarizes OMB's report to Congress on the first year of DQA implementation, focusing on the data correction requests federal agencies received under the Act during that period and how the requests were resolved.

A short section of the CRS report describes OMB Watch's analysis of OMB's annual report to Congress, summarizing our complaints of flaws, inaccuracies, and bias. CRS's observations and suggestions for possible improvements in the DQA support many of the conclusions and recommendations from OMB Watch's analysis.

Mirroring a recommendation from OMB Watch's analysis, the CRS report recommends more reliable data be collected regarding the DQA's effect on rulemaking or agencies' resources. CRS concluded the DQA can have "a significant impact on federal agencies and their information dissemination activities." For example, OMB's recent annual report on the DQA provided "numerous examples of agencies changing their policies and publications in response to administrative requests for correction from affected parties." The authors also note such policy changes have continued after the time period covered by OMB's report.

It is unknown which member or committee of Congress requested the CRS report on the DQA or for what purpose.

Perhaps the issues raised in the CRS report will prompt Congress to further investigate the DQA's impact on agency activities. To take action on this and ask Congress for an independent investigation of the costs and impacts of the DQA click here.

Court Strikes Down Part of the Patriot Act

Federal District Judge Victor Marrero ruled Sept. 29 that surveillance powers under the USA PATRIOT Act were unconstitutional, marking a significant victory for civil liberties groups.

The American Civil Liberties Union (ACLU) filed suit against the Department of Justice, challenging Section 505 of the Patriot Act, which gives the government unchecked authority to issue "National Security Letters" to obtain consumer records from Internet providers, booksellers, libraries, and other businesses without judicial oversight. The provision also prevents anyone that receives such a letter from disclosing the request -- essentially a gag order. The ACLU was forced to file the suit itself under seal, so it did not violate this gag order.

Marrero ruled that the gag order of Section 505 violates the right to freedom of speech under the First Amendment, and that the unchecked collection of records violates the right to be free from unreasonable searches under the Fourth Amendment. ACLU's Executive Director, Anthony D. Romero cited the case as "a landmark victory against the Ashcroft Justice Department's misguided attempt to intrude into the lives of innocent Americans in the name of national security."

A 90-day stay for enforcement of the ruling is in effect to allow time for an appeal. Attorney General John Ashcroft, an outspoken advocate of the law enforcement provisions in the Patriot Act, told reporters, "Without knowing the specifics, I wouldn't be able to assure that the case would be appealed, but it is almost a certainty that it would be appealed."

See the related *OMB Watcher* article, "Kyl Proposes Expanding the Patriot Act."

Kyl Proposes Expanding the Patriot Act

Sen. Jon Kyl (R-AZ) introduced an amendment to the Senate intelligence reform bill that would heighten government secrecy and threaten civil liberties. The amendment seeks to build upon the secret surveillance powers granted to the government under the Patriot Act.

Kyl Amendment

Kyl's amendment, added Sept. 28, would expand law enforcement's authority to operate in secrecy and weaken checks and balances that safeguard civil liberties. The amendment uses some provisions from the Patriot Act II, failed legislation that was never introduced to Congress after a leaked draft in 2003 resulted in strong public backlash. The House version of the intelligence reform legislation already incorporates Patriot Act II provisions.

Among other things, the Kyl amendment would:

- Expand secret eavesdropping and search powers
- Infringe on the right to privacy for library, medical and other personal records
- Enable the government to present secret requests for the deletion of classified information from information given to the defense in certain court cases
- Allow for the secret use of information gathered through intelligence intercepts and searches in immigration cases
- Make any crimes resulting in fatalities a death-eligible offense if it meets the USA PATRIOT Act's overbroad definition of terrorism.

Outside of the obvious threats to civil liberties, some public interest groups feel that such sweeping changes proposed in the Kyl amendment go beyond the scope of the 9/11 Commission's recommendations and are not appropriate to be considered for the intelligence reform bill.

House Version of Intelligence Reform

Similar to provisions in the Kyl amendment, the House is considering law enforcement provisions in its intelligence reform bill. H.R. 5150 contains a number of controversial provisions that mimic the Patriot Act II, such as deportation of aliens who assist terrorist groups, and greater penalties for attempted chemical or nuclear attacks against the United States.

Because the House and Senate versions of the bill are so different, it is unclear whether Congress will be able to reconcile the differences before adjournment at the end of this week.

Stalled Patriot Act Legislation

Congress is currently sitting on several other Patriot Act related bills that could restore civil liberties that were stripped away by the Patriot Act. The Security and Freedom Ensured (SAFE) Act is a bipartisan bill that would amend the Patriot Act to limit some of the egregious secret surveillance provisions, as well as those governing search warrants, authorized under the Patriot Act. The Senate Judiciary Committee held hearings on the SAFE Act Sept. 22, but it is unclear whether the legislation will move forward.

The Civil Liberties Restoration Act 2004 (S. 2528) also would "fix" some of the problems with the Patriot Act by ending secret hearings, ensuring due process for detained individuals, limiting secret seizures of records, and restricting the use

of secret evidence. This bill has been sitting in both the House and Senate Committee on Judiciary since June.

