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INSIDE ALEC

A PUBLICATION OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

FOCUS ON TELECOM & IT

Wireless Competition
Public Policy Issues

State Telecom Deregulation

Best Practices for Modernizing IT and Increasing Transparency in Government

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INSIDE ALEC

A PUBLICATION OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

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MODEL LEGISLATORS | BY REP. ERIC KOCH (IN)

State Telecom Deregulation

ALEC's *Telecommunications Deregulation Policy Statement* recognizes that, since the *Telecommunications Act of 1996* was enacted, the telecommunications industry has continually experienced "fits and starts" in advancing deregulation and furthering competition. Consequently, the process of bringing advanced technology to consumers has become a regulatory morass.

ALEC policy holds that free market principles will best serve consumers when businesses can compete within an environment unburdened by indiscriminate regulations, market uncertainty, and political involvement.

In furtherance of these principles, the *Telecommunications Regulatory Modernization Act* model legislation preserves intact state public utility commission jurisdiction over areas where continued public interest oversight remains appropriate—such as 911, universal service, deaf relay services, dialing parity and codes, and subjects delegated by federal law—while permitting regulated carriers to choose to opt into an alternative regulatory structure wherein they:

- Retain price caps with tightly restricted escalators for basic line only service customers for a defined period, in order to provide those customers a reasonable transition adjustment period before the basic line service prices become subject to market conditions;
- Are permitted to offer all other services (including other wireline telecommunications, wireless, VoIP, broadband, Internet, advanced, or other services) without state public utility commission oversight;

Indiana State Representative Eric Koch (R-Bedford), a member of the ALEC Telecommunications and Information Technology Task Force, is the author of ALEC's *Telecommunications Regulatory Modernization Act* and was co-author of *Indiana House Enrolled Act 1279* (2006). He is a member of the Indiana House Commerce, Energy, Telecommunications & Utilities Committee and serves as Assistant Republican Caucus Chairman.

- Remain subject to the same business restrictions (as, for example on fraudulent and deceptive dealing or other unfair business practices) that the state has deemed appropriate for the Attorney General or other state or local law enforcement agencies to enforce with respect to any other business; and
- Remain subject to such state public utility commission oversight over wholesale services as is delegated or permitted by state or federal law.

This model is based upon legislation we passed three years ago in Indiana (HEA 1279). That bill was crafted based upon one clear and simple premise: That the local voice telecommunications marketplace is extremely competitive.

Not so long ago, consumers had but one choice for local telephone service, maybe two options, if they were really lucky. That, however, is not the case today, with a number of companies with a variety of different technologies —cable, wireless, VoIP—offering real choices to consumers. And it is the consumers who are seeing the benefits of a highly competitive marketplace, where numerous providers are all scrambling to offer the latest and greatest products and services at the most competitive prices.

In many states, however, there remain old and outdated telephone company regulations that single out just one of the many competitors in the marketplace—in this case, the traditional land -line telephone companies like Verizon and AT&T. That unbalanced regulatory structure is what this model bill reforms in a very simple, common-sense way: it simply treats all competitors the same.

This is exactly what we did in Indiana in 2006, and the results speak for themselves. We have seen expansion of rural broadband, with AT&T, Verizon, and other providers expanding high-speed Internet access to over 100 additional rural communities. More than 2,150 new jobs have been created by Comcast, AT&T, and Verizon alone. Nearly $1.5 billion has been invested in new telecommunication infrastructure by AT&T (over $1 billion), Verizon ($300 million), Embarq ($18 million), and smaller telephone companies (over $150 million). Robust new competition has resulted in more than 35 new state video franchises being issued to seven cable companies and 10 traditional telephone companies. Traditional landline carriers are now offering a real alternative to cable in Anderson, Bloomington, Columbus, Indianapolis, Kokomo, Lake County, Muncie, Ft. Wayne, New Haven, and Huntertown; while Comcast has expanded its digital voice service to an additional 70,000 rural homes. The innovation generated by this competition has brought to market products like *Discovery Education on Demand* by Comcast, a collaboration between Comcast and the Discovery Channel, a first-in-the-nation service that delivers to Hoosier parents and students—at no additional cost—instant and convenient at-home access by cable and Internet to digital educational media and help tools that are aligned with Indiana's K-12 educational standards to link the home to the classroom.

This model act is based not only upon the Jeffersonian principles of limited government and free markets, it's based on legislation that has proven results. Modernizing telecommunications policy to maximize the benefits of a competitive marketplace is one of the most important issues legislatures across the nation will address in the coming years. Already, more than 20 states have taken steps to update their telecommunications policy, either through regulatory agencies, their legislature, or a combination of both. Now, with even more states considering action, ALEC has once again taken the lead by adopting a policy statement and model legislation the can serve as a proven guide for state policymakers. ■

Modernizing telecommunications policy to maximize the benefits of a competitive marketplace is one of the most important issues legislatures across the nation will address in the coming years.

ALEC TELECOM & IT MODEL LEGISLATION

Read up:
ALEC's Telecommunications and IT Task Force model acts, resolutions and statements of principal online.

www.alec.org

MODEL LEGISLATORS | BY REP. PHIL MONTGOMERY (WI)

Wisconsin's Battle for Civil Justice Reform

Generally speaking, tax increases resulting from state tax code are often seen as the gravest of threats to the overall health and vitality of the local economy, while statutory changes that increase the cost of doing business (often referred to as "hidden taxes") are seen as less troublesome. While policymakers may recognize this distinction, businesses do not. For them, both contribute to the cost of making goods and providing services. Whether such costs are passed on or absorbed is of little consequence because the end result is the same—a competitive disadvantage, a loss of jobs, and a weaker bottom line.

Among the class of hidden taxes, the cost of litigation is particularly problematic as it reaches across all sectors of the economy. It manifests itself through the practice of defensive medicine which contributes to the rising cost of health care. For manufacturers, liability insurance premiums must be factored into the cost of their products. Local governments are not immune as they are seen as ripe lawsuit targets because of their access to taxpayer dollars.

In the wake of several high profile cases of lawsuit abuse in the early 1990s, the state of Wisconsin enacted a series of civil justice reform measures, many of which were based upon ALEC Model Legislation. Arguably, the most significant of all the tort reform proposals enacted in 1995 involved changes to the state's joint and several liability law. Prior to that time, Wisconsin had a so-called 1 percent rule, meaning that a co-defendant found to be 1 percent at fault could be liable for 100 percent of the plaintiff's damages. With strong bipartisan support, the 1 percent rule was replaced with a joint and several liability standard that more fairly assigned financial responsibility for damages among the parties in tort claims.

Earlier this year, Gov. Jim Doyle presented the State Legislature with his recommendations for the state's next two-year budget. Tucked away in the 1,700-page bill, were wholesale changes to the state's civil justice statutes, including a substantial re-write of the 1995 joint and several liability law and a restoration of the 1 percent rule.

Wisconsin's biennial budget deliberations are typically limited to fiscal issues. Governor Doyle's decision to include controversial policy changes as part of his plan to close a multi-billion-dollar budget shortfall forced tort reform supporters to act quickly to engage and educate legislators as well as the general public about the importance of civil justice reform.

Thankfully, the ALEC Civil Justice Task Force stepped forward to join with Wisconsin manufacturers, building contractors, health care professionals, insurers, and restaurateurs in advocating for common sense civil justice reform. The highly effective public relations campaign convinced a bipartisan majority of legislators to reject the Governor's wholesale changes to the state's civil justice statutes.

Give credit where credit is due. Not only was ALEC, and its staff, there to help enact tort reform in 1995, they were there to prevent those reforms from being rolled back. As a result, Wisconsin businesses, large and small, can cross the hidden taxes resulting from changes to the state's joint and several liability statutes off the list of concerns as they struggle through in the midst of our current economic downturn. ■

State Representative Phil Montgomery is a Republican legislator from Ashwaubenon, Wisconsin. He serves on the Wisconsin State Legislature's Joint Finance Committee, the state's budget-writing committee, the Joint Committee on Information Policy and Technology Committee, and the State Assembly Energy and Utilities Committee. Representative Montgomery serves on the ALEC Board of Directors as its Secretary and is a member of the ALEC Telecommunications and Information Technology Committee.

MODEL LEGISLATORS | BY SEN. CURT BRAMBLE (UT)

An Historic Opportunity to Promote Freedom

In February, ALEC's senior director of policy and strategic planning, Michael Bowman, let me know that the International Republican Institute (IRI) had contacted him to find a legislative trainer who could be sent to Iraq to work with members of the newly-elected Iraqi legislature. With the assistance of ALEC and Ric Cantrell, chief deputy of the Utah Senate, I was able to accept the invitation.

IRI arranged for me to travel to Erbil, Iraq on a U.S. State Department Letter of Authorization. Upon my arrival, IRI's Dominic Belone and I spent the next few days finalizing the curriculum and agenda, and getting all of the materials translated into Arabic. The purpose of the training was to help the newly-elected Iraqi officials better understand their role as representatives of the people; to encourage and hone the skills necessary for building consensus and forging coalitions with elected officials from varied backgrounds and philosophies; and to provide direction on how to address the challenges that a democratic representative faces every day.

The 20 Iraqi participants were from the 57-member Baghdad Provincial Council (BPC), the governing body for Baghdad and environs. They were a diverse group, representing Sunni, Shiite, and other factions, and included seven women. We encouraged all attendees to interact with each other by dividing them into four groups of five, mixing participants from the various religious and political factions together. At first, there was some participant resistance to this, but by the conference's end, these heterogeneous teams were able achieve consensus with relative ease.

The first exercise required each group to identify the five most pressing issues they would encounter as elected officials. They were tasked with reaching unanimous agreement on their group's conclusions and presenting their findings to the entire class. Given the factional dynamics of the attending members, the exercise's success was hardly assured. However, the participants not only identified the issues, but achieved group consensus on which issues to highlight. At the conclusion of the exercise, all 20 attendees agreed that the most pressing issues they would face were: economic development and unemployment; education; corruption and ethics in government; infrastructure, including water, sewer and roads; and health care. I found it striking that this list of concerns could have been drawn up by legislators anywhere in the United States and indeed almost anywhere in the world! Once the issues had been identified, each group agreed on possible solutions and presented and discussed the various proposals with all of the conference participants. During the three-day conference, we explored as a group ways that each member could make a difference and how support could be built for their ideas within the BPC and among their constituents.

These exercises confirmed my belief in the universality of politics and demonstrated that politics is the art of the possible—the art of finding compromises that work. Iraqi complaints about media bias and the difficulties in getting their message to their constituents differed little from observations made by my American colleagues. The Iraqi officials I met have the same desire to serve and contribute to their communities as their American counterparts. And while the newly-elected Iraqi legislature will face huge challenges as they work to build a representative democracy, they also possess great potential to bring freedom, liberty, and self-determination to a war-torn country. ■

Senator Curt Bramble was elected to the Utah State Senate in 2000. He is a member of the ALEC's Board of Directors and of ALEC'S International Relations Task Force.

