NOVEMBER / DECEMBER 2011

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INSIDE ALEC

A PUBLICATION OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

SPECIAL ISSUE

INTERNATIONAL RELATIONS + TELECOMMUNICATIONS & INFORMATION TECHNOLOGY

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Highway Robbery — Why Power on Transportation Issues Should Be Restored to the States

BY U.S. REP. TOM GRAVES (GA)

Envision a mafia-like scheme. The federal government shows up uninvited and says, "Ya gotta keep your highways in good shape, but since we're lookin' out for ya, we're gonna hold onto your highway money until it's time to spend it, understand?"

When the time comes to start projects, the federal government hands your state an envelope of cash, but it seems a little thin. The feds explain that they're actually looking out for a lot of friends and need to keep some of that cash to "reward some people and make sure everyone has some nice things, so fugetaboutit."

As absurd as it sounds, that's exactly what happens to over half of our states because of the Highway Trust Fund. Over fiscal years 2005-09, our states "donated" nearly $15 billion of our gas-tax revenue, to be doled out by the federal government for projects in other states.

Fifty-five years ago, President Dwight Eisenhower worked with Congress to create the Highway Trust Fund to construct our interstate highway system. The original plan called for a 16-year gas tax of 3 cents per gallon in order to pay for the entire project. The tax was to drop to 1.5 cents per gallon in 1972.

Well, the gas tax never declined, and instead was raised and extended many times until reaching the 18.4 cents per gallon tax we know today. It's reasonable to expect such an enormous, nationwide plan to require extra time and funding, but after so many years, I think most would agree that the interstate highway system is complete and the central government's job is done. Clearly, we need steady funding to maintain and expand our highways, but are federal bureaucrats the right people to manage that money?

I believe the federal government has mishandled our gas-tax revenues and mistreated our states, and it's not hard to understand why. A big pile of money in Washington is like flypaper for political agendas, lobbyists, special interests and earmarks. The Highway Trust Fund is no exception, and it's being drained for projects that have absolutely nothing to do with highways.

According to the Heritage Foundation, about 38 percent of our highway funding went to non-highway projects in fiscal 2009. That means that even among states that are so called "beneficiaries" of the Highway Trust Fund, many of them lose out at the end of the day, being forced to spend their gas tax revenue on non-highway projects.

One example of misuse is how a troika of Big Government all-stars—the Department of Transportation, the Environmental Protection Agency, and the Department of Housing and Urban Development—have teamed up to advance something called the Livability Initiative.

Essentially, they've decided your neighborhood needs some touching up, so they've started taking money from highways and giving it to smaller local projects such as bike paths, sidewalks, scenic byways and decorative flower arrangements for medians. But the livability plan is small potatoes compared to the many rail programs, commuter-transit projects, bridges to nowhere and administrative costs that soak up our highway dollars.

With Washington currently overwhelmed by so many of its own mistakes, highway funding is one issue that can and should be handed back to the states.

That is why I was proud to vote in 2008 in favor of SR 750 as a Georgia State Representative. SR 750 "urges the federal government to cease the collection of motor fuel taxes in Georgia so that the state can collect and distribute the taxes without the delay caused by federal collection and disbursement." Some might consider this a "conservative" position—however in Georgia, SR 750 passed with overwhelming bipartisan support. I believe many states can find bipartisan majorities willing to support legislation like this as well.

There are several legislative proposals in Washington that would return transportation power back to the states. For instance, I introduced H.R. 3264: the Transportation Empowerment Act, which would transfer authority to the states over a four year period, reducing federal gas taxes from 18.4 cents to 3.7 cents per gallon, and giving the states control over their local roads, while continuing a reduced federal role for legitimate national projects like interstate highway system maintenance. However, neither the Transportation Empowerment Act nor any of the other proposals being considered in Congress will succeed without pressure from the states—pressure from your state legislatures. As a former member of ALEC, I know how important ALEC can be in moving forward solid public policy at the state level—that is why I look forward to working with you to advance legislation that lessens Washington's stranglehold on the states.