Fox Guarding the Clearinghouse on Contracts Data

On October 1, a downsized government office turned over key data on roughly $290 billion worth of government contracts to a private company to provide online access. Critics on the left and right predict this move could raise barriers to public disclosure and undermine the public's ability to hold federal contractors and government officials accountable for the way taxpayer dollars are spent.

The Federal Procurement Data System (FPDS) holds data on all federal contracts worth more than $25,000. Over seventy federal agencies report contracts to the General Services Administration, which until last week operated the database.

For a quarter century the federal government has collected and managed the data, although the public has found the data less than easy to work with. The solution was to downsize the federal workforce for FPDS and outsource the work to Global Computer Enterprises.

The critics, including the Project On Government Oversight (POGO), are most concerned that the public will face more fees to access the data in the system. Global has committed to provide free public access to analytic reports. The pre-canned reports break down federal expenditures on outsourced activities by agency, identify the top federal contractors and give other summary analyses. Under the new system, users interested in drilling down further than the reports must buy additional custom analyses. To run queries on the database itself, users are asked to pay a $2,500 fee for lifetime access to the data.

As POGO notes in an op-ed, Halliburton and other federal contractors avoid public scrutiny when the public is left in the dark about key figures in their contracting deals. Halliburton recently noted it could not account for $1.8 billion on a military support contract.

GSA still supports free public access to data on federal contracts for fiscal year 2003 and all prior years at www.fpdc.gov/fpdc/fpdc_home.htm. Data for fiscal year 2004 will be available through the new system at https://www.fpds.gov.

Wyden Targets Over-Classification

Sen. Ron Wyden (D-OR) has successfully attached an amendment aimed at curbing excessive government secrecy to the Senate's intelligence reform legislation. Wyden proposes creating an independent review to provide periodic oversight to the system and limit excessive classification of documents.

The government's over-classification of documents was among several issues highlighted by the 9/11 commission as contributing the country's inability to prevent the terrorist attacks. The commission recommended several changes to the intelligence system including establishing a National Intelligence Director position, creating a National Counterterrorism Center, and limiting the excessive use of classification. When information is inappropriately classified, it prevents officials from sharing and capitalizing on that data in a timely manner.

Wyden's amendment would create an Independent National Security Classification Board to review contested classification decisions and, when appropriate, recommend declassification to the President. While the President would not be obligated to accept the board's recommendations, the President would have to provide written justification to Congress for any rejected board decision.

Ironically, four years ago Congress approved a Public Interest Declassification Board comprised of nine members selected by the White House and congressional leadership to increase oversight for declassification. However, the members have never been selected, nor has the committee been convened.

Senate Declines to Act on Corzine's Chemical Security Amendment

In an effort to break the congressional logjam on chemical security, Sen. Jon Corzine (D-NJ) has offered a piece of compromise legislation as an amendment to the intelligence reform bill. Unfortunately, the amendment was ruled non-germane to the bill and rejected from consideration.

More than three years after the 9/11 attacks, there are still no federal security standards for chemical plants. Corzine has offered strong chemical security legislation in the last two sessions of Congress, but each time the bill has stalled because of stiff resistance from the chemical industry. This past session, Sen. James Inhofe (R-OK), Chairmen of the Environment and Public Works Committee, introduced an alternative chemical security bill that effectively stalemated Corzine's proposal.

In an effort to move legislation on the important issue of chemical security, Corzine proposed a limited version of his own bill as an amendment to 9/11 legislation. The narrowed amendment had support from environmentalists and labor groups who believed the narrowed proposal still retained the crucial elements needed for a successful chemical security program.

Corzine's amendment retained requirements that chemical facilities perform vulnerability and security assessments that consider safer alternatives and submit the reports to the Department of Homeland Security for approval. Under the amendment the highest threat facilities -- 123 plants that each put a million or more people at risk -- would have had to implement all cost-effective methods of reducing risk.

The amendment exempted agricultural facilities, such as fertilizer users, that endanger less than 10,000 people. However increased security would have still been required at those locations to prevent theft. Corzine's proposal would also have allowed industry assessment programs to substitute for the government's requirement so long as the programs met minimum standards outlined in the statute, including mandatory consideration of safer alternative technologies. Approval of the industry programs would have required a public rulemaking process.

While the Corzine amendment represented a much narrower effort than his original bill, it remained superior to Inhofe's proposal, which does not require consideration of safer alternatives, submission of plans to the government, implementation of cost-effective risk reduction, or public evaluation of industry programs. Inhofe offered his legislation as an alternative amendment but it, too, was ruled non-germane.

USAID Withholds Whistleblower Information, Legislation Moves Forward

The U.S. Agency for International Development (USAID) is accused of firing a whistleblower and withholding from Congress his information on environmental noncompliance in multi-national development bank projects.

The employee, John M. Fitzgerald, was the only environmental analyst at USAID examining U.S. supported international development projects' compliance with environmental standards. He alleges that USAID gave in to pressure from the U.S. Treasury to hide information about projects in Africa, South America and Eastern Europe that were not complying with environmental rules. Projects not properly reviewed for environmental consequences may not receive U.S. support under the Pelosi amendment, which also requires biannual reporting to Congress. Fitzgerald found that nearly half the projects receiving money from multilateral development banks received no environmental review, and the reviews that were conducted were often incomplete. His allegations about USAID's noncompliance were removed from a report to Congress. Since his dismissal in 2002, there have been no reports sent to Congress.