MODEL LEGISLATORS | BY REP. SUSAN LYNN (TN)

New Emissions Rule Bypasses Congress

In September, the Obama administration revealed its new Corporate Average Fuel Economy standards, which will require new vehicle fleets to average 35.5 mpg by 2016. As usual, the devil is in the details. Now we learn through a plan released jointly by the Environmental Protection Agency (EPA) and the Department of Transportation (DOT) that the new standards come with a subtle but startling twist. In addition to meeting more stringent fuel standards, for the first time, new vehicles will have to meet greenhouse gas emission targets as well.

The campaign to reduce greenhouse gas emissions in this country is nothing new. Most notoriously, this summer the U.S. House of Representatives approved the Waxman-Markey Cap-and-Trade bill designed to raise prices on the energy sources we rely on the most. But not everyone may be aware of an ongoing strategy to skirt Congress and implement greenhouse gas restrictions via the EPA's authority under the *Clean Air Act*. President Obama wasted no time instructing his EPA administrator, Lisa Jackson, in February, to take the necessary steps to classify greenhouse gases, such as carbon dioxide, as pollutants, a necessary precondition for regulation.

Standards affect price, safety

This approach is almost universally recognized as problematic even by proponents of emissions cuts, since the *Clean Air Act* is designed to control local pollutants, not ubiquitous and natural gases critical to life on the planet. But in a year of tea parties, spirited town halls, and a more cautious upper chamber of Congress, proponents will take what they can get—even if it causes serious problems for the country and its economy. The new greenhouse gas vehicle emissions standard is just the beginning of a multi-step strategy to meet the goals of Waxman-Markey legislation without the nuisance of legislative approval.

Indeed, just seven days after the new vehicle standard was released the EPA announced it would begin monitoring greenhouse gas emissions from not just mobile sources like cars and trucks but stationary sources like businesses and energy sources.

This gets tricky. To sidestep some of the larger problems associated with using the *Clean Air Act*, the EPA plans to ignore the act's trigger emission level of 250 tons per year and arbitrarily substitute 25,000 tons per year. This might sound like good news for those who like to see the government tread as lightly as possible on our economy. The problem is this will surely invite litigation by environmentalists who want to see the act followed as written. The result will be a regulatory cascade in doses they hope will be small enough for us to swallow.

Many are calling this move a breach in the separation of powers since the executive branch is blatantly manipulating the letter of the law to suit its own purposes. In response, Sen. Lisa Murkowski, R-Alaska, has indicated she will offer an amendment to EPA's 2010 fiscal spending bill that would halt this effort to regulate stationary sources.

Fuel economy standards, even the ones we are used to, are misguided. Fuel efficiency gains drive up the price of cars and usually come at the additional cost of vehicle weight, which makes our cars less safe. Couple this with an unprecedented greenhouse gas regulatory scheme and this administration is pushing the nation headlong down a tricky regulatory road that promises to cause legal, economic, and safety problems for our country. Meanwhile, many of us naively thought that when it comes to reducing greenhouse gas emissions, we were making this decision together through our elected leaders in Congress. ■

Susan Lynn is a member of the Tennessee General Assembly and is the Chairman of the Commerce Task Force for the American Legislative Exchange Council. This article is reprinted from *The Tennessean*, Oct. 2, 2009.

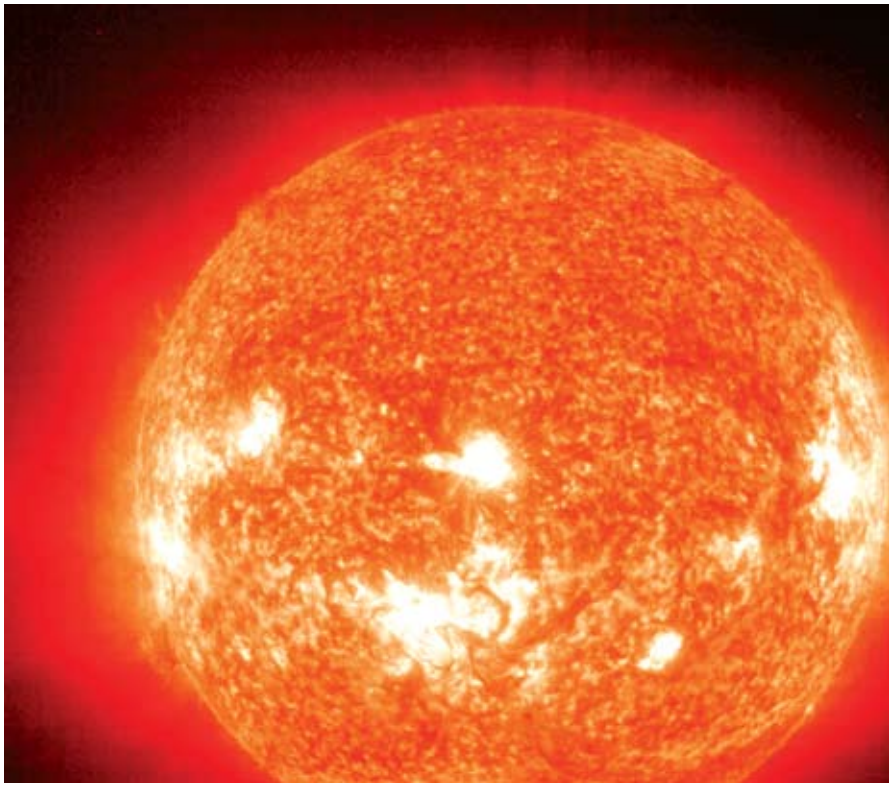
EMP Attacks, Infrastructure & Public Policy Concerns

BY JEREMY THOMPSON & MEAD TREADWELL, INSTITUTE OF THE NORTH

Currently, Federalism in the United States delegates the responsibility for security and defense to the federal government; but there are cracks in the competency of federal awareness that remind states to remain vigilant. While the reasons for the cracks may be numerous, one reason is that bureaucracies have been tasked with greater authority to shape the strategic vision of security and defense. The 9/11 Commission pointed out that bureaucracies possess a distinct lack of imagination that sometimes limits their ability to see threats in the future.

That lack of imagination exists now toward the threat of electromagnetic pulse (EMP). EMP is a term used to describe a class of waves that disrupt and destroy electronics. Damaging EMP waves can come from solar storms, electric devices, or from a nuclear blast. When a nuclear bomb is detonated above the earth's atmosphere, the gamma rays from the blast produce a radio frequency wave in the atmosphere that upsets or damages electronic control systems, sensors, computers, and communications systems within line of sight of the blast. That means one high altitude explosion can cover a large portion of the continental United States.

In 2006, Congress authorized a commission to assess the vulnerability of critical national infrastructures to the specific threat of an EMP attack set off by a high-altitude nuclear explosion. What makes a high-altitude nuclear blast a dangerous scenario is the crippling effect of the EMP pulse on critical infrastructure. The indirect cascading effects would be far more devastating than any blackout, hurricane, or flood we have experienced to date.



NASA/ESA, NASA/Goddard Space Flight Center Scientific Visualization Studio

Two of the major themes from the report issued by the 9/11 Commission were pervasive use of supervisory control and data acquisition (SCADA), and critical infrastructure (CI) interdependency. SCADAs are the tools that make our critical infrastructure function. They have numerous uses. They may monitor and automatically release coolant or lubricant if a component gets too hot. They are used to monitor pipeline pressure without the need for a human being present. They are used to monitor the North American power grid and automatically switch on power plants when power use is at its peak. All these uses of SCADA have created better services at a lower cost for the consumer, whether it be communications, emergency services, public safety, transportation, or electric power.

But EMP Commission found that

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SCADAs are vulnerable to EMP. If these devices are struck with EMP, in most cases they would need to be replaced. But, not only would they need to be replaced, many of the components would need replacing as well. Because of their pervasive use, it is not feasible to expect a decline in the use of these electronic controls.

EMP

Electromagnetic pulse. Describes a class of waves—from solar storms, electric devices or nuclear blasts—that disrupt and destroy electronics.

The interdependent nature of all sectors of CI is illustrated by the relationship between telecommunications and electrical power. To bring generation, transmission and distribution back online after an outage, telecommunications are vital, but telecommunication capability requires power to operate. There are numerous similar examples across all CI.

William Forstchen, in his novel "One Second After," tells the story of a small town in North Carolina after the United States suffers a devastating EMP attack from a nuclear-tipped scud launched from a ship offshore into the atmosphere over the Eastern seaboard. What is unique about an EMP attack like the one described in the novel is that while no one may die from the direct effects of the blast, the cascading effects create utter chaos and many people die as the infrastructure they depended on collapses.

What is sobering about such a scenario is that an attack could come from an anonymous source. Scud missile technology has proliferated worldwide, trickling down from traditional competitors to rogue nations and asymmetric threats. Pirate activity off the coast of Somalia shows how vulnerable ships are to hijacking. Iran's nuclear ambitions and connections to terrorist networks worldwide, and Pakistan's vulnerability to radical Islamic forces seeking to seize its nuclear arsenal creates a series of dots that require little imagination to connect.

Yet, the dots are not being connected. The Department of Homeland Security has made no official move to implement or even accept the recommendations of the EMP Commission report on critical national infrastructures. While some members of Congress understand the threat and wish to do something about it, most of the ire has been directed at power industry figures as a Congressional hearing earlier this summer illustrates.

What should state policymakers do? First, read and learn the reports written by the EMP Commission, which can be obtained for free from the Commission's Web site. Pay particular attention to the recommendations made at the end of the chapters in the report on critical national infrastructures. Unfortunately, no one state acting on its own is enough to prepare for this threat without federal coordination, but there is a gap in awareness and understanding of the problem that needs to be closed. No matter what committee you may chair as a legislator, chances are there is a chapter in the report that concerns you in some way. Many of the members of the EMP Commission are willing to testify before state legislative committees or regulatory commissions.

Second, learn about critical infrastructure from an industry perspective. Remember that CI is an industry, and we want it to be healthy for the consumer. The kind of policy which seeks to preserve free market forces to the greatest degree possible will ultimately be better for the consumer, so avoid solutions that are cost prohibitive. Seek to make partners within the industry.

To learn more about critical infrastructure in your state, ask the Homeland Infrastructure Threat and Risk Analysis Center (HITRAC) within the Department of Homeland Security. As part of the National Infrastructure Protection Plan, the federal government offers states assistance through HITRAC in their own infrastructure planning efforts.

Third, prioritize your efforts. Of all CI, electrical power and telecommunications are the top two that should be given priority. The EMP Commission report gives an excellent overview of the nature of the electrical power system in the United States. The recommendations at the end of the chapter should provide lots of material for questions to pose to your state regulatory body.

Whatever efforts you undertake, learn from other states and pass on the knowledge that you gain. Local planners in New York conducted a tabletop exercise to talk about the emergency planning and capability needed to respond in an EMP event. Local planner expertise is a key component of any preparation.

Fourth, urge those in your state to press the Department of Homeland Security to work with states to implement the recommendations of the EMP commission report. Pass a legislative resolution calling for federal action. Contact the Institute of the North for help with wording the resolution.