U.S. REP. TOM GRAVES was elected to Congress in June 2010 where he is on the House Committee on Appropriations after serving seven and a half years in the Georgia General Assembly. He represents Georgia's 9th Congressional District, which extends from the northern suburbs of metro Atlanta to the northwest corner of Georgia, bordering Alabama and Tennessee. As a state legislator he served on ALEC's Tax & Fiscal Policy Task Force and was named 2009 Legislator of the Year.

Keystone XL — A Critical Project for America

BY MICHAEL WHATLEY

The U.S. Department of State is currently deciding whether to grant a permit to allow TransCanada to build the Keystone XL pipeline that will carry oil from Alberta, Canada, to Gulf Coast refineries in Texas on a route that will traverse Montana, the Dakotas and Oklahoma, among other states. The project has gained a lot of attention both because of those who support it (unions, the business community and energy consumers) and those who oppose it (environmental activists and a bevy of actors and actresses including Danny Glover and Daryl Hannah). And in the case of its supporters, Keystone XL has managed to forge an unlikely coalition of interests from across the political spectrum!

The Consumer Energy Alliance (CEA) is strongly in favor of the Keystone XL pipeline because, in addition to being the safest pipeline ever built, it will create thousands of jobs, strengthen the American economy and lower prices at the pump.

After studying the proposed pipeline for over three years, the State Department has concluded that it will be the safest pipeline ever constructed. State's extensive environmental review of Keystone affirms that it will "have a degree of safety over any other typically constructed oil pipeline under current code and a degree of safety along the entire length of the pipeline system similar to that which is required in High Consequence Areas (HCAs)." The State Department also studied over a dozen routes for the pipeline and found that the current one is the safest and that the alternatives would "disturb more land and cross more bodies of water than the proposed route." Despite the heated controversy surrounding the pipeline's course over the Ogallala Aquifer, the State Department concluded that there was no scenario in which the aquifer would be at risk. In its report, the State Department noted that 25,000 miles of pipeline already cross the Ogallala Aquifier and that pipelines are the safest, most efficient way to transport oil. Further, Keystone XL will be built with state-of-the-art technology reducing the risk to a negligible level.

Keystone XL will produce a wide range of economic benefits to the United States. The pipeline will create more than 120,000 jobs across the country (including 20,000 in manufacturing and construction), will generate hundreds of millions in federal, state and local taxes and will create $20 billion in economic growth nationwide. These are revenues that can go to improving our public schools, roads and hospitals.

The Keystone XL Pipeline project also has energy security benefits. The 700,000 barrels of oil per day that this pipeline will bring to Gulf Coast refineries will be coming from Canada—our neighbor, closest ally and largest trading partner. This oil supply will not be affected by violent revolutions like those that took place in Egypt and Libya and will not be used as a political weapon as we have seen happen with Russian energy. It is significantly less expensive than oil from the Persian Gulf and will help drive down fuel prices for both military and civilian consumers.

In order to grant the permit that will allow the pipeline to cross between Alberta and Montana, the State Department must determine whether the project is "in the national interest" and anticipates doing so before the end of the year. At a time when the unemployment rate remains stubbornly high and the economy remains stubbornly weak, CEA strongly believes that granting a permit which will create tens of thousands of jobs, give a shot in the arm to the American economy and significantly reduce our pain at the pump—all while protecting the environment by incorporating the strongest safety measures ever built into a pipeline—is certainly in the national interest.

MICHAEL WHATLEY is the Executive Vice President of the Consumer Energy Alliance, a nonprofit, nonpartisan organization that supports the thoughtful utilization of energy resources to help ensure improved domestic and global energy security and stable prices for consumers.

A Free Trade Agreement with Carve Outs Is Indeed an Oxymoron

BY REP. VAL RAUSCH (SD)

A relatively new protectionist trend, free trade agreement carve outs, surfaced at the most recent round of Trans-Pacific Partnership (TPP) negotiations in Chicago this past September. The TPP is a multilateral trade framework being negotiated between the United States and eight other Pacific-rim nations: Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore and Vietnam.

The TPP was designed to expand to include additional nations, and from the outset TPP partners have been committed to producing a high standard agreement that will set new benchmarks for trade and economic integration. However, a TPP agreement that is not comprehensive and does not cover all commercial sectors and sub-sectors of the U.S. economy would fail to achieve this ambitious and important objective.