Public Employees for Environmental Responsibility (PEER) filed a whistleblower complaint on behalf of Fitzgerald. The federal civil service court that heard the case ruled in favor of Fitzgerald Sept. 1, saying that his disclosures are protected under the Whistleblower Protection Act (WPA), that his disclosures contributed to his dismissal, and that he is now entitled to a full hearing.

While the WPA is shielding a federal employee in this case, it is well know that the law does not provide enough protections for all whistleblowers. Since Congress unanimously strengthened the law in 1994, the courts have defied statutory language and congressional intent by drastically limiting the circumstances under which an employee is even eligible for whistleblower protection. Court rulings now prevent the WPA from protecting whistleblowers if they disclose wrongdoing to a co-worker, act in connection with job duties, or if someone else has already exposed the same conduct.

Legislation to strengthen the WPA is currently before Congress. S. 2628, the "Federal Employee Protection of Disclosures Act," is the first stand-alone whistleblower protection bill to be approved by the Senate Committee on Government Affairs in ten years. The House Government Reform Committee approved similar legislation Sept. 29, but H.R. 3281 lacks the structural reforms of the Senate bill to prevent the current frustrations from continuing. This includes allowing whistleblowers normal access to appeals courts and closing the loophole in which security clearances can be revoked from national security whistleblowers.

Visit OMB Watch's action alert to tell your representatives to pass the stronger Senate version of whistleblower protection legislation during the House-Senate conference. For more information on whistleblowers, see the Government Accountability Project.

FEC Appeals Decision Overturning Reform Rules

The Federal Election Commission moved Oct. 1 in the U.S. District Court for a stay of the court's ruling holding unlawful various FEC implementing regulations for the Bipartisan Campaign Reform Act of 2002 (BCRA). The FEC's motion is the latest development in the ongoing legal battle over campaign finance reform, aspects of which could have profound implications for nonprofits.

The move comes after the congressional sponsors of BCRA, unhappy with many of the rules the FEC wrote to implement the legislation, filed a lawsuit challenging the rules. On Sept. 19, U.S. District Court judge Colleen Kollar-Kotelly ruled that FEC should rewrite 15 of the 19 challenged regulations because they are not consistent with the intent of BCRA. The judge's 157-page opinion devotes most of its attention to rules relating to coordination between campaigns and independent groups and to solicitation of soft money by national political parties and federal candidates.

In requesting the stay, the FEC is seeking a clear statement that the rules under review will remain in effect pending appeal and that the agency is not required to initiate rulemaking proceedings under the Sept. 19 order. The FEC noted that the Court's order remanded the rules without vacating them. The plaintiffs in the lawsuit challenging the rules will file a response by close of business Oct. 5.

The ruling on electioneering communications could have the most impact on nonprofits. The opinion found the exemption for 501(c)(3) organizations was not adequately justified, questioning assumptions about IRS enforcement of the prohibition on partisan activities. The court also overturned the exemption for unpaid broadcasts without addressing any of the substantive issues that had been raised, including the absence of threat of corruption when no money is involved.

Finally, the court overturned the exemption for Internet communications from the definition of coordinated public communications. As with unpaid advertising, the court did not consider the low cost and wide availability of Internet communications in making its ruling.

For more background on these exemptions and their implications for nonprofits, see the Sept. 30, 2002 OMB Watcher article summarizing the theme.

Senate Finance Committee Considers Nonprofit Accountability

The Senate Finance Committee has sent a letter to Independent Sector (IS), a coalition of 600 member organizations and foundations, asking IS to convene a national panel of nonprofit representatives to recommend legislative options to increase nonprofit accountability. The Sept. 22 letter follows Finance Committee hearings on nonprofit practices held in July that examined allegations of excessive compensation, tax shelters, and Internal Revenue Service (IRS) noncompliance. Committee staff released draft proposals for reform during the summer, and nonprofit groups provided input and responses.

Based on the hearings and the comments, the committee is now considering various types of reforms. The committee has been concerned with this issue after scandals surfaced last year involving a small number of large nonprofits, including the Nature Conservancy.

Independent Sector plans to convene representatives from two dozen charity and foundation organizations and create working groups to discuss various issues that the Senate has proposed. IS and other participants at the Senate hearings championed increased transparency and enforcement through extensive changes to nonprofit tax reports (IRS Form 990).

Lawmakers are considering extensive oversight of nonprofits, including the size of an organization's board of directors and the amount of employee compensation allowed.

Although the committee asked IS for input from nonprofits, organizations that disagree with the Senate's proposed course of action may not be asked to participate. The committee wrote in a letter to IS, "We encourage you to work with those committed to reform and not let a potential minority prevent substantive improvements by requiring unanimity on proposals."

Increased oversight and enforcement, if not carefully crafted, could lead to unnecessary administrative burdens for small nonprofits. Seventy percent of charities have annual budgets under $500,000, and tougher regulations and enforcement could be overly burdensome to them. Nonprofits of all types are urged to give input to the committee, because any new regulations will affect the entire sector.