The Secretary of Homeland Security said earlier this year that there is a need for local first responders to step up, given that the nature of the federal government is such that it cannot act as a first responder. An EMP scenario means the absence of power, telecommunications, and outside aid. The catastrophic effects of such a scenario demand our attention. ■

Best Practices for Modernizing IT and Increasing Transparency in Government

BY BRADEN COX, ACT/NetChoice

Software users—and that's pretty much everybody nowadays—live in a state of abundance. Want to share photos online? Organize communications from colleagues? Get information about where to go out for dinner? "There's an app for that," as the popular Apple iPhone commercials proclaim.

But when it comes to state and city government use of software, is there a best practice for that? There should be.

Governments have a number of options for upgrading and managing their information technology (IT) resources. Many states and cities are in the modernization process of migrating from legacy systems to new applications. Moreover, governments are increasingly looking to cloud computing and Web 2.0 software applications to make the governing process more open and transparent.

States looking to obtain the best software at the right price should act now (if they haven't already) to implement an updated procurement process that acknowledges all the various information technology alternatives.

Modernizing technology infrastructure under constrained budgets

In the late 1990s there was a concerted push for governments to adopt new IT solutions. Some of this modernization was spurred by fears of the "year 2000 problem" while other changes were efforts at "e-government."

A decade later, many states are in need of modernization—particularly in network systems still run by old mainframes. But today's economy provides challenges to state chief information officers (CIOs). A December 2008 publication from the National Association of State Chief Information Officers (NASCIO)—"Digital States at Risk: Modernization Legacy Systems"—aptly describes the current environment:

"Although the current fiscal crisis in the states is more severe than could [have been] anticipated, State CIOs are faced with the same continuing pressures. State CIOs are required to streamline IT budgets, justify IT spending and increase service delivery and efficiency to their government, citizen and business customers."

Many states are pursuing modernization efforts. One example is the Commonwealth of Virginia, which since 2005 has pursued a public-private partnership to upgrade IT systems. According to the Virginia Information Technologies Agency (VITA), state government has accomplished the following technology upgrades:

- **PC refresh**: More than 34,000 desktops, laptops and tablets have been replaced across the Commonwealth.
- **Network**: A total of 1,627 agency sites have migrated to the new centrally managed network. The benefits allow for enhanced application security and interoperability.
- **Messaging**: Twelve agencies with approximately 12,900 users have been migrated to enterprise e-mail and are benefiting from easier file sharing and better e-mail security.
- **Help desk**: Seventy-nine agencies with approximately 46,500 users now call the central VITA help desk.

In addition to modernizing technology, many governments want to modernize the governing process. Technology can also help make governments more transparent.

Increasing government transparency

Using technology to promote government transparency is best thought of as a process that increases citizen access and participation, and holds policymakers more accountable for their actions.

Governments can facilitate transparency through technology. New York City, the District of Columbia, and Portland, Oregon, have "opened up" their data and provided it in raw (often XML or text) formats around which citizen developers can build applications. Moreover, many governments want to take advantage of wikis, blogs social media, and other Web 2.0 applications for interacting with constituents and increasing citizen participation.

Another consideration for transparency is where governments store their data. Will governments continue to store software and data on their own computers, as most do now, or allow companies to store it all online in the digital cloud?

There are a number of vendors and

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sources available to modernize government and increase transparency. Choosing the right one starts with a comprehensive and objective technology procurement process.

Best practices

Governments should simplify and streamline the procurement processes to take advantage of the innovative solutions that exist in the IT marketplace. Best practices can guide state and city governments as they choose among the various options in the marketplace.

At the federal level, Apps.gov was recently launched by the General Services Administration to act as an online storefront where federal agencies can purchase cloud-based IT services. It is a beginning step for highlighting Internet-based alternatives, but it hasn't changed the underlying (and often slow-moving) procurement process.

A better procurement process gives government organizations a broad set of choices, including solutions for on-premise and cloud environments. All solutions—including open source, packaged products, and commercially developed software—should be considered on the merits of their technology and organizational value.

An explicit bias for open source or commercial software, or cloud-based or on-premise software—that is imposed by politicians—is not in a government's best long-term interest. Sometimes open source may be the best solution, sometimes a commercial product may be the best solution. Software procurement determinations should be made objectively based on many factors.

There are various techniques to manage the aging and replacement of systems, including "life-cycle approaches" for applications and infrastructure or plans developed in advance for the "end-of-life" of new IT systems. This methodology is often referred to as total cost of ownership (TCO) analysis, which considers more than just up-front acquisition costs. Other costs that should be factored include long-term services and support costs, maintenance, security patch processes, training, and archival processes.

An objective procurement process should focus on best practices. It should be unified so that all software and services can compete under objective criteria for procurement dollars.

To achieve objectivity and uniformity, a government procurement process should consider the following best practices:

- **Participation**: The process provides significant opportunities for participation from small and medium-sized businesses.
- **Cost**: Total cost of ownership analysis been used to determine expected spending on implementation and integration and lifetime use costs and consider the availability of warranties and indemnities for IP claims. After procuring software, there should be mechanisms to track cost overruns and scheduling delays.
- **Neutrality**: IT procurement should be driven by user requirements, and not by mandates or preferences for a particular brand, vendor, or development model.
- **Scalability**: The procurement process should recognize the differing needs and sizes of IT environments, whereby a variety of products and services available from different sources may need to scale to both small and large user bases.
- **Privacy and Security**: The privacy and security implications for users and governments should be documented and considered. This includes data security for email and documents accessed and stored remote through cloud computing.
- **Accessibility**: The software should meet all the legal criteria (Sect. 508) for disability access?
- **Innovation and Jobs**: Consider whether there is an existing development ecosystem in place that provides vendor support for maintenance, integration and training over a specified time period.

In any procurement process it is essential for the federal and state governments to safeguard against waste, fraud and abuse. There should be avenues for complying with FOIA requests, no matter where data may reside. These and other considerations can be easily handled if there is the right process in place.

Best practices are needed whether an agency wants to license a user-oriented Web 2.0 application or develop an agency-wide systems integration project. A clear, objective procurement process helps governments and citizens. But just as important, it allows for a participatory ecosystem for developers to create innovative software and IT services to help promote a modern, transparent government. ■

cloud computing

Encompasses any subscription-based or pay-per-use service that, in real time over the Internet, extends IT's existing capabilities.

Tax Code Treatment of Work Cell Phones

ALEC calls for an update

BY LAUREN BROWN

In recent years, cell phones have revolutionized the workplace. Innovations in cell phone technology and competitive pricing now includes flexible, unlimited calling plans. Unfortunately, our tax laws have failed to keep pace with these dynamic marketplace developments.

Since 1989, the Internal Revenue Service (IRS) has treated cell phones as "listed property," meaning their personal use qualifies as extra compensation for tax purposes. Under the current law, an employer must report an employee's work cell phone usage as income unless the employee meets detailed documentation rules, designating whether the call was business or personal and also demonstrating the cell phone is used for business more than fifty percent of the time. Only when an employee meets those onerous requirements does his or her cell phone use qualify as a working condition "fringe benefit" that can be excluded from an gross income. No similar are imposed on the use of personal calls made on work landline phones.

Over the past couple of years, IRS examiners challenged businesses and universities regarding personal use of work cell phones, in some cases assessing additional taxes. Particularly, state and local governments and universities have been targets of the IRS' recent push to closely monitor the compensation of executives at tax-exempt institutions. After IRS auditors found that employees were not keeping logs, UCLA was hit with a $239,196 bill, and the City of San Diego had to pay $186,471. Rather than issuing cell phones to employees, many employers have decided to give employees a stipend to purchase phone service and avoid IRS' reporting requirements. Concerns persist that more businesses will cancel wireless contracts and instead give employees a reimbursement for a portion of their personal cell phone to avoid reporting requirements.

Lauren Brown was ALEC's 2009 Research Intern.

ALEC's *Resolution Urging Congress to Update Tax Treatment of Cell Phones* encourages Congress to repeal the Tax Code's treatment of cell phones as listed property and the accompanying burdensome reporting requirements. Focusing on the onerous rules required for documenting cell phone use and the expense and difficulty for employees to maintain such logs, the Resolution declares: "The Tax Code's treatment of cell phones and similar telecommunications equipment is outdated, does not correspond to technological advancement in wireless, fails to reflect the integration of wireless technology in American businesses, and is ill-suited to the 21st Century American economy."

Pending legislation in Congress would provide updated cell phone tax treatment. Earlier this year, Representatives Sam Johnson and Earl Pomeroy introduced H.R. 5450, the *MOBILE (Modernize Our Bookkeeping in the Law for Employee's) Cell Phone Act*. The legislation updates the tax treatment of cell phones and Blackberries used for business by removing them from the definition of listed property in the Tax Code. Senators John Kerry and John Ensign introduced companion legislation in the Senate (S. 2668).

Revealingly, in mid-June, the IRS backed away from its earlier proposals to more uniformly enforce the law, instead recommending Congress update the law to ensure that neither companies nor workers will be subject to taxes for employees' personal use of work cell phones. IRS Commissioner Doug Schulman said, "The passage of time, advances in technology and the nature of communication in the modern workplace have rendered this law obsolete."

The Tax Code's treatment of wireless devices is hopelessly outdated and fails to reflect the integration of wireless technology into American business. Cell phones should not be subject to luxury tax laws created 20 years ago. ALEC hopes that Congress will soon repeal the Tax Code's treatment of cell phones as listed property to reflect today's realities. ■

How "Bad Faith" Becomes Bad Law

Legislators should continue to reject efforts to unreasonably expand liability for insurance claims handling

BY VICTOR E. SCHWARTZ & CHRISTOPHER E. APPEL

State legislatures around the country have become increasingly bombarded with proposals to overhaul state insurance laws in order to root out so-called "bad faith" in the handling of insurance claims. Generally speaking, this legislation purports to compel insurers to act in good faith in their dealings by expanding the scope of liability and heightening existing penalties for "bad" insurer acts, such as the unjust delay or denial of a claim.

While on the surface this expansion of law may seem to many state legislators like a helpful and attractive consumer protection measure, the reality is that bad-faith initiatives often miss their basic purpose and are anything but a step in the right direction. Knowledgeable legislators have appreciated that in many instances this legislation is designed to generate mass litigation and punish insurers even where they try to act responsibly. For these reasons, most legislators have appropriately repudiated such proposals.

ALEC recently passed a resolution to address the growing area of concern regarding unfair and unbalanced bad-faith legislation. The resolution identifies and opposes types of acts which create new and expansive private causes of action, lower existing bad-faith standards, and impose unreasonable penalties beyond the limits of what is recoverable under an insurance contract. This article builds on the ALEC resolution to provide a guide for legislators and other interested parties to navigate the landscape of bad-faith law, learn how these laws are commonly abused and manipulated, and understand how expansive bad-faith legislation can become a recipe for disaster that harms both insurers and ordinary insurance consumers.