Trade agreement carve outs are the exclusion of certain goods from a free trade agreement (FTA)—sugar, alcohol, tobacco and dairy products have sometimes been the targets of carve outs. By definition an FTA with carve outs excludes certain economic sectors from FTA coverage and because of this cannot be considered comprehensive. Those calling for carve outs often base their arguments on public health concerns and are engaged in a well-meaning, but ill-conceived effort to protect consumers. The American Medical Association (AMA), for example, has urged the Obama Administration to carve alcohol and tobacco out of future trade agreements, including the TPP. However there is no compelling evidence to support the enhancement of public health by carving legal products out of FTAs. FTAs do not prevent a country from enacting regulatory laws within its borders to achieve public health objectives, as long as those laws are nondiscriminatory, do not violate other FTA provisions (intellectual property, for example) and are not simply restrictions to trade disguised as public health measures.

But while FTA carve outs have no discernible public health benefits, they do have troubling international trade consequences—especially if included in an agreement that is likely to become the gold standard for future FTAs in the foreseeable future. Carve outs make goods coming from countries that are parties to FTAs that include them less competitive (more expensive) than goods coming from trading partners that are signatories to FTAs without carve outs. To illustrate, upon final ratification of a TPP agreement containing carve outs, U.S. goods subject to the exclusions would be less competitive in Peru than the same goods coming from the European Union, which has an FTA with Peru that does not contain carve outs. American companies that produce products excluded from FTAs would be less competitive which is likely to result in reduced profits and the potential loss of American jobs.

But perhaps the most alarming aspect of including carve outs in free trade agreements is that they have the potential to be used to further protectionism—the very thing FTAs are adopted to prevent. The exclusion of one legal product from FTA coverage facilitates the exclusion of others—all ostensibly for public good. There is a long list of products from industries that a country might want to protect that could arguably pose a risk to public health if used incorrectly or consumed in large quantities. Sugar, dairy products and meat leap immediately to mind as commodities that could easily find themselves subject to FTA carve outs in a protectionist move masquerading as a public health measure. This slippery slope endangers the whole project of trade liberalization and calls for a comprehensive approach to TPP as well as all other future trade frameworks.

> "But perhaps the most alarming aspect of including carve outs in free trade agreements is that they have the potential to be used to further protectionism—**the very thing FTAs are adopted to prevent.**"

Ninety-five percent of the world's consumers live beyond our shores, and reaching those consumers is one of the most effective ways for states to grow their economies. Excluding products, subsectors or sectors will undermine U.S. competitiveness, reducing an FTA's economic promise for American companies and workers in your state and across the nation. Free trade agreement carve outs, should be opposed in the Trans-Pacific Partnership Agreement and in all future free trade frameworks the United States negotiates.

REPRESENTATIVE VALENTINE "VAL" RAUSCH is the Speaker for the South Dakota House of Representatives and has served there since 2004. He was Mayor of Big Stone, SD from 1993-1999 and is currently a member of ALEC's International Relations Task Force.

Promoting U.S. Competitiveness through 21st Century Trade Agreements

BY GINA VETERE

Innovation and creativity are and have historically been key to U.S. economic prosperity. America has been known as the leading nation of innovators: think Thomas Edison and the phonograph, Henry Ford and the automobile, and more recently, Ivan Getting and Bradford Parkinson and the Global Positioning System (GPS). We have succeeded because we believe in the promise and potential of harnessing our innovative and creative capacities through the protection of American intellectual property.

Intellectual property (IP)—embodied in products such as films, computer software, biopharmaceuticals, medical devices and other consumer goods—is America's biggest trade asset. Studies have shown that the IP-intensive industries employ more than 19 million workers, create higher paying jobs across all skill levels, and drive 60 percent of total U.S. exports.

Since 95 percent of consumers live outside of our borders, expanding global markets for the goods and services that result from American ingenuity should be our number one priority. We can do so by leveling the playing field through free trade agreements (FTAs) and thereby allow America's businesses and workers to successfully compete with those anywhere in the world.