Conferees Consider Rights, Restrictions on Electioneering

Opponents of church electioneering are breathing a tentative sigh of relief. On Sept. 29, Rep. Bill Thomas told the first meeting of conferees that he would not consider amendments to a discussion draft of his proposed version of the corporate tax bill. The chair of the conference committee on is opposing any amendments to that bill that were not provisions or modifications to the previous already-passed Senate or House versions. However, there is still concern that the conferees could include language similar to H.R. 235 , the "Free Speech Restoration Act" which would allow religious organizations to support or oppose candidates for public office without losing their tax-exempt status.

The House conferees filed approximately 41 amendments and the Senate conferees filed about 300 amendments to the discussion draft. Thomas is expected to unveil his Chairman's mark at the next meeting of conferees Oct. 4.

H.R. 235 discriminates against nonreligious nonprofits by giving religious organizations rights that other 501(c)(3) groups would not have. It would also permit considerable expenditures of tax-deductible funds to publicize endorsement-sermons and other election-related presentations made during religious services or gatherings through television, radio, and other media. This soft-money loophole would hurt all nonprofits.

Please see our action alert and let the conferees know this provision is a bad idea for nonprofits.

The House conferees are: Bill Thomas (R-CA), Tom Delay (R-TX), Jim McCrery (R-LA), Phil Crane (R-IL), Bob Goodlatte (R-VA), John Boehner (R-OH), Jim Sensenbrenner (R-WI), Lamar Smith (R-TX), Sam Johnson (R-TX), Joe Barton (R-TX), Richard Burr (R-NC),Charles Rangel (D-NY), Sander Levin (D-MI), Charles Stenholm (D-TX), George Miller (D-CA), Henry Waxman (D-CA), John Conyers, (D-MI)

The Senate conferees are: Chuck Grassley (R-IA), Orrin Hatch (R-UT), Don Nickles (R-OK), Trent Lott (R-MS), Olympia Snowe (R-ME), Jon Kyl (R-AZ), Craig Thomas (R-WY), Rick Santorum (R-PA), Gordon Smith (R-OR), Jim Bunning (R-MO), Mitch McConnell (R-KY), Judd Gregg (R-NH), Max Baucus (D-MT), Jay Rockefeller (D-WV), Tom Daschle (D-SD), John Breaux (D-LA), Kent Conrad (D-ND), Bob Graham (D-FL), Jim Jeffords (I-VT), Jeff Bingaman (D-NM), Blanche Lincoln (D-AR), Edward M. Kennedy (D-MA), and Tom Harkin (D-IA).

Letter to the Editor and Response Regarding Aug. 9 Article on New CFC Rules

To the Editor:

During my last few years on active duty service, I watched the number of charities registered with CFC [the Combined Federal Campaign] grow dramatically. And many of them sounded dubious. Yet we were encouraged to donate, even at our meager wages. This applied to federal civil service employees as well. However, I fully support the new CFC rule that charities have to certify that they don't support terrorism or organizations that do. It's already been proven in the national media that many benign-sounding charities were actually funding groups that continue terrorism worldwide. This has been forced on Corporate CEOs and was the same policy forced on South Africa. The policy is *not* misguided, but long overdue.

But the most specious and false comment made was trying to continue the myth of Sen. McCarthy's search for communists and traitors in federal government agencies as some kind of witch-hunt. Even in the late 20th Century, the truth had come out that McCarthy was absolutely right; even President Truman agreed with him, and started the fight from the Executive Office, as Rep. Nixon had done from the House. The declassification of the Venona Papers, and reviews of documents in the former Soviet Union archives proved there were Communist spies giving away top-secret data.

I have alerted former active duty friends, as well as many military organizations about this new rule and your wrong-headed reaction to it. Additionally, I have passed it on to active duty personnel who can complain directly to elected officials and get some immediate results. Your position is egregious and anti-American.

Kevin Dwyer Orlando Florida
Retired Air Force NCO

OMB Watch Response to CFC Letter

Dear Mr. Dwyer,

Thank you for sending your feedback on OMB Watch's position on the CFC's new requirement that participating organizations check employees' names against government terrorist watch lists. Your letter raises a few issues that need clarification and further explanation.

There has been confusion in the press about what exactly CFC is asking nonprofits to do. The new rule is not a certification that a charity is opposed to terrorism and does not support it. If that were so we would not have the fight we are having. Charities strongly oppose terrorism and the good works of many international nonprofits help reduce the tensions and despair that make people susceptible to the appeals of terrorists.

This rule has both practical and philosophical problems. Charities would have to check, using their own limited staff time and revenue, multiple lists that are often full of errors, inconsistent, and out of date. The lists also do not have enough information to verify whether an employee whose name matches one on a list is in fact the same person. For example, Sen. Edward Kennedy has repeatedly been stopped from boarding airplanes because the name Edward Kennedy appears on the list, referring to someone else.

Even if the practical problems were resolved, there is still a philosophical problem with requiring charities to do the work of government investigators. It is not an appropriate role for us, and could lead to serious harm to innocent people, as has already happened to thousands.

We are aware of no evidence showing that list checking by charities makes our country any safer. However, we respect your right to disagree with us. Discussion over disagreements, aimed at reasonable resolution of issues, and exercising our freedom of expression, are fundamental to democracy and patriotism. It is not "anti-American" as your letter states.

Yours truly,
Kay Guinane

See Aug. 9 Article.