What's really at stake in bad-faith legislation

An important first step in becoming educated about insurance bad faith is to identify from where efforts to transform this

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area of law are coming. Unlike other legislation heralded as "consumer protection" and championed by bonafide consumer groups, the driving force behind state lobbying efforts for bad-faith laws are often plaintiffs' lawyers who view expansive bad-faith legislation as a major boon to their litigation business. More than that, the organized plaintiffs' bar understands that an expansive bad-faith law can have the effect of creating a market for litigation, and one that can secure the financial future of many of their members. In this regard, the plaintiffs' bar appears less concerned about the needs of most insureds and the public policy impacts of overly expansive bad-faith laws than in dramatically increasing litigation opportunities for their members.

Increasing the amount of litigation, however, is only one part of this trial lawyer agenda; a concurrent objective is to increase the value of each new case substantially. To accomplish this goal, bad-faith proposals often heighten the range of available penalties while lowering the standards for those penalties to be imposed. The effect provides plaintiffs' attorneys with the best of both worlds—less work for a higher payoff—and is nothing short of a complete transformation in the law. That insurers are perceived in a negative light by many in the public and are often viewed as having "deep pockets" make them an attractive target for this type of proposal, which would likely be scoffed at by legislators if attempted against other industries or in other contexts. Moreover, given the incredible potential to expand both the quantity and dollar value of litigation, it is easy to see why bad-faith bills are honey in the mouth for their underwriting members in the plaintiffs' bar.

Where the law currently stands

Recognition of bad faith as the basis for an independent right of action is only a product of the last 35 years of American jurisprudence.[1] Over this comparatively short period, the law of bad faith has witnessed unprecedented growth and development. Throughout the 1970s and 1980s, a majority of states adopted a bad-faith action as an addition to their common law.[2] With few exceptions, states recognize that to succeed in a bad-faith lawsuit, there must be "an absence of a reasonable basis for denial of policy benefits and the knowledge or reckless disregard of a reasonable basis for a denial."[3] In other words, courts have made it clear that bad faith means an intentional wrong perpetrated by the insurer.

During this same period of development, every state also adopted statutes to supplement the common law and establish a state regulatory layer of protection. These laws were based on model legislation that was produced by the National Association of Insurance Commissioners (NAIC) for enforcement by state insurance regulators, not private personal injury lawyers.[4] The statutes generally require insurers to communicate promptly with respect to claims, implement reasonable standards for claims investigation, negotiate in good faith, and pay insureds promptly when liability has become reasonably clear. They also prohibit intentional insurer acts such as altering claims forms, making payments without stating the policyholder's coverage, requiring submission of preliminary claims reports with duplicative information to cause delay, and intimidating claimants by making them aware of an insurer's policy of appealing any arbitration award favorable to the insured.

Regrettably, judicial interpretation of these existing, often identical, bad-faith statutes has varied significantly. Some state courts have interpreted these laws to allow private enforcement, while others retain exclusive oversight and enforcement through the state insurance commissioner. Adding greater complexity to the landscape of bad- (***Faith**, continued on p. 19)*

1 See generally Victor E. Schwartz & Christopher E. Appel, Common-Sense Construction of Unfair Claims Settlement Laws: Restoring the Good Faith in Bad Faith, 58 Am. U. L. Rev. 1477 (2009).

2 See id. at 1482-86.

3 Anderson v. Continental Insurance Co., 271 N.W.2d 368, 377 (Wis. 1978).

4 See Schwartz & Appel, supra, at 1512, n.169.

Wireless Competition and Public Policy Issues

BY SETH COOPER

Consumers across the country are enjoying wireless experiences thanks to a dynamic marketplace for wireless products and services. Explosive growth and technological advances have characterized the wireless marketplace in recent years, vindicating the largely hands-off posture taken by federal and state governments toward wireless. Nonetheless, some state policy impediments and the renewed threat of federal regulation could detrimentally harm wireless deployment and adoption. Free market policies must prevail if consumers hope to enjoy new and future benefits of wireless.

Innovation

The wireless marketplace is a paragon of rapid innovation in technology and service. Recent years have witnessed an explosive proliferation of mobile handset device with an ever-increasing variety of functions and features for consumers to choose from. Handset devices offer an assortment of small button and keyboard options, as well as touchscreen capabilities. In addition to voice services, wireless consumers now partake of a number of new, advanced wireless communications services, including mobile-to-mobile text and multimedia messaging, web browsing, and other specialized applications. Consumers now have within their grasp a myriad of downloadable media products, such as ringtones, music mp3 files, and high-definition video programming. Downloadable smartphone applications can even be designed and customized by consumers themselves. In the future, it is likely that most smartphones will include "tethering" functionality, whereby handsets with Internet capabilities can serve as a conduit for laptops or PC's to connect to the Net. Meanwhile, wireless networks are undergoing an ongoing upgrade, with major carriers deploying third-generation (3G) wireless networks that allow consumers increased handset functionality, greater speeds, and improved reliability.

Competition

There is robust competition in the wireless marketplace, presenting consumers with competitive product and service offerings. According to a recent FCC Report "[m]ore than 95 percent of the U.S. population lives in census blocks with at least three mobile telephone operators competing to offer service,

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and more than 60 percent of the population lives in census blocks with at least five competing operators." This competitiveness has driven down costs to consumers. Early 2009 estimates of average monthly minutes of use per subscriber total 769, with an average cost per minute of $0.06. The average cost per minute has proceeded on a downward trajectory, with a 2003 average cost per minute of $0.10. Consumers have the option of entering into month-to-month service plans with wireless carriers, or selecting longer-term service plans that enable to obtain handsets at little or no up-front cost. Pre-paid calling plans have also grown in popularity recently, allowing consumers to pay for an allotment of voice minutes that they can use over a time period of their own choosing.

22.8

Amount, in billions, wireless carriers have spent on average, each year since 2001 to upgrade networks.

What's more, the wireless industry stands on the brink of even strong marketplace competition. In addition to ongoing upgrades by major carriers to 3G networks, plans for Internet-based fourth-generation (4G) networks are already in the works. Both existing wireless carriers and a host of prospective new entrants have already made extensive investments in research and development for deploying competing 4G wireless networks.

Employment

Aside from benefits to consumers, wireless is the source of significant workforce activity. Directly or indirectly, the wireless industry employs some 2.4 million people. Wireless carriers directly employ some 268,000 people. Wireless jobs pay approximately 50 percent higher than the national average of other production workers.

Capital investment

Wireless has also contributed to the economy with significant capital investment. Over the last decade, the wireless industry has invested over $200 billion in improving infrastructure. This includes both research and development and the construction of new cell towers. As of December 2008, wireless carriers have deployed 240,000 cell tower sites across the nation. Since 2001, wireless carriers have averaged an annual investment of $22.8 billion to upgrade their networks.

State policy obstacles to wireless deployment and adoption

Unfortunately, wireless deployment and adoption has been hindered by certain policy and administrative obstacles at the state and local level.

1. Wireless tower siting and collocation

One important area in which states have room for improvement is cell tower siting and collocation. Long delays by local governments in considering cell tower siting or collocation permit applications have prevented more rapid deployment of needed wireless infrastructure. Such delays also leave wireless carriers in a bind over whether to endure the attending opportunity costs or devote their resources elsewhere. Wireless carriers permit applicants are largely unable to seek legal redress once a local government has made its decision. Arbitrary denials of permit applications by local governments have resulted in even longer delays and litigation costs for both local governments and wireless carriers. As a result of local government inaction or misfeasance, wireless service availability and quality is reduced by a lack of new or improved infrastructure.

ALEC's *Wireless Communications Tower Siting Act* requires local authorities to take final action on a cell tower siting permit application within 75 days of its filing. It also requires local authorities to take final action on a collocation permit application within 45 days of its filing. Absent a showing of necessity by the permitting authority, a failure to take action within the allotted time results in the permit being automatically approved by operation of law.

ALEC believes that lengthy delays in the permitting process need to be curtailed, and the disciplining force of a shot clock is a necessary answer to the problem of delays.

The certainty of deadlines allow wireless service providers to better assess the costs of regulation—i.e., the risk of lengthy delays, lengthier processing, and rejection of collocation or new siting applications. Clear timeframes for action on applications reduces costly unknown variables for applicants. Through the form of lower prices, consumers also benefit from reduced uncertainty costs to wireless service providers. To the extent date-specific deadlines hasten authority approval, consumers benefit from a more rapid deployment of advanced wireless services.

2. High state taxation of wireless services

Wireless services are also subject to an increasingly heavy state tax burden. ALEC is concerned that many states have limited the growth and availability of wireless services to consumers by excessive taxation.

ALEC's *Statement of Principles for Telecommunications Tax Reform*, encourages "pro-growth" tax polices that "encourage the deployment of traditional and advanced communication infrastructure on a technology neutral basis." However, a snapshot look at taxation of wireless services by states suggests that state tax rates are *not* pro-growth. High rates of state taxation on wireless reduces

overall economic welfare. In the time ahead, ALEC will continue its support for lowering the tax burden on wireless services.

3. State public utility commission preemption

One positive trend among states has been the removal of unnecessary layers of wireless regulatory oversight at the state level. In particular, the trend among states has been to limit or entirely remove their respective public utility commissions' respective jurisdiction over wireless. Since federal law prohibits any state regulations concerning entry or rates of wireless services, expansive state regulatory regimes are more likely to be a source of protracted, futile litigation that will divert wireless carrier investment and thereby harm consumer welfare.

ALEC's careful consideration of this issue is reflected in its *Wireless Competition Act*. This important model state legislation removes state PUC jurisdiction over wireless. Some 30 states have adopted legislation based on or otherwise similar to ALEC's model. Marketplace forces are much more likely to enhance consumer choice and discipline competitors' conduct than multiple regulatory entities. It is crucial that these deregulatory efforts continue.

Federal policy perils for wireless innovation and competition

Despite wireless marketplace's dynamism under the minimal federal regulatory environment that has continued since 1993, a handful of interest groups have pressed for onerous new wireless regulations. A handful of potentially harmful regulatory schemes are now being considered by federal regulators.

1. FCC's investigation of the wireless industry

This fall, the FCC launched a sweeping inquiry into the wireless industry. The FCC's investigation targets almost every conceivable aspect of both the upstream and downstream markets for wireless products and services. Its line of questioning reaches into wireless issues beyond the FCC's own jurisdiction. While no regulations have been proposed at this stage, the broad scope of the FCC's wireless inquiry and its related actions raise concerns that the inquiry will attempt to lay the groundwork for expansive new regulations of the wireless products and services will disrupt market innovation and competition.