With the emerging Trans-Pacific Partnership (TPP) Trade Agreement, the United States has a unique chance to help formulate the rules for how trade is conducted in the Asia-Pacific for decades to come. The agreement, being negotiated among the United States and eight other partners: Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam—will serve as a template for future FTAs in the Asia-Pacific region and around the world. The TPP will be crucial in our efforts to continue to protect new ideas in the global marketplace.

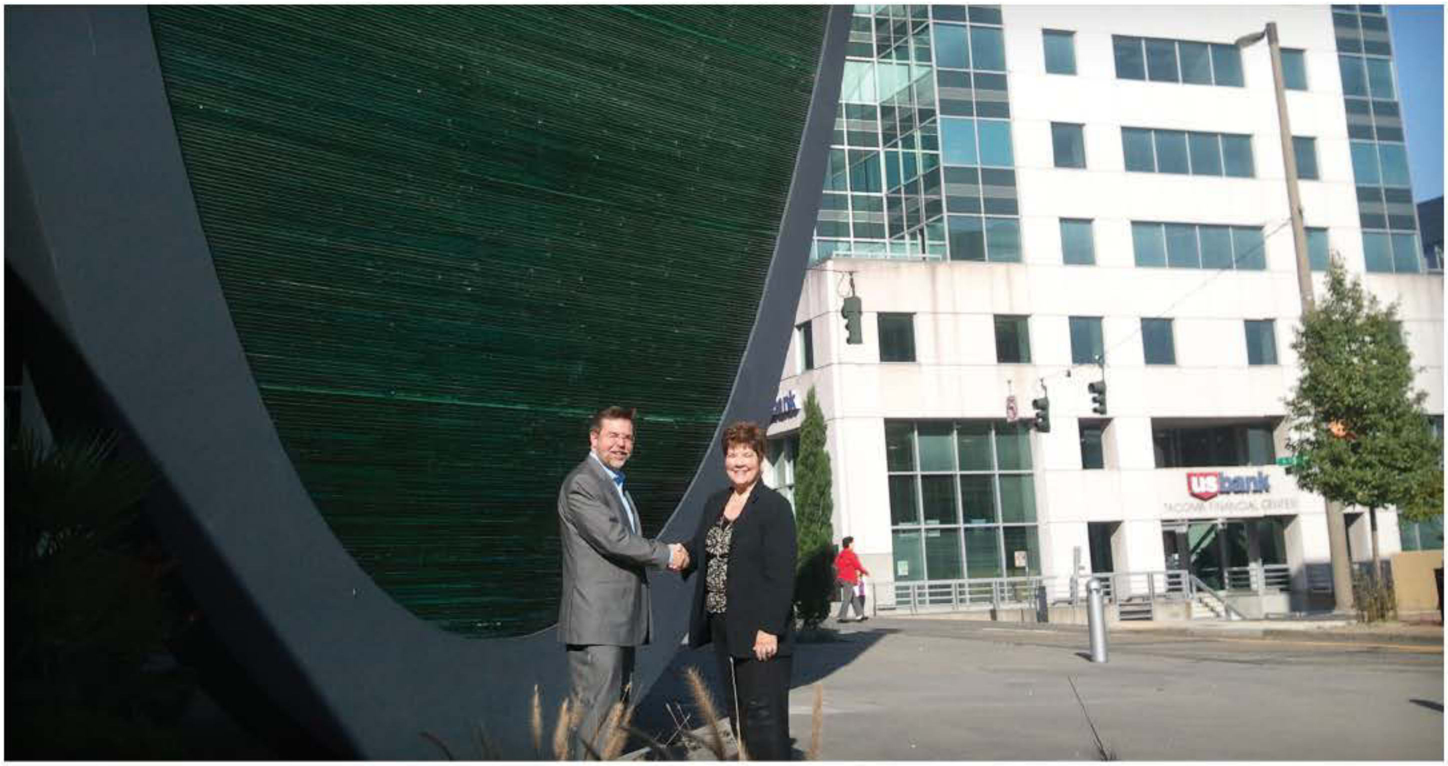
A TPP agreement with modern day IP provisions is beneficial to all innovative and creative industries in America. Biopharmaceutical innovators, for instance, are disadvantaged in countries where the regulatory data protection rules and patent enforcement rules do not reflect standards of protection similar to those found in advanced economies. Likewise, while our copyright industries are one of our most vibrant export sectors, they are under attack from rampant and massive online IP theft. Adequate and effective legal protection against hackers and incentives for all the players in the online environment to cooperate against piracy can help. Similarly, our trademark holders lose jobs, revenue, and consumer trust when counterfeits masquerade as trusted brands. A strong TPP agreement—where the rules of the game are clearly established, agreed upon, and enforced—can help prevent these harms and ensure that our innovative American firms create jobs in your state.