States Take Lead on Emissions Standards

Fearing the Environmental Protection Agency (EPA) may stall or weaken federal regulation on diesel emissions, 11 states and the District of Columbia announced on Sept. 29 plans to implement California's standards for diesel fuel emissions as a backup to the federal regulation promulgated by EPA.

EPA promulgated regulations in January 2001 to mandate dramatic decreases in harmful emissions, most notably particulate matter and nitrogen oxide. These standards, known as the "Federal 2007 Rule," are scheduled to take effect in 2007. However, according to state and local pollution control officials, EPA has received pressure from the trucking industry to weaken the rule.

In order to ensure truck drivers in California will be forced to comply with the original federal standard, California passed its own diesel fuel standards in October 2001 that are identical to the federal standard and scheduled to take effect at the same time.

Unwilling to rely on EPA to fully implement the rule, other state and local leaders worked with the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO) to create a

Model Rule, based on the California standard, that states could adopt to ensure diesel emissions would still be regulated in the event that the federal standard is not implemented or is weakened. STAPPA and ALAPCO are comprised of air pollution control officials from the states, territories, and major metropolitan areas.

Though industry representatives deny any attempts to delay or weaken the rule, EPA officials have met repeatedly with industry representatives to discuss the rule, according to the BNA Daily Report for Executives. Charles Drevna, spokesman for the National Petrochemical & Refiners Association told BNA that meetings were only to "outline where we see potential problems in implementation and then work out the kinks that will minimize or avoid the potential problems such as cross-contamination in storage tanks and pipelines."

According to the Executive Summary, "The Model Rule sets out a basic set of provisions for the purpose of adopting the California 2007 Rule by establishing a requirement that heavy-duty diesel trucks sold, leased, or registered for use in the adopting state must have a Certificate of Conformity issued by the California Air Resources Board ('CARB')." The Model Rule also includes optional provisions for enforcement and record keeping as well as additional regulatory documents to help guide state lawmakers in adopting the rules.

Like the federal regulation, the model rule, if implemented, will reduce emission levels by 90 percent for particulate matter and 95 percent for nitrogen oxide. According to a STAPPA/ALAPCO press release, the adoption of these regulations by these 12 jurisdictions will affect about one-third of truck sales. To date, the states that have implemented or plan to implement the California standard are Connecticut, Delaware, the District of Columbia, Georgia, Maine, Maryland, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania and Rhode Island.

House Committee Blasts FDA for Delay on Antidepressant Warnings

Food and Drug Administration officials were forced before a House committee to defend their choice not to respond with precautionary measures despite mounting evidence from as early as 1996 that antidepressants could be causing increases in suicidality (both suicidal ideation and suicide attempts) in children.

Rebukes for the FDA's failures came from both sides of the aisle at the Sept. 23 hearing as lawmakers reprimanded the FDA officials for failing to protect the public health. According to testimony given by senior officials from the FDA's Office of Drug Evaluation before the House Committee on Energy and Commerce, the FDA had been on notice since the mid 1990s most clinical trials have shown that antidepressants are no more effective than placebos in treating child depression but decided nonetheless forestall strong warnings on the use of antidepressants in children.

Testimony also revealed FDA senior officials may have suppressed and softened the conclusions of one of their senior medical investigators, Dr. Andrew Mosholder, who last year found a connection between antidepressants and suicidality in children. The FDA did not let the doctor present his findings in front of an advisory committee meeting in February but, rather, had another doctor present the results of the clinical trials without Dr. Mosholder's conclusions.

FDA officials rationalized their decision to suppress the information by saying they did not want the advisory committee to think the findings were the FDA's official conclusions. "We thought it was potentially dangerous to the public to present a premature conclusion to the public," stated Dr. Robert Temple, director of FDA's Office of Drug Evaluation I. FDA did not allow Dr. Mosholder to present his results until September, after his findings were corroborated by outside experts at Columbia University and by an FDA medical examiner.

Several House members questioned why the advisory committee, comprised of medical professionals, would not be able to understand the complexities and uncertainties of the study even if the general public could not. "What was the harm in allowing Mosholder an opportunity to present his data?" asked Committee Chairman Joe Barton.

After seeing the full results this September, the advisory committee voted 15-8 in favor of recommending strong "black-box" warnings on antidepressants. The House committee repeatedly accused the FDA of weakening past recommendations of the advisory committee and questioned whether the FDA would actually follow the most recent recommendations. Though Dr. Temple promised a decision on the warning label within a few days, the committee members certainly did not get the reassurance that they were looking for. "I'm not predicting that we won't go with the black-box warning," Temple responded. At the same time, he also indicated that he did not believe that the 15-8 vote was a clear majority and promised only that the FDA would look at the rationales of the votes when weighing the decision.

In response to the findings of the clinical trials on children, the FDA is now planning to look at thousands of adult clinical trials to see if the same increased risk of suicidality exists in the adult population.

Industry Influence Weakens USDA Dietary Guidelines

The Dietary Guidelines Advisory Committee, which includes seven members with strong industry connections, recently released its recommendations for an update of *Dietary Guidelines for Americans*. Not surprisingly, the committee's recommendations for controlling intake of carbohydrates, sugars and fats were vague and weak, prompting 25 nutritionists to send a letter to HHS calling for stronger, clearer language.