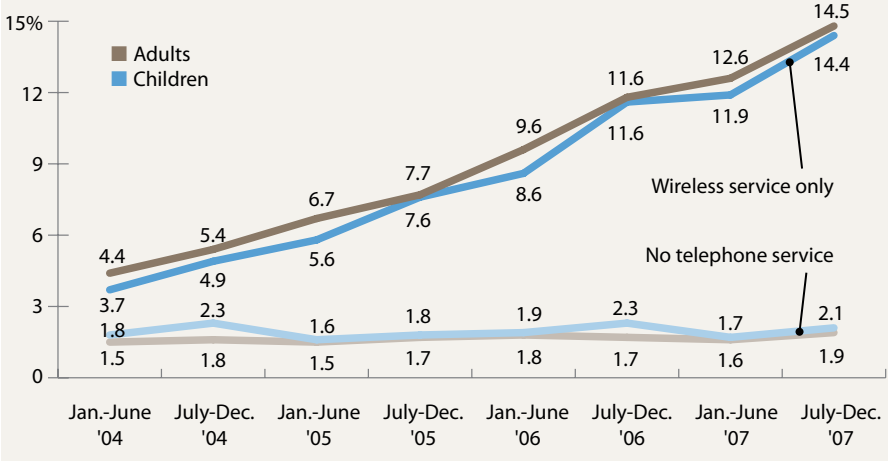
2. Specter of smartphone application regulation

The FCC's recent demands that Apple explain why it has not approved Google's "Google Voice" application for the Apple iPhone. Despite the FCC's lack of jurisdiction over smartphone manufacturers, its questioning of Apple implied that device makers have or should have some kind of regulatory obligation to cater their own devices to accommodate their marketplace rivals. (Google manufactures its own smartphone.) The results of such a policy create a detrimental free-rider problem: device makers would be required to subsidize their own competitors' products and services. The FCC's informal inquiry into this matter heightens concerns that its formal inquiry into wireless will indeed lead to federal regulation of smartphone applications. ALEC's *Resolution for Pro Consumer Policy in Voice, Video and Data* urges federal regulators to avoid imposing new and unnecessary layers of regulation on the competitive marketplace for these innovative technologies.

3. Worries over wireless spectrum use regulations

The FCC's wireless inquiry also raises the possibility of federally imposed network management conditions on carriers use of wireless spectrum. The FCC's imposition of "open access" (or "forced access") mandate on a portion of the 700 MHz spectrum it auctioned in early 2008 constituted an unfortunate backslide from the FCC's prior free-market based approach to spectrum management. The encumbered spectrum auctioned for approximately $7 billion less for the federal treasury than it would have raised without regulatory mandate, strongly suggests that the more encumbered spectrum will not be put to its highest and best economical use. As part of its current wireless investigation, the FCC has once again raised the prospect of imposing similar kinds of regulatory obligations on wireless spectrum,

PHONE USE IN THE UNITED STATES: 2004-2007



including spectrum subject to future auctions and spectrum that has already been auctioned without such regulatory strings attached.

Spectrum efficiency and flexibility is best achieved by leaving spectrum use open to the widest possible range of competing business models. This allows competing spectrum auction winners flexibility to meet consumer demands. The efficacy and viability of different wireless network approaches business models should ultimately be decided by wireless carriers competing to satisfy consumer preferences, not regulator preferences. Serious inequities are also presented by any kind of retroactive regulation on wireless carriers who bid and won spectrum licenses under the expectation of freedom from regulation. ALEC's *Resolution Concerning Management of the Public Spectrum* supports the use of market mechanisms such as public auctions for making new wireless spectrum available and also supports flexible use of spectrum by wireless spectrum licensees.

4. Peril of wireless "network neutrality" regulations

Public spectrum use conditions constitute just one vehicle by which wireless carriers could be subjected to so-called "network neutrality" regulations. The FCC's wireless inquiry has expressly raised the issue of whether it should impose onerous regulations governing the management of wireless network data traffic. Wireless cellular technology constraints make wireless networks particularly sensitive to high data traffic levels. As growing numbers of consumers increasingly adopt smartphone devices and opt for data-rich applications, wireless data networks are pushed to capacity. Wireless carriers' desire to allow as many consumers as possible to send and receive data through their networks requires intelligent network management techniques to accommodate consumers. But network neutrality regulations undermine the freedom of wireless carriers to manage their networks by requiring them to treat all data packets alike.

Under such regulatory constraints, consumers will likely find the quality of wireless service reduced. Slower speeds for web browsing and application functions and dropped calls could become more prevalent if carriers are prevented from intelligently managing their networks' traffic flow. The looming presence of a regulatory regime governing wireless networks and uncertainties surrounding federal enforcement will also make it less likely that wireless carriers will pursue and implement innovative solutions to common network problems such as viruses, spam, worms, and illegal traffic content such as child pornography. Regulatory uncertainties leading to decreased wireless network investment will also have a deleterious effect wireless network innovation. Network neutrality regulations freeze one particular model of network management in place and prevent the ongoing evolution of broadband networks. In the end, wireless network neutrality regulations would effectively result in consumers having to rely on dumb wireless networks to use their smartphones.

Wireless network neutrality regulations would constitute a major step backward from the FCC's deregulatory policies concerning information services such as wireless broadband. And serious doubts surround the question of FCC jurisdiction to impose common carrier-type regulations concerning wireless broadband services.

ALEC's *Resolution on Network Neutrality* opposes new regulations on advanced information services. ALEC will continue to monitor the FCC's wireless inquiry process and convey its public policy position that the network freedom, innovation and competition that have resulted in the dynamic wireless marketplace we see today must be preserved.

5. Aggressive antitrust enforcement concerns

News reports issued during the early days of the new Administration suggested the U.S. Department of Justice was investigating major wireless carriers. However, subsequent reports indicate that no such investigation is taking place. Concerns were legitimately fueled by the Department of Justice Antitrust Division Chief's pledges to be more tough and aggressive in investigating and suing businesses under antritrust law. Particularly unsettling to many was the Antitrust Chief's public proclamation that increased antitrust enforcement would stimulate the economy. Undoubtedly, the fire was fueled by anti-market interest groups asserting that big business is inherently bad, ignoring the disciplining constraints of competition in the marketplace.

ALEC's *Telecommunications Deregulation Policy Statement* urges the conservative application of antitrust law, requiring careful microeconomic analysis to prove that consumers are harmed by price fixing or other specific, collusive conduct. In light of the robust competition existing in the wireless marketplace today and the potential competition from new entrants, overzealous antitrust enforcement entirely lacking in economic rigor should be rejected. ■

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(***Faith**, continued from p. 14)* faith law is that a number of states have adopted private enforcement provisions and additional prohibited acts that are not part of the model NAIC laws. These enforcement provisions can enable private actions to be brought under statute or common law, and can result in inconsistent standards for what constitutes "bad faith." The presence of additional prohibited insurer acts can also compound this adverse effect. For instance, additional provisions often include rigid criteria, such as specific time limits within which an insurer must process a claim, and provide a basis for much of the bad-faith litigation raising concern to ALEC members. States such as Missouri, Illinois, and Rhode Island, for example, have statutes prescribing a strict 10- or 15-day window in which an insurer must provide claims forms or violate the state's unfair claims settlement act.[5] Some states also set strict and arbitrary deadlines for other practices, such as when an insurer must respond to a claim[6] or even when a claim must be settled.[7]

Sanctions also vary significantly across states. Oklahoma, for instance, imposes a fine, enforced by the state Insurance Commissioner, between $100 and $5,000 for each violation of its bad-faith statute,[8] while Maryland imposes a penalty up to $125,000 for any violation.[9] A number of states also allow private claimants to recover punitive damages.[10] Still others, such as Louisiana, provide additional private recovery beyond the insurance contract by permitting as damages a multiple of any compensatory award.[11]

The differences among states regarding identification of bad-faith conduct, enforcement mechanisms, and remedies create a wide range of treatment for bad faith in the handling of insurance claims. Although most states' statutes appear similar, and sometimes nearly identical in form, their interpretation by courts and the presence of additional provisions or remedies creates close to 50 unique state landscapes. It is against this backdrop that much of the recent legislation has sought to take advantage of the muddled state of the law and unreasonably expand and distort the core principles of bad-faith law.

How plaintiffs' lawyers want to change the law

Plaintiffs' lawyers have sought to legislatively modify bad-faith laws in four key ways: (1) create a statutory private right of action; (2) remove any intentional conduct standard; (3) enumerate strict criteria that purports to show bad faith; and (4) increase and expand bad-faith penalties. As the ALEC Resolution Opposing Unfair and Unbalanced Bad Faith Legislation illustrates, each of these modifications standing alone has the potential to alter a state's litigation environment dramatically and unfairly. When they are combined, as they routinely are in bad-faith bills, a broad new "super-tort" is created which allows virtually any claimant who has been denied payment on an insurance claim to maintain a bad-faith lawsuit.

The overreaching and unbalanced effect of such proposals can be appreciated by even the harshest critic of insurers. Consider what would happen if a bill adopting these proposals were enacted and plaintiffs could bring a statutory bad-faith action against an insurer for technical errors—regardless of any malicious or intentional insurer conduct—and recover broad damages. It would give rise to unreasonable litigation with unjust outcomes: for example, if an insurer reasonably disputed a claim, but because of a clerical error in data-entry failed to meet a statute's window of time for providing the proper claims forms, that insurer could be punished by being forced to pay the reasonably disputed claim in full, subjected to extra-contractual damages such as a compensatory damages multiplier, made to pay attorney's fees and court

5 See 215 ILL. REV. STAT. ANN. § 5/154.6(o); MO. REV. STAT. § 375.1007(13); R.I. GEN. LAWS § 27-9.1-4(13).

6 See, e.g., FLA. STAT. ANN. § 626.9541(1)(i)(3)(e); OKLA. STAT. tit. 36, § 1250.4(C); R.I. GEN. LAWS § 27-9.1-4(16); S.D. CODIFIED LAWS § 58-33-67(1).

7 See, e.g., CONN. GEN. STAT. § 38a-816(15)(B) (requiring an insurer to settle claims within forty-five days); N.M. STAT. ANN. § 59A-16-20(F) (characterizing the failure to settle "catastrophic claims" within ninety days as a prohibited unfair claims practice); W. VA. CODE § 33-11-4(9)(o) (requiring claims to be settled within a ninety-day period).

8 See OKLA. STAT. ANN. tit. 36, § 1250.14.

9 See MD. CODE ANN. INS. § 27-1001.

10 See MASS. GEN. LAWS ch. 176D, § 7; MASS. GEN. LAWS ch. 93A, § 9.

11 See LA. REV. STAT. ANN. § 22:1973(C).

costs, fined thousands of dollars by the state, and forced to reengineer its claims processing system.

Taken together, the insurer may be dealt a devastating blow, on multiple levels, for a single unintended act. Furthermore, even with a well-trained staff, such human errors are practically unavoidable where insurers are tasked with handling hundreds of thousands of claims per year, or thousands of claims per day. By creating a private right to sue that removes the essential bad-faith requirement of intentional or willful conduct, and reduces the standard to mere negligence, plaintiffs' attorneys are able to turn an insurer's minor technical error (the criteria for which is often created by the same legislation) into a highly profitable settlement.