The TPP is envisioned as a cutting-edge trade accord that will serve as a doorway through which American exporters can better access the booming markets of Asia. America's struggling economy, increasing unemployment, and burgeoning deficit need a catalyst that would help bring us out of this economic rut—moving forward with the TPP agreement is a critical part of accomplishing that goal. Since the agreement has important precedential value as it will likely serve as a template for IP protections for future trade agreements, it is critically important that the TPP negotiators seek the highest level of IP protections to achieve effective and transparent enforcement of IP rights. The IP provisions contained in the U.S.-Korea FTA should act as a baseline.

"A strong TPP agreement—**where the rules of the game are clearly established, agreed upon, and enforced**—can help prevent these harms and ensure that our innovative American firms create jobs in your state."

Our economic progress is intrinsically tied to the interactions with our trading partners. The TPP will boost U.S. exports and strengthen U.S. commercial ties to a region that are vital, both strategically and economically. Most importantly, a TPP agreement will create jobs and allow all regions of the country the golden opportunity to export innovative American products confident that their ingenuity will be protected by strong IP provisions. At this time of extraordinary economic uncertainty, our ability to preserve and grow innovative, creative industries is vital to our global competitiveness.

GINA VETERE is Executive Director for International Intellectual Property at the U.S. Chamber's Global Intellectual Property Center (GIPC). Gina oversees the center's multilateral and international programs promoting the protection of IP rights.



ALEC IRTF Member Senator Pam Roach (right) with Anthony Hemstad (left), President and CEO of World Trade Center Tacoma in Washington state.

Trade Equals Jobs

BY SEN. PAM ROACH (WA)

The biggest issue in almost every state today is the economy—how to get more people working and return the country to robust growth. One path to prosperity is growing our exports, which amounts to an "economic stimulus" that doesn't require more government spending! However, U.S. businesses need to shift their emphasis from domestic sales only and overcome their concerns about the perceived complexities of selling overseas.

Most Trade Dependent State

Washington by most measures is the most trade-dependent state in the country. Exports are about 23 percent of Washington's GDP, while they are just 13 percent of the U.S. as a whole. Geography provides a partial explanation. Situated in the northwest corner of the country, Washingtonians have always been outward looking. The excellent natural ports in both Seattle and Tacoma (now the 2nd largest port complex on the West Coast) mean that it is often cheaper to ship Washington goods to East Asia than by railroad to Atlanta. Boeing is by far the biggest single exporter in the US, and today it employs over 78,000 Washingtonians directly and many more indirectly. Almost 75 percent of Boeing's production is currently exported.

Washington trades much more than planes though. Software and other tech products along with agriculture and forest products are also major export sectors, and much of the state's agricultural production is exported. Many Asian noodles are made with Washington wheat and Japanese racehorses eat food from Washington's timothy hay. Brown & Haley's Almond Roca has become one of the premier confections in China, and Washington apples are ubiquitous. Some of Washington's major retail firms—like Costco and Starbucks—depend on international trade for many of their products that we consume here in the U.S. Both of those firms see much of their future growth coming from overseas expansion and are currently opening outlets in a wide array of countries. Washington service firms are also exporting heavily. For instance, over two-thirds of Microsoft's sales (both products and services) are in international markets.

Opportunities Outside our Borders

For companies in your state to thrive they need to look at opportunities beyond their state and even beyond national borders. For sustained long-term growth most companies would benefit from an international component in their business plan. While the U.S.A.'s population continues to grow and now stands at roughly 312 million, that is still only 5 percent of the global population. As we've seen in recent years, the U.S. economy has not been growing quickly—but there are good opportunities to sell into international markets that are growing, and sometimes U.S. goods and services can be very competitive in those markets. It is often much easier to sell into markets that are expanding quickly – India's and China's economies both grew by more than 10 percent in 2010 and Brazil's grew almost 7.5 percent. Only 1 percent of U.S. companies export. Of those, over half export to only one country. Companies in other developed countries are much more export-oriented.