The 13-member committee, appointed by USDA and HHS in August 2003 has strong ties to food, drug, dietary supplement and other related industries. According to a Center for Science in the Public Interest article, the members of the advisory committee include:

- **Fergus M. Clydesdale** has held stock in and consulted for several food-related companies. His pilot food plant at the University of Massachusetts at Amherst receives corporate support. He has worked closely with the American Council on Science and Health (ACSH), an industry-supported group that downplays practically every food-related

health concern, including trans fat. He is chairman of the board of directors of the industry-funded International Life Sciences Institute (ILSI) and been a director of the industry-funded International Food Information Council (IFIC).
- **Vay Liang W. Go** is an associate director of a University of California at Los Angeles nutrition center that has received funding from numerous drug companies.
- **Penny M. Kris-Etherton** has consulted for Campbell Soup and Procter & Gamble, served on an American Egg Board advisory committee, and received research funding from the American Cocoa Research Institute, the Peanut Institute, Abbott Laboratories, and the Campbell Soup Company.
- **Theresa A. Nicklas** has conducted research funded by the Sugar Association (the trade association for the cane and beet sugar industry) and the Kellogg Company. She has urged the Food and Drug Administration (FDA) not to list refined sugars on food labels.
- **Russell Pate** has received at least $200,000 from ILSI and is an advisor to an IFIC project.
- **Xavier Pi-Sunyer**, of Columbia University College of Physicians and Surgeons, has been a paid consultant or advisor to numerous drug companies and received research support from Campbell Soup and Warner-Lambert.
- **Connie M. Weaver** has conducted research for the National Dairy Council, National Dairy Board, Wisconsin Milk Marketing Board, Mead-Johnson Company, and Procter & Gamble. She was a "Kraft Research Fellow" in 1998. Weaver has also served on the ILSI board of directors.

In response to the committee recommendations, 25 nutrition experts sent a letter to HHS calling for stronger, clearer language. While praising the underlying science used by the advisory board, the letter criticized the weakness of the committee's conclusions. "The scientific fine print in the advisory committee's report makes it clear that Americans should be eating much less saturated fat, trans fat, cholesterol, and added sugars," the Center for Science in the Public Interest's Margo G. Wootan said in a press release

As reported in an earlier Watcher article, the dietary guidelines have also been the subject of a Data Quality challenge filed by the industry-funded think tank Center for Regulatory Effectiveness.

In an attempt to free health guidelines from the influence of industry, Sen. Peter Fitzgerald (R-IL) offered a bill last year that would assign the responsibility of writing dietary guidelines to the Institute of Medicine. "Putting the USDA in charge of dietary advice is in some respects is like putting the fox in charge of the henhouse," Fitzgerald told *CongressDaily*.

However, many charge that Congress itself is too easily bullied by the powerful food industry. When Fitzgerald held a hearing last year on the issue, he was forced to hold the meeting in "the Commerce Committee instead of the Agriculture Committee subcommittee, which he also chairs, because the Agriculture Department and food companies had pressured Agriculture Committee not to hold the hearing," according to the *Congress Daily*.

With Fitzgerald set to retire next year, the issue will likely get swept under the rug.

Court Declines to Bar Regionally Restricted Vehicle Recalls

The agency charged with keeping motor vehicles safe and reliable has been allowing automakers to restrict vehicle defect recalls to selected states rather than conduct recalls nationwide. Now a federal court has declined to bar such regionally restricted recalls.

Regional Recalls

The National Highway Traffic Safety Administration (NHTSA) regulates motor vehicle defect recalls to serve the goals of the National Traffic and Motor Vehicle Safety Act. Under the Safety Act, NHTSA has broad investigative powers that allow the agency to identify defects, to declare the need for defect recalls, and to supervise any recalls whether initiated by the agency or voluntarily by automakers. *See* 49 U.S.C. §§ 30166, 30118-20. The identification of a safety defect triggers two important responsibilities: notice and remedy.

- NHTSA must require the manufacturer to notify all dealers and registered owners of the defective vehicles to inform them of the defect and encourage them to have the vehicles repaired as quickly as possible. *See* 49 C.F.R. §§ 577.2 & 577.5.
- For vehicles subject to safety defect recalls, automakers must promptly repair or replace the defective part or refund the owner's purchase price. *See* 49 U.S.C. § 30120.

Since the mid 1980s, NHTSA has been permitting a type of recall not contemplated by the Safety Act: a non-nationwide, regionally restricted recall. In such recalls, NHTSA allows automakers to restrict both notice of defects and the repair/ refund remedies to a few states rather than the entire nation. Auto safety groups have compiled several examples:

- Automakers conducted several safety recalls between 1992 and 1998 to repair vehicle parts that corroded when exposed to salt. NHTSA permitted the automakers in these cases to conduct the recalls in selected states rather than the entire country. Even though the corrosion occurred for all the affected cars when exposed to salt, NHTSA permitted the automakers to limit their recalls to the states that, in the automakers' judgment, used the most salt on their roads (and in which, therefore, the unsafe corrosion would occur most quickly). The various regional recalls for salt corrosion were inconsistent in identifying the states privileged to benefit from the recalls: some corrosion recalls included Missouri and Minnesota, for example, whereas other corrosion recalls simply ignored the same states. Moreover, even though California uses more salt in its mountain areas than many of the states that were included in these corrosion recalls, none of the corrosion recalls included any part of California.