In the past few years, plaintiffs' attorneys have managed to successfully sell such legislation in a few states. For example, since 2007, Colorado and Washington have each significantly amended their bad-faith laws to permit a private right of action incorporating a negligence standard.[12] In 2009, there were also similar bad-faith bills introduced in more than a dozen other jurisdictions.[13]

Why expanding bad-faith represents unsound public policy

The consequences of unreasonably expanding—perhaps more aptly described as re-defining—the law of bad faith would be adverse to both sides of the insurance transaction. When the law allows an insurer to effectively be punished where there is no intent to harm a policyholder, and especially when the insurer is willing to correct a mistake, the dynamics of the system change dramatically. The pressure to settle a case when there is any doubt—no matter how remote—that the insurer *could be* incorrect or mistaken and therefore liable for substantial extra-contractual damages, can become enormous. Plaintiffs' lawyers, attune to this changed dynamic and seeing blood in the water, would have a clear incentive to simply "add on" a bad-faith claim to every insurance coverage dispute and expand the scope of recovery. As a result, the number and amount of insurance settlements would significantly increase, unnecessarily driving up insurance costs.

Ultimately, these costs would be borne not by a "wealthy insurer," but rather by individuals, small businesses and other insurance consumers onto whom higher premiums are passed. The increase in costs would also likely price many consumers out of the market for insurance altogether, increasing the number of uninsured and underinsured, and further increasing costs for those able to maintain insurance. Some insurers might discontinue or substantially curtail their insurance services because it would be too risky to do business in a jurisdiction with an overly-expansive bad-faith law. This would additionally penalize consumers through less insurer competition and fewer coverage choices.

Both insurers and insurance consumers would also likely be harmed by a greater incidence of insurance fraud by insureds. As a practical matter, the increased settlement pressure from an expansive bad-faith law would make it more risky for insurers to try to "get to the bottom" of any claim, even those the insurer believes lack merit.

Finally, it is important to note that despite all of these adverse public-policy effects, there has been no clear showing of a need for broader remedies for an insured who believes his or her claim should be paid. State insurance regulators function to safeguard insureds, and are empowered to impose penalties against insurers or otherwise take corrective action. Contract remedies are also available to insureds, in addition to other intentional torts outside the perimeters of the contract. If legislators determine that more legal power is needed to assist insureds, that additional enforcement responsibility should be held by state regulators charged with safeguarding insureds and not by private actions in an already expansive tort system.

ALEC members should be cognizant of the harmful impacts of expansive bad-faith legislation and the often self-serving motives of those who underwrite efforts to water down and redefine bad-faith law. Legislators must continue to maintain rational limits, or soon, even good faith will become consumed by bad faith. ■

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12 See H.B. 1407, 2008 Leg., 66th Sess. (Colo. 2008) (codified at COLO. REV. STAT. § 10-3-1115); S.B. 5726, 2007 Leg., 60th Sess. (Wash. 2007) (codified at WASH. REV. CODE § 48.30.015).

13 In 2009, bad-faith bills were introduced in the following jurisdictions: S.B. 103, 2009 Leg., 67th Sess. (Colo. 2009); S.B. 763, 2009 Leg., Reg. Sess. (Conn. 2009); S. 962, 2009 Leg., Reg. Sess. (Fl. 2009); H.B. 450, 2009 Leg., Reg. Sess. (Ga. 2009); S.B. 1137, 2009 Leg., Reg. Sess. (Iowa 2009); L.D. 1305, 2009 Leg., 124th Sess. (Me. 2009); H.B. 345, 2009 Leg., 61st Sess. (Mont. 2009); S.B. 157, 2009 Leg., Reg. Sess. (N.M. 2009); A.B. 224, 2009 Leg., Reg. Sess. (Nev. 2009); S. 132, 2008-09 Leg., 213th Sess. (N.J. 2008); A. 3698, 2009 Leg., Reg. Sess. (N.Y. 2009); H.B. 2791, 2009 Leg., Reg. Sess., 75th Sess. (Or. 2009); S.B. 746, 2009 Leg., Reg. Sess. (Pa. 2009); H. 5196, 2009 Leg., Reg. Sess. (R.I. 2009); B. 18-103, 2009 Leg., Reg. Sess. (D.C. 2009).

phot: M.V. Janztzen

PASS-ID: Reviving the REAL ID Act

BY JIM HARPER, CATO INSTITUTE

In 2005, Congress passed a national ID law called the *REAL ID Act*. REAL ID sought to federalize state driver licensing policy by threatening to reject the IDs of air travelers from states that didn't comply with federal standards. Congress passed the law without a holding a hearing on it and without having an up-or-down vote in the Senate. In fact, the first hearing on REAL ID was held in a state legislature.

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Compliance with REAL ID would cost states billions of dollars, increase lines and waiting times at motor vehicle bureaus, and create nationally accessible databases of driver information—without adding to the country's security. So in 2007, ALEC passed a resolution opposing REAL ID.

Since then, 15 states have passed bills barring themselves from implementing REAL ID, and nine more have passed resolutions denouncing REAL ID. When the federal deadline for compliance with the national ID law passed in May 2008, not a single state was in compliance, and the Department of Homeland Security hustled deadline extensions to every state—even states that didn't request them. Some advocates will use the new deadline at the end of 2009 to stir the national ID pot, but this deadline is no different than the one that passed uneventfully in 2008.

The *REAL ID Act* is essentially dead, but some state lobbying groups have been working to make it an opportunity for themselves. If REAL ID were to move forward, and if they could make a plausible case that the federal government would fund it, these state lobbies could cement their role as beggars in Washington, D.C. for governors and legisla-

tures. They would have a permanent job asking Congress for money and managing federal control of state driver licensing policy.

So the National Governors Association, joined by the National Conference of State Legislatures, went to work. In meetings and telephone conversations with Senate staff, they spun the story that REAL ID was not going away. The "political reality," they said, was that there was going to be a national ID program.

Compromise is catnip in Washington, D.C., and staffers for Senators who had opposed REAL ID convinced themselves and their bosses that introducing a new version of REAL ID with a different name was a grand bargain. This is how the *PASS Act* (S. 1261) was born—the old REAL ID law with a new name.

PASS ID is modeled directly on REAL ID. The structure and major provisions of the two bills are the same. Just like REAL ID, PASS ID sets national standards for identity cards and drivers' licenses, withholding federal recognition if they are not met.

REAL ID and PASS ID both subject every applicant for a license to "mandatory facial image capture." They both put a "digital photograph of the person" on the card. They both dictate what documents state motor vehicle bureaus have to check and what data they have to put on their cards, including the data on cards' "machine readable zones." Both bills requires states to share information about drivers. REAL ID and PASS ID—the REAL ID revival bill—have the same structure and the same aim—to create a national ID card.

Some argue that PASS ID does a better job of protecting privacy. But just like REAL ID, PASS ID would require states to share driver data on a very large scale. (The text of the legislation just doesn't say so.) As with REAL ID, the security weaknesses of any one state's operations would accrue to the harm of all others.

PASS ID does call for privacy protections and data security, something REAL ID lacked. But PASS ID's convoluted "privacy" protections include a requirement that individuals may access, amend, and correct their own personally identifiable information. Nobody knows how to give people access and correction rights like this without opening huge new data security risks. Creating a national identity system that is privacy protective is like trying to make water that isn't wet.

Once the national ID system is in place, PASS ID places no limits on how the DHS, other federal agencies, states, and localities could use the national ID system to regulate the population. A simple law change or amendment to existing regulations would expand the uses of the national ID system to give federal authorities control over access to employment, access to credit cards, voting—even cold medicine. And these are just the ideas that have already been floated.

In some ways, PASS ID is worse on privacy. It ratifies "enhanced drivers licenses" for use as national IDs. EDLs are a card system designed by DHS and State Department bureaucrats along with a few compliant governors. RFID chips built into them can be scanned remotely to identify people without their knowledge. This kind of thing is not good for privacy.

With its huge tax revenues—and willingness to borrow on the credit of future generations—the federal government may put up the tens of billions of dollars it takes to fund the national ID system. If PASS ID revives the federal government's national ID project, driver licensing bureaucracies in the states will grow, but they won't be accountable to state leaders any more. They will work for the feds. NGA and NCSL—the real winners—will lock in their role as lobbyists for motor vehicle departments.

The distinct roles that the Constitution sets out for the states and federal government are supposed to create tension among them, not collaboration. When the federal government dictates state policies, the result is not good for liberty, privacy, or the economy. The national ID system found in the *PASS ID Act* is not good for liberty, privacy, the economy, or state governments. ■

Card Check: Update

BY MICHAEL HOUGH

If you like the idea of the federal government owning the banks and car companies, you'll love mandatory, binding arbitration. This provision, which is contained in the *Employee Free Choice Act* (EFCA) currently being considered by Congress, would have the federal government decide the terms of contracts between employers and unions if the two are unable to come to an agreement.

Most of the current controversy around EFCA has centered on the card check provision, which would deny workers the right to vote by secret-ballot during union recognition elections. Recently a couple of U.S. Senators, sensing that the card check is too politically unpopular, dumped that provision in hopes of passing the rest of the bill.

Unfortunately, the legislation still contains binding, mandatory arbitration, which is just as bad. Having the government write the contracts for employees deprives them of their right to vote on the contract, as they normally would be able to if their union had agreed to the contract. These contracts would be binding for two years—which would mean whatever provision that a government bureaucrat devises, companies would be forced to live with.

Not only does this provision deny workers their right to vote on contracts and negatively impact employers, but it also distorts the role of arbitrators and the federal government. Currently arbitrators are used to mediate disputes and all parties are required to negotiate in "good faith." EFCA would change this and instead, after 120 days of dispute, government arbitrators insert themselves and impose a binding ruling on both parties. Never mind the fact that the appointed government arbitrator may have little to no knowledge of the company or the workers—he or she now would have the power to make the decisions affecting both parties.

Labor unions support the binding, mandatory arbitration provision because they believe the government will give them favorable terms and even help bail out their pension plans—many of which are seriously underfunded.

For those of us who treasure free-markets and limited government, EFCA is a threat to both these values. Mandatory, binding arbitration, like card check, is bad for employers, workers, and our economy. Even without card check, EFCA is a very bad piece of legislation that should be rejected by Congress. ■

Driving Public Charter School Quality

The indispensable role of authorizing

BY GREG RICHMOND

Sixteen years after the doors of the first charter school opened in the United States, almost 5,000 charters are educating 1.5 million public school children in 40 states and the District of Columbia. In response to the catastrophe of Hurricane Katrina, New Orleans is rebuilding its entire public education around the core of charter schools. Now, nearly 60 percent of all New Orleans public school students attend a charter school. In certain districts, charters enroll nearly a quarter of all public school students and in some states charters are serving nearly 10 percent of all public school students. Charters are clearly a success story.

Authorizing – the process of recruiting, selecting, overseeing, and evaluating charters – is the key to not only a reliable and growing supply of charters; it's a major factor in assuring that charters are on the high end of the quality scale. Depending on state law, charter authorizers include legislatively created state commissions, universities, nonprofit organizations, mayor's offices, and local school districts, among others. And, over the past decade and a half, authorizers have established practices and amassed deep knowledge on effective and agile public oversight of school *outcomes, not inputs*. We know that the purpose of authorizing is to improve student performance. This focus on results sets charter authorizers at the forefront of public accountability.

Strong charter authorizing is grounded in four equally important tenets:

- High standards for charter school student academic performance
- Requirements that ensure all charter school students are treated fairly
- Safeguards that protect public funds
- A light touch with compliance and a strong focus on outcomes

Together, these ideals frame the many important tasks authorizers must undertake to protect the public trust and ensure that charters provide high quality teaching and learning environments.