Trade Deficit

The U.S. has a substantial trade deficit that has remained stubbornly high ever since the oil shocks of the 1970s. While the large volumes of imported oil are responsible for a significant portion of that trade deficit, another reason is that not enough U.S. companies focus on selling their goods and services internationally. Of course the biggest U.S. firms do, but very few small and medium-sized businesses bother to look internationally—and that limits their growth potential.

Federal Initiative

The president recognizes this opportunity and in 2009 he announced the National Export Initiative (NEI) with the goal of doubling U.S. exports within five years. According to the U.S. Department of Commerce, exports of goods and services in 2010 increased 17 percent over 2009 to total $1.84 trillion. That 2010 figure is estimated to be responsible for supporting nine million jobs in the United States.

In order to achieve this goal it will take companies that are exporting today to export more—and it will also require U.S. companies that haven't exported to start doing so. Making that first exporting step can be daunting at first, so it is recommended that your local companies reach out to the private or governmental experts on international trade for guidance and help.

Where to Go for Help

The Federal Department of Commerce actively promotes trade and has staff in over 75 U.S. Embassies. U.S. companies can access these trade experts around the globe and even have them help set up meetings with potential trading partners through Commerce's Gold Key service. See www.export.gov for more information on federal programs that can help companies in your state.

Many states also actively promote international trade through their own State Department of Commerce or other equivalent group. Some states outsource this promotion work to NGOs, which in these times of tight budgets can be a very cost-effective way to stretch the very limited funds available for trade promotion programs. In Washington it is the State Department of Commerce that leads the State's official efforts for international exports. Washington's Commerce Department maintains five offices overseas in key export markets including China, Japan, Taiwan, Europe and Mexico.

Many states have NGO resources as well such as the World Trade Club or the World Trade Center that can provide non-governmental assistance for companies looking to trade. As we just passed the 10th anniversary of the attack on the World Trade Center in New York, I'll focus on the World Trade Center as a partner. There are 323 World Trade Centers in 96 countries. About 100 of them—like my local center in Tacoma—are full service groups that assist in trade matchmaking, do trade counseling and put together trade missions. See www.wtca.org for more information and to determine if there is a World Trade Center in your state. Some states choose to outsource their trade efforts to groups like the World Trade Center of Greater Philadelphia which coordinates export projects for the State of Pennsylvania. This model could work in your state as well.

Investment

Beyond trade in goods, attracting more foreign investors and entrepreneurs to the U.S. can spur the economy. Most developed countries have active programs to lure international entrepreneurs to relocate to their countries. Australia and Canada have both been very aggressive and effective in finding foreign investors. A visit to the vibrant downtowns of Vancouver, B.C., or Toronto, Ontario, amply illustrates how successful they have been with these programs. The United States has a program as well – the EB-5 Immigration program. There have been successful EB-5 projects in the U.S., but it is a more unwieldy program than that of competitor countries. Making it more user-friendly would attract more jobs and investment to the U.S.

Of course we also need to look at making it quicker and easier for international businesspeople and tourists to get visas to come to the U.S. in the first place. This past summer what would have been a significant visit by a group of Chinese CEOs was cancelled after the majority of them were turned down for entry-visas to the U.S. This is after they had to wait up to 52 days just to get an interview at a U.S. consulate. Then following a brief interview they were rejected without explanation. U.S. visas for Chinese citizens are only good for a year (most countries have visas good for a decade) and, along with requiring in-person interviews, are also quite expensive. None of this sends the message that we are truly open for business. It is hard to increase trade when the federal government won't even allow CEOs who want to invest in the U.S. to come see their potential investments or meet with their future trading partners.

Conclusion

All states are facing an increasingly international future, and businesses in your state need to embrace the opportunities opening up in the major developing countries. The U.S. has huge untapped export potential, and more U.S. exports translates into jobs in communities across the country. To reach that potential, local companies should work with federal, state and NGO trade experts, and the U.S. government needs to make it easier for us to attract international investment and to have more foreign businesspeople and tourists visit our nation.