- Ford Escorts were recalled to fix cracked fuel tanks that could leak, causing deadly fires. NHTSA actually permitted Ford to limit its recall to 12 states, in one of which --California -- Ford was allowed to limit the recall to ten counties. Although Ford apparently claimed to have selected for the recall only those parts of the country that experienced more than 2,500 "cooling degree days" (a measurement used to anticipate energy demand) in a

given year, NHTSA did not force Ford to justify choosing the "cooling degree day" measurement, the 2,500 days cutoff, or the exclusion of some areas that met or exceeded the criterion (such as Death Valley, the hottest location in the country, that logs more than 5,000 cooling degree days on average every year).

- A later recall also involved the risk of fuel tank fires. The Ford Windstar was recalled in 1999 because a fuel tank defect created a risk of stress fractures, which in turn created a serious risk of deadly fuel tank fires. Because the fuel tank's propensity to crack seemed partially related to hot temperatures, Ford restricted the Windstar recall to 11 states along with ten southern California counties and Nevada's Clark County. NHTSA permitted Ford to limit the recall to these areas even though they excluded New Mexico, North Carolina, Tennessee, Virginia, and the California county that includes Death Valley -- all of which have high monthly average temperatures equal or greater than the states included in the recall.

NHTSA codified the practice of regional recalls in an August 1998 letter to automakers that specified criteria for permitting regional recalls. NHTSA first distinguished two kinds of weather-related defects: (1) those that manifest after a single or short-term exposure to certain weather conditions, and (2) those that manifest only after longer periods of exposure. NHTSA declared that regional recalls would henceforth be inappropriate for the former category, but the agency permitted regionally restricted recalls for the latter whenever the manufacturer could demonstrate that "the relevant environmental factor ... is significantly more likely to exist in the area proposed for inclusion than in the rest of the United States."

Additionally, NHTSA stated in the letter that notice requirements in the case of regional recalls would apply to vehicles originally sold in covered states and vehicles currently registered in recall states at the time of the recall. The letter suggested that automakers would also need to conduct follow-up notifications two to three years later in order to reach owners who moved into covered states after the original recall notice. The letter did not, however, extend notice requirements to owners of vehicles that were purchased in the recall states but moved to a non-covered state before the recall. Further, the letter did not contemplate vehicles purchased and registered in non-covered states that nonetheless regularly enter the covered states (as, for example, in the case of vehicles purchased and registered by someone whose domicile is a non-covered state but whose occupation requires travel to a covered state).

Moreover, the August 1998 letter was styled as a set of "policy guidelines" rather than regulatory requirements. As such, the letter was never published in the Federal Register with an opportunity for public comments, and its actual policy content was apparently not applied rigorously across the board. For example, auto safety groups that challenged regional recalls in court could not identify any regional recalls in which NHTSA actually required the automaker to conduct the follow-up notice described in the August 1998 letter.

About the Court Challenge

Two auto safety groups, the Center for Auto Safety and Public Citizen, challenged the practice of regional recalls in federal court. They argued that the practice of regional recalls denies owners of defective cars in excluded states the notice and remedy they need and thus violates the Safety Act. They also charged that NHTSA's policy and practice of permitting regional recalls constitute rulemaking without notice and comment and are arbitrary and capricious, thus violating the Administrative Procedure Act (APA). The court's decision, entered Sept. 30, denied the APA claims, finding that the August 1998 letter was merely informal guidance rather than a prospectively binding rule.

More surprisingly, the court upheld the regional recall policy. The pivot of the court's rationale is the meaning of the key terms "defect" and "motor vehicle safety." On one level, the court decision differs from the plaintiffs' position because of a straightforward application of legal canons of statutory interpretation, albeit one which shifts the focus from notice and remedy to the defect itself. On another level, however, is a more complicated policy dispute about safety, risk, and equity. The text of the court decision manages the latter dispute by burying it in the former, resolving it without addressing it by recasting a philosophical disagreement as a semiotic one.

The major divergence between the plaintiffs and the court on the matter of statutory interpretation is which section of the statute needs to be interpreted. For the plaintiffs, the most relevant parts of the Safety Act at stake in the case were the notice and remedy sections. For the court, the case turned on the parts of the Safety Act that define which defects are subject to recall.

The plaintiffs stressed that the notice and remedy provisions of the Safety Act do not contemplate regional recalls but instead insist that notice and remedies will be provided to "each person registered under State law as the owner" of an affected vehicle. 49 U.S.C. § 30119(d)(1)(A). In fact, the Safety Act also explicitly provides for exemptions from the general notice and remedy requirements, but it limits those exemptions to a number of criteria, chief among which is whether the exemption would serve the public interest. *See id*. §§ 30118(d) (notice) & 30120(h) (remedy). NHTSA further cannot allow any such exemptions without first publishing a notice in the *Federal Register* and allowing the public to comment on possible exemptions. See id. These specifications of NHTSA's authority to grant any exemptions from notice and remedy requirements notably do not include exemptions of defective vehicles or vehicle parts located in areas in which the defect presents a comparatively lower risk of manifesting.