The National Association of Charter School Authorizers (NACSA) – a member of ALEC's Education Task Force – recently issued an eight-part series of guides outlining critical statutory and regulatory policies for states to create and sustain effective charter school authorizing, to drive innovation and change in the charter sector, to provide real choice, and to equip students with the skills and knowledge to succeed after high school. Together with our *Principles and Standards for Quality Charter School Authorizing*, 2009 edition, NACSA has produced a state-of-the-art framework for policy, regulation, and public administration to obtain high quality charter schools.

The policy guides cover the eight essential elements of the authorizing "life cycle":

- **Multiple Authorizers**: States should have more than one "entry gate" into the charter sector.
- **Funding for Authorizers**: Authorizers must have adequate resources to do their jobs effectively. There are, however, creative funding approaches that do not unduly burden public coffers and are exemplars of public-private partnership.
- **The Application Process**: Setting the entry bar high enough to approve quality charter schools but not so high that you stifle innovation and choice.

POLICY DOWNLOADS

ALEC's *Charter Schools Act* and *Next Generation Charter Schools Act*
These model bills established ALEC's policy supporting publicly accountable multiple authorizing authorities. Available at www.alec.org.

NACSA policy guides or Principles and Standards, go to www.qualitycharters.org.

Greg Richmond is the President and CEO of the National Association of Charter School Authorizers (NACSA). NACSA is a professional organization of authorizers and education leaders who work to achieve quality public charter schools. NACSA's authorizers oversee the majority of charter schools in operation. NACSA provides training, consultation, and policy guidance to authorizers and others interested in using public charter schools to improve student outcomes.
www.qualitycharters.org

- **The Charter Contract**: All authorizers and schools should have clear, legally enforceable agreements that define the outcomes to be achieved by the school and the autonomies provided to the school. Good contracts protect both the public interest and the charter school's autonomy.
- **Performance Accountability**: The heart and soul of the matter. Authorizers must have clear, reliable, multi-dimensional information on all aspects of the school's performance – student achievement, financial stewardship, leadership and governance effectiveness, compliance practices, focus on mission.
- **Appeals Processes**: Authorizing must be done with transparent, clear, predictable processes and charters should have the right to appeal key authorizing decisions.
- **Replication**: Great charters should have the ability to "clone" themselves in an efficient manner. Authorizers need to establish a streamlined but rigorous process to drive quality by rewarding the best charters with the ability to replicate.
- **Renewal**: The single most important juncture in the life of a charter school (after the doors open that first day) is its periodic renewals. Renewals cannot be automatic; it should be earned through strong student results and effective organizational stewardship. Authorizers must use predictable standards, have a rich set of information, and a clear process for making renewal decisions.

In every aspect of state charter authorizing law, the authorizers must have adequate statutory authority to fulfill their responsibility to standards of excellence. Each policy guide contains detailed guidance on how to design charter school authorizing so that it is an effective force of public accountability.

ALEC INTRODUCED TO HUNDREDS OF CHARTER SCHOOL LEADERS

The chairmen of ALEC's Education Task Force—State Sen. Nancy Spence (CO) and Mickey Revenaugh of Connections Academy—presented ALEC's model policy on charter schools during a session at the National Association of Charter School Authorizers' (NACSA) Leadership Conference. This was ALEC's first time participating in NACSA's yearly meeting, which was held in Salt Lake City, UT, October 19-21, welcoming hundreds of charter school leaders from across the country.

"As a legislator and ALEC representative, it was great meeting and working with folks who are on the front lines of the charter movement," said Sen. Spence, who discussed with attendees how they can work with legislators when trying to improve charter school laws in their states. "We couldn't be more grateful to NACSA for the invitation."

Following an introduction to ALEC and its mission by Education Task Force Director Jeffrey William Reed, Mickey Revenaugh led attendees in a discussion on the gaps and strengths in their states' charter laws—highlighting that many, if not most, of their concerns are addressed in model legislation.

"Charter leaders need to know what charter policies exist and, more important, that they can have major influence on changing such policies," said Revenaugh, who sponsored ALEC's *Next Generation Charter Schools Act* in 2007. "Through ALEC's newest partnership—with NACSA—there's an incredible opportunity to work with charter leaders across the nation and positively impact state policy through model legislation."

Effective authorizers engage in an on-going dialogue with the schools they operate. But, rather than focusing on compliance, authorizers focus on outcomes. Authorizers also play a critical role protecting charters from "regulatory creep" and promoting fair and full access to public resources for public school students in charters. Good authorizers perform a function that benefits all of public education: they collect and share successful innovations from charters directly to other public schools and to the public school system administration.

Yet not all authorizers perform their obligations well and poor authorizing can harm the charter school sector by denying good applications for new schools, interfering in the operations of schools, or allowing weak schools to stay open. Realizing this risk, many states are now putting in place systems to evaluate authorizers against national standards for quality authorizing. After all, a strong charter school sector depends not just on good charter schools; it also depends on strong laws and good authorizers, all working together to produce better educational outcomes for students. ■

Packed and Panicked

BY COURTNEY O'BRIEN

WORKSHOP
"How to Reduce Your Prison Population and Save Money!"

ALEC's States & Nation Policy Summit
Washington, D.C. | Dec. 3, 2009

In California, federal court judges ordered the state to release over 40,000 inmates from prisons because of overcrowding. In Michigan, a jail built to hold 307 inmates packs in over 400 inmates, while more await arraignment. In Massachusetts, riots erupted in Middlesex Jail: built for 161 inmates, yet holding over 400.

With almost every state facing budget deficits next year, a number of them are proposing releasing criminals from prison in order to save money and to avoid building new prisons. According to the Justice Policy Institute, state and local government detention expenses have increased by 519 percent since 1982. The problem is not going to get any better either. According to the Council of State Governments' Justice Center, state and federal prison populations are expected to add approximately 192,000 persons at a cost of $27.5 billion between 2007 and 2011.

Yet as jail and prison population grows, monies allocated to their continuance are being severed; squeezing offenders through the bars and onto local sidewalks.

States that are choosing to simply release offenders back to the same neighborhoods where they committed their crimes, with little help or supervision, are making a big mistake. According to the U.S. Department of Justice, 52 percent of all inmates let out of prison by emergency release are rearrested. In addition, 45 percent of inmates released early failed to appear at scheduled court appearances and of those who failed to appear in court 20 percent remained fugitives for over one year. These startling facts tell us that the emergency release of prisoners will significantly decrease public safety.

Rather than an "immediate solution" to prison overcrowding, the emergency release of prisoners is a catalyst for decreased public safety and greater future strains on already bulging prisons and jails.

There are smarter solutions. In Texas, Representative Jerry Madden helped lead the fight to invest in community treatment for alcoholics, drug addicts, and the mentally ill. Rather than building three new prisons, Rep. Madden freed space and provided rehabilitation to offenders; ultimately saving money and lives.

In addition, policy solutions exist through the private sector. ALEC produced the innovative "Conditional Post-Conviction Early Release Bond" which would allow for the early release of legislatively defined participants from prison—primarily non-violent offenders—but require that they post a bond. The bond would be revoked if they did not meet all the requirements of the program like keeping gainful employment and staying off drugs.

Upon the breach of any single condition of release, the bond could be revoked by the court, a warrant issued and the participant re-incarcerated. The financial penalties of the bond would create strong incentives on the part of the bond agent, and/or the convict's family if they guaranteed the bond, to see that the participant abides by all the conditions of release, or be promptly surrendered back into custody. This would guarantee low recidivism and would require no additional staffing or administrative costs for local and state governments. A similar program is already in place and thriving in Mississippi.

This more effective solution would reduce prison populations of non-violent offenders while limiting the risk to the community. The bond would encourage participants to stay out of trouble and assure their prompt return to custody should they misbehave. The effectiveness of the commercial bail bond industry, which recovers 97 percent of all fugitives, is due in part to the free-market financial incentive.

ALEC has also just started a Corrections & Reentry Working Group which will discuss and produce reform options for some of the key issues surrounding corrections policy. This will include addressing the addiction, mental health, and the reentry of offenders to society.

Instead of opening the flood-gates without a dam, the solution should be to guarantee a safer community by using an institution whose job is to hold offenders accountable at no cost to the taxpayer. We should rely on market-based solutions that produce innovative results through private enterprise. When addressing the crisis of prison overcrowding and shrinking budgets, let us look to private industry to *bail* us out. ■

Courtney O'Brien is the Legislative Assistant for the Public Safety and Elections Task Force at ALEC.

Criminals Flee the Coop at Taxpayers Expense

BY COURTNEY O'BRIEN

If many public agencies will lobby hard against transparency—even at the cost of public safety.

The National Association of Pretrial Services Agencies is one such organization. This association represents pretrial agencies—local government entities that release criminal defendants from jail, at minimal cost to the defendant, but at large cost to the local taxpayer. They promote a government-run, taxpayer-funded version of what private industry does better as commercial bail bondsmen.

Originally set up to deal with indigent defendants, pretrial agencies have expanded their operations to include offenders who are financially capable of securing a private bond.

However, unlike commercial bail operations, if a defendant released by a pretrial agency fails to appear in court, a penalty is rarely paid.

The *Philadelphia Inquirer* reported earlier this year that bail-skipping criminals have cost that city $1 billion of lost revenue over the last 30 years. By contrast, commercial bail bondsmen must forfeit the entire amount of the bond if the suspects they insure don't appear in court as scheduled. They thus have a much greater incentive to make sure their customers are held accountable and show up to court.

The American Legislative Exchange Council has produced model legislation that calls for pretrial agencies to make public their budgets, staffing, release recommendations and number of defendants released, and to track any crimes committed by released defendants. The public has the right to know if its tax dollars are being used to bail dangerous criminals out of jail, and to demand that defendants be properly monitored once released.

Yet, instead of working to improve the performance of their members, NAPSA is focusing its efforts on attacking ALEC and working to defeat transparency legislation.

In Florida and Texas, two states that have passed similar legislation, NAPSA is complaining that these laws have imposed "harsh administrative burdens upon them" such as "reporting standards." However, NAPSA discredits its own argument by citing that "29 Florida pretrial services programs were already tracking their results."

According to the U.S. Department of Justice, pretrial agencies are not very good at supervising criminal defendants. Criminals released by pretrial agencies are significantly more likely to skip out on scheduled court appearances if they are being monitored by a government-run pretrial release agency than by a private bail bond agency.

According to the DOJ statistics, an estimated 30 percent of defendants released by the government are still fugitives after one year, compared to 19 percent released on commercial bail. In addition, three-quarters of pretrial agencies don't track how many of the offenders they have released end up being rearrested for other offenses while awaiting trial.

Luckily, a separate Justice Department study answered that question and found that almost 18 percent of those released by pretrial agencies committed crimes while awaiting trial.

30

Percentage of defendants released by the government who remain fugitives after one year.

19

Percentage of defendants released on commercial bail who remain fugitives after one year.