SENATOR PAM ROACH is serving her 6th term in the Washington State Senate. She has traveled to 35 countries and participated in trade missions to China, South Korea, Thailand, and Taiwan. She has led missions to China and Honduras and she is the founder of La Escuela de Esperanza, a nonprofit organization helping children in Honduras. She is a member of ALEC's International Relations Task Force.

Taiwan and ICAO: An Aviation Anomaly

BY AMBASSADOR JASON C. YUAN

Of America's visionary contributions to global progress, convening the 1944 Chicago Conference on International Civil Aviation may be among the least understood or appreciated. Well before the end of World War II, America recognized that a regime would be needed to standardize air safety requirements and establish international routes thus facilitating the growth of air commerce.

To that end, the U.S. invited more than 700 delegates from over 50 countries to Chicago where they worked from November 1 through December 7, 1944. The result was the Chicago Convention—the treaty that provides the foundation for the modern system of international commercial flight that we know today, including the International Civil Aviation Organization (ICAO)—a specialized agency of the United Nations (UN) that writes the rules that countries must follow to manage the safety of their airlines and airports and the efficiency of their air corridors.

Based in Montreal, ICAO has adapted impressively over the years to the rapidly changing needs of a constantly evolving global aviation industry, and the U.S. Federal Aviation Administration (FAA) has long been a staunch supporter. In the early 1990s, after the U.S. Congress instructed the FAA to ensure the safety of foreign airlines operating to and from the U.S., the agency set ICAO requirements as the benchmark and established a simple test for any country that wants its airlines to fly to American cities: Does it comply with ICAO's standards or not? If not, flights to the U.S. by that country's airlines are subject to strict limits and increased surveillance. ICAO's activities are essential to the successful functioning of global air transport—in many ways the world's economic circulatory system.

However, because ICAO has followed the UN's "One China" policy for 40 years, Taiwan is specifically excluded from ICAO's activities. This has ramifications for Taiwan and for commercial aviation globally. Taiwan is a vital aviation hub in the East Asian region, an essential link between Northeast and Southeast Asia, and an indispensable part of the global air transport system. With jurisdiction over a significant block of airspace—officially known as the Taipei Flight Information Region (Taipei FIR)—Taiwan sits at a very busy international aviation crossroads. The Taipei FIR connects with three others in the region, and serves four domestic and twelve international air routes. Each year the Taipei FIR provides air traffic control services to more than 1.3 million flights and 40 million passengers. With its 18 airports, airlines around the world consider Taiwan a significant market. Some 30 airlines, including 23 that are foreign owned, provide scheduled air services to and from Taiwan. Despite its important geographic location and the number of travelers who traverse the Taipei FIR, Taiwan faces anachronistic and unjustified obstacles to meaningful participation in ICAO's work. Taiwan is prohibited from contacting ICAO for the latest international guidance on issues like safety, security, environment, and air traffic management. Taiwan has to go to great lengths to gather information on ICAO decisions, and often has difficulty validating the information that it does obtain. Representatives from non-governmental organizations and the private sector in Taiwan—private citizen experts who have much to contribute to ICAO's vitally important work—are similarly barred from participating in technical and academic seminars hosted by ICAO. This makes it extremely difficult for Taiwan to maintain civil aviation practices that are consistent with world standards. This situation also prevents ICAO from establishing the seamless, globally consistent system of international aviation envisioned in the Chicago Convention.

Taiwan's inability to participate in ICAO's work isn't an abstract or academic problem; it has real and worrisome consequences for air safety. Consider the following examples: ICAO's ongoing effort to improve air safety frequently produces amendments to its aviation safety program. It takes several years to formulate and validate a new amendment and requires input from aviation regulatory bodies in all countries to ensure success. Because ICAO is prevented from receiving input from Taiwan, the process is inherently deficient. Moreover, because new requirements so often require additional resources and/or training, Taiwan's aviation sector—both government and private entities—are often "behind the curve" because access to timely and relevant information about updated requirements is denied.