For the court, the Safety Act provisions that matter most are those that define the defects subject to notice and remedy provisions. The Safety Act defines two key terms as follows:

> "[D]efect" includes any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment.
>
> "[M]otor vehicle safety" means the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes non-operational safety of a motor vehicle.

Id. § 30102(a)(2), (8). According to the court, that "performance" is embedded in each definition "clearly implies that consideration must be given to the manner in which the vehicle is used." *Center for Auto Safety v. NHTSA*, No. 04-392 (ESH) (D.D.C. Sept. 30, 2004), at 20. For the court, the possibility that "defect" can mean a "defect in performance"

compels this conclusion:

> With this in mind, it becomes readily apparent that the statute does not outlaw regional recalls; rather, it envisions that the agency will exercise its discretion to determine whether a safety-related defect exists in a given scenario. To this end, it is logical to include a vehicle's locale of operation when considering its "use" and "normal operation." In other words, a motor vehicle may contain a safety-related defect when used in some states but not in others, and so if a vehicle experiences a significant number of failures in a specific climate, it is fair to conclude that the vehicle has a safety-related defect related to performance.

Id. at 21. In other words, the court concluded that vehicles with climate-induced defects are not inherently defective but, instead, are only defective in locales with the given climate conditions.

Accordingly, the court concluded that defect recalls need only apply to vehicles with the climate-related or condition-specific defects, which in the court's interpretation are vehicles in states with the given climates or conditions.

By shifting terrain and focusing on the interpretation of the terms that define defects subject to recall, the court construed the meaning of "defect" so broadly that it effectively allows NHTSA to designate a given defect with so many conditions and caveats that limitations on the scope of notice and remedy get built into the very definition of a defect. The court essentially allowed "defect" to permit geographically limited conditions so that it need not spend any time interpreting the seemingly universal language of the notice and recall provisions of the Safety Act.

In so doing, the court ignored one of the central canons of statutory construction: that the interpretation of any one clause of a statute must be read in light of its related terms, so as to recognize the larger coherence of any body of statutory law. Among other things, the Supreme Court has repeatedly held that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). The Safety Act does not permit any geographic exclusions from its notice and remedy obligations except insofar as any contemplated exclusions (whether geographically limited or total nationwide exclusions -- the statute does not distinguish between them) meet specified criteria and are subject to formal public notice and comment procedures.

Further, the Safety Act grants NHTSA largely unreviewable discretion in the determination of the existence of a defect, although it does not grant the same degree of discretion in the mandatory notice and recall provisions. The court's decision ignores this aspect of the Safety Act's structure as well, and it grants the agency far more discretion over the scope of notice and recall than the Safety Act itself intended.

By interpreting the terms defining defects as permitting the designation of geographically exclusive or otherwise condition-specific criteria, the court eviscerates these exclusion clauses. The court decision effectively permits two tiers of notice and remedy exclusions: total exclusions, still subject to the Safety Act, and partial exclusions, which could dodge the Safety Act's exclusion clauses by being embedded in the designation of the defect itself. The court did not consider the frightening prospect of NHTSA being so captured by industry influence that it designates a defect so specifically that an automaker would not need to provide notice or comment to a single person.

Consequences

Buried in the opinion's seeming logic and (as the court put it) "common sense" is any recognition of the consequences of these regionally limited recalls. Consider the court's easy elision of climate conditions with political jurisdictions as when, discussing climate-specific defects, the court observed, "In other words, a motor vehicle may contain a safety-related defect when used *in some states* but not in others." Climate conditions do not respect strict boundaries of county or state lines; a record heat wave, or a sudden winter storm requiring larger-than-normal use of salt to de-ice roads, could hasten the manifestation of a latent defect in a state excluded from a regional recall.

Moreover, people do not live their lives confined by state lines. Some metropolitan areas -- for example, Chattanooga, Kansas City, and New York City -- are sited right along their respective state lines, and people who live in Georgia, Kansas, and New Jersey often cross their state lines every day to work or shop in those cities. Those people could well be experiencing the same climate-hastened defects as citizens of the states they visit, but the arbitrariness of regional recalls could mean that these out-of-state citizens are excluded from notification or the free recall remedy of their defects.

In fact, the climate aspect of some of these defects does not necessarily mean, as the court would have it, that the defect does not manifest itself at all in other climes. In the cases of salt corrosion, for example, the climates of northern or mountainous states did not themselves induce corrosion; rather, the climate required heavy and regular use of roadway salts that caused the corrosion. The same car is vulnerable to salt-induced corrosion whether it is registered in Minnesota or Tennessee; the relative climate differences may mean only that the Minnesota car will corrode *more quickly* than the Tennessee car. Regional recalls create the inequitable result that the Minnesota driver could obtain the free remedy whereas the Tennessee driver would be forced to pay for replacement parts out-of-pocket. The court decision creates the absurd consequence that the Minnesota car has a "defect" whereas the Tennessee car, experiencing the same corrosion for the same reason, does not.

The court decision does not mean the NHTSA must pursue a practice of regionally limited recalls; it only permits NHTSA to continue along the course it set back in the mid-1980s. Whatever the possibilities for further court challenges of the practice, the ultimate problem is that NHTSA believes these arbitrary and nonsensical regional recalls are sound policy. They are only the latest example of NHTSA's unfortunate tendency in recent years to shortchange the public interest in favor of corporate special interests.

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