18

Percentage of defendants released by pretrial agencies who committed crimes while awaiting trial.

Rather than correcting these inefficiencies, NAPSA efforts are focused on promoting a dangerous taxpayer-funded system and attacking its private industry competition.

These agencies are responsible for releasing criminals onto our sidewalks. The consequences of poor transparency are not just a waste of our money, but also a danger to our communities. ■

Courtney O'Brien is the Legislative Assistant for the American Legislative Exchange Council's Commerce, Insurance and Economic Development & Public Safety and Elections Task Forces.

Restoring the Role of State Legislators in our Federal System of Government

BY REP. DAN GREENBERG (AR) & REP. DOLORES MERTZ (IA)

WORKING GROUP
Fiscal Federalism & State Sovereignty
ALEC's States & Nation Policy Summit
Washington, D.C. | Dec. 2, 2009

www.alec.org and jwilliams@alec.org for more conference information

More than 200 years ago, the drafters of the U.S. Constitution recognized that a system of checks and balances was crucial to the concept of limited government. Not only did they create three separate branches of the federal government – legislative, executive, and judicial – but they also ensured there would be a balance of power between the federal and state levels of government.

The states were given rights, most notably the 10th Amendment, but the power to stand up for those rights was the ability of state legislators to select U.S. Senators. However, since the passage of the 17th Amendment in 1913, providing for direct election of U.S. Senators, state legislators and the state level of government have lost the role they were originally intended to have in balancing the power of federal government.

As a result, the growth of federal power has increased dramatically. For example, the number and cost of unfunded federal mandates on states continues to rise.

Our experience in recent years with congressional majorities of both parties is strong evidence that regardless of the party in power, the trend towards increased federal power and an increasing burden of unfunded federal mandates is likely to continue.

What can states, and particularly state legislators do?

ALEC has already led the way on dealing with these issues through its "Resolution for a Limited Constitutional Convention on Unfunded Mandates" and "Resolution to Restate State Sovereignty." There will also be a focused discussion on what else can be done at ALEC's 2009 States and Nation Policy Summit in Washington. **We would suggest the following**.

Simply asserting our rights under the 10th Amendment and our opposition to unfunded mandates is not likely to sway Congress. The Courts do not always side with states.

But there may be another way. Constitutional reform could restore a role for state legislators in our federal system of government. For example, unfunded mandates imposed without a state's consent could be prohibited by constitutional amendment. Other limits on the growth of government power at the expense of states would also be possible.

Under Article V of the U.S. Constitution, either Congress or state legislators can initiate the amendment process. By a 2/3 vote, Congress can propose amendments which must then be ratified by 3/4 of the states. But Congress is very unlikely to propose any amendment that would limit its own power.

States can also initiate the amendment process if majorities of the legislatures in 2/3 of the states call for a convention for the purpose of proposing amendments, to be ratified by 3/4 of the states. The problem is that almost no one wants to see a convention free to amend the Constitution at any point.

So, the key question for state legislators is: Could 34 cooperating state legislators call an "Amendments Convention" limited to an up or down vote on proposing just one amendment, just as Congress can pass a resolution proposing just one amendment?

In the Federalist Papers, Hamilton and Madison argue that the states' power to propose amendments is the same as the power of Congress. That would imply that they believed states could call a convention limited to consideration of just one amendment. There is significant support for the concept of a limited convention, including a study by the American Bar Association.

Rep. Dolores Mertz is the Chairman of the Agricultural Committee of the Iowa General Assembly and ALEC's 2007 National Chairman.

Rep. Dan Greenberg is a member of the Arkansas House of Representatives and serves as the Chairman of ALEC's Elections and Legislative Ethics subcommittee.

But whether the U.S. Supreme Court would uphold such a limit cannot be known for sure. So, any strategy for an Amendments Convention limited to an up or down vote on just one amendment must rely on the cooperation of the states calling for such a convention.

We believe that such a strategy could succeed.

Any delegates who broke their pledge would run severe political and legal risks in their home state. They would face the political uncertainty of the convention, the legal uncertainty of the U.S. Supreme Court, and the certainty that any rogue amendment would be illegal to consider in 34 states. The likelihood of success under these conditions would be very small. Few politicians are inclined to take big personal and political risks with little chance of success.

Any interest groups tempted to seek their own amendment would conclude they have a better chance of rallying support for their own one issue convention, rather than passing and ratifying an "outlaw" amendment at one called for another purpose.

In other words, if a majority of legislators in 34 states were determined to call a limited one-amendment convention, they would have a very high probability of success.

What might be an amendment that such a convention should consider? There are many possibilities. But one of the most interesting might be a simple amendment to Article V that would allow 2/3 of the states in the future to propose single amendments to the Constitution without having to call a convention at all.

One advantage of such an amendment is that it focuses solely on the restoration of power to state legislators, without addressing the policies to which such power might be applied. And state legislators would be squarely faced with the question: Should they act to regain some of the power the original Constitution gave them in our federal system of government?

Another advantage would be that an amendment allowing states, as well as Congress to propose just one specific amendment for ratification would end forever the chance of an "accidental" constitutional Convention.

In the past, states have threatened to call an Amendments Convention in order to pressure Congress to act. Such threats would no longer be necessary. And our constitutional system of government would be more stable as a result.

There is no doubt that changes in our Constitution must be considered with the utmost care. But the uncontrolled growth of federal power argues that some limits on congressional power are essential.

State legislators were intended by the Constitution to provide this check on the power of Congress. State legislators today have the power to restore the balance of power written into the Constitution by those who wrote it. But most state legislators are not even aware that they could exercise that power. The idea that legislators could reliably call a convention limited to a single amendment is new.

Perhaps it is time for concerned state legislators to take the lead in encouraging the study of this important idea for constitutional reform that could transform the role of state legislators in American government in the 21st century. ■

Restoring Federalism

Our proposed resolution calling for a convention would state that the same precise resolution must be passed by 34 states in order to take effect.

The resolution would limit authority of the convention to a debate and an up or down vote on the precise text of a proposed amendment contained in the resolution.

The resolution would not take effect unless the state passed a law with the following five specific provisions:

- Limit the authority of delegates from that state to a debate and a single up or down vote on the amendment.
- Require that all delegates take a pledge to limit their actions as required by state law.
- Severely punish delegates who break their pledge and exceed their authority.
- Provide for the automatic resignation of those who break their pledge.
- Outlaw consideration or ratification in that state of any but the authorized amendment from the convention.

Improving Science in the Classroom

BY STEPHANIE J. LINN

The topic of global warming is surrounded by ongoing debate in the scientific community. While some scientists, politicians, and environmentalists insist that man-made global warming will bring about utter devastation in the near future, thousands of scientists question their alarmist claims.

Unfortunately, this debate is not reflected in many public schools. Many teachers use global warming films and lesson plans that were developed by environmental activists. It is common for teachers to show Al Gore's *An Inconvenient Truth* to their students to educate them about climate change. Many parents and scientists have expressed concern that the film promotes an alarmist ideology that is based on inaccurate scientific information. Showing *An Inconvenient Truth* in public schools is inappropriate for two main reasons: the film cannot withstand scientific scrutiny, and it only presents the global warming issue from one ideological perspective.

In 2007, Stuart Dimmock, a British citizen and father of students at a state school, felt that it was wrong for his children's state-funded school to show what he saw as a politically charged and scientifically dubious film, *An Inconvenient Truth*. He brought legal action against the British Secretary of State for Education and Skills for distributing copies of the movie to students in the United Kingdom. In the British High Court's ruling, Mr. Justice Burton highlighted nine significant inaccuracies in the film. These errors were so glaring that the Court ruled that teachers must discuss them with their students whenever the film is shown in class.

But the film is not the only way students are misled about global warming. Laurie David, a producer of the documentary, also helped develop "The Down-to-Earth Guide to Global Warming," an educational resource for young students. The book originally included a graph showing the earth's temperature increasing before carbon dioxide levels were increasing; a fact that dismantles the main premise of *An Inconvenient Truth*. When this was pointed out to the publishers of the book, they simply switched the labels of the graph in an attempt to deliberately misrepresent the truth.

Most American students have an incomplete and inaccurate environmental education because many educators rely solely on *An Inconvenient Truth* and its accompanying educational resources to teach students about global warming. This has led some parents to conclude that showing this film in schools may have more to do with promoting partisan politics than fostering substantive science education. This concern has led parents in Federal Way, Washington to challenge the school's choice to show *An Inconvenient Truth* to their children. The school board decided that teachers must show "credible, legitimate" opposing viewpoints of the documentary in order to give students a holistic understanding of the global warming issue.

While some schools are moving towards a balanced approach to environmental education, some State Legislators are encouraging schools to head in the wrong direction. New York State Legislator, Rep. Peter Rivera, introduced a bill during the 2009 session that would require all students in grades K-12 be shown *An Inconvenient Truth*. Rivera defends his bill in a press release in which he calls for all students to see the documentary in order to inspire a youth-led "environmental revolution" to solve our planetary "crisis."

ON-LINE RESOURCES

Environmental Literacy Improvement Act
- www.alec.org

"Climate Change in the Classroom"
- www.heartland.org

State Legislators can support ALEC model legislation in order to counter the recent push in some states to mandate showing *An Inconvenient Truth* in public schools. The *Environmental Literacy Improvement Act* would require schools to include a wide range of scientific perspectives in their global warming programs and curricula.

How are students expected to think critically about issues such as climate change when they are purposefully taught only half the story? A professional science educator should champion science literacy, not environmental politics. The *Environmental Literacy Improvement Act* may cultivate a learning environment where sound theories are taught in a balanced manner, which is especially important given that global warming is such a hotly contested and complex issue. ■

Stephanie J. Linn is the Legislative Assistant for the Civil Justice and Natural Resources Task Forces at the American Legislative Exchange Council.


"I want to give work to people, not take it away. I need something that's affordable. Electricity from coal does that for me."
Olivia Albright owns AOA Products, a small company in Toledo, Ohio. Olivia's business may not be big by some people's standards. The business has grown from something that she started in her garage, and today employs seven people ... who Olivia refers to as family. But the story doesn't end there because Olivia has big dreams. She wants to grow her company, be able to employ more people, and even be in the position to offer health-care coverage to her employees.
Low-cost electricity from coal is a part of Olivia's story, and she knows that. Every machine at AOA runs on electricity. And Olivia knows that to keep those machines running and her business profitable ... she depends upon affordable electricity. She's lucky, in a sense, because in Ohio, where she works, coal, America's most abundant and affordable resource, provides 85% of their electricity. Using coal to generate electricity not only keeps energy costs low for businesses like Olivia's, but it also helps create jobs for American workers.
Learn more about Olivia's story at www.americaspower.org.
Olivia Albright
Owner
AOA Products – Toledo, Ohio
CLEAN COAL.
AMERICASPOWER.ORG

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Mark your calendar now
for these upcoming ALEC events.

Calendar

37th Annual Meeting
Aug. 5-8, 2010

2010 States & Nation Policy Summit
Dec. 1-3, 2010

For more information about ALEC's annual conferences, visit www.alec.org