Out of concern for aviation security, ICAO launched a "Universal Security Audit Program" in 2003, and a first round of audits of national security programs was completed in 2007. With direct assistance from ICAO, member states have been able to review and improve the administrative and regulatory elements of their respective aviation security systems in accordance with relevant ICAO standards. Taiwan, on the other hand, has been wholly excluded from the audit program and has to go to great lengths just to collect the information necessary to update its regulations and operations. Taiwan has been unable to obtain any assistance from ICAO in ensuring that it is fully meeting applicable requirements.

Taiwan's security management system was established according to ICAO guidance issued in 2006. Although we learned that ICAO had begun reviewing that guidance, Taiwan remained entirely in the dark as to the content and direction of the review because it lacked a direct channel of communication with ICAO. When ICAO released its revised regulations in June 2009, Taiwan discovered for the first time that its security management system required updating and improvement in order to meet new ICAO requirements. ICAO members, on the other hand, had been able to amend their own regulations well in advance, based on discussions and conclusions in ICAO meetings, and thus to be fully in compliance even before ICAO officially promulgated the revised rules.

ICAO's oversight of international aviation often requires the formulation of regional agreements—efforts that typically result in changes to international standards, procedures, and forms tailored to special geographic circumstances. Taiwan can neither play a direct role in the negotiation of agreements for the Asia-Pacific Region nor obtain timely information regarding the outcome of negotiations. Unable to plan for these changes in advance, Taiwan is impeded in its efforts to improve its civil aviation sector in compliance with international expectations and full implementation of ICAO standards and recommended practices.

It doesn't have to be this way.

We know that full membership in ICAO is available only to "contracting states" to the Chicago Convention, and that, given the diplomatic climate restoring Taiwan's membership in ICAO is not currently feasible. Fortunately, ICAO's rules already offer ample opportunities for more meaningful participation by Taiwan in its proceedings. The rules allow non-contracting parties—including "other bodies"—to send representatives to meetings as "observers." This is true for the ICAO Council—ICAO's principal governing body—as well as the Council's Standing Committees and air navigation meetings. In other words, ICAO has already established a legal basis for Taiwan to be invited to ICAO meetings in an "observer" status. Taiwan would have no voting rights in such meetings, but would at least be apprised in real time of developments within the organization. Unfortunately, there appears to be a fundamental reluctance to open ICAO's doors in this way.

Some argue that ICAO's rules do not permit it to invite Taiwan to participate in its proceedings. A review of other groups and organizations that have been permitted to participate makes clear, however, that there is more than enough flexibility within ICAO to accommodate Taiwan. Given what's at stake—closing a very serious gap in ICAO's geographic coverage in the interest of enhanced aviation safety and security—ICAO's member governments should place substance over form and take advantage of that flexibility.

Given Taiwan's geographical significance and the volume of flights traversing the Taipei FIR, ICAO should invite Taiwan to attend its meetings as an observer and make appropriate arrangements to involve Taiwan in important proceedings and activities thus helping to ensure the safety and security of international civil aviation everywhere. Additionally, ICAO should invite representatives from Taiwan to participate in ICAO technical meetings and training courses. We call upon the international community to acknowledge the extent that Taiwan's continued exclusion from ICAO's activities impairs the organization's effectiveness in achieving the core objective of the Chicago Convention—establishment of a seamless, global system of international air services characterized by universal standards of safety and security. ALEC passed a resolution over a year ago to do just that. After 40 years of exclusion, it is time to restore Taiwan's ability to participate meaningfully in the work of ICAO for the benefit of international aviation everywhere.

AMBASSADOR JASON C. YUAN has served as the Representative at the Taipei Economic and Cultural Representative Office (TECRO) in the United States from August 2008 to the present, and has held a number of other diplomatic positions including TECRO Representative to Canada (1994-96) and the Republic of China's Ambassador to Panama (1996-98).

North Carolina's Broadband Battle

BY REP. MARILYN AVILA (NC)

"I am not a Luddite."[1]

So began my opening remarks at a marathon negotiation session with stakeholders representing a number of North Carolina cities and members of the telecommunications industry to develop state policy regarding municipal broadband.

What had brought all of these interested parties to the table?

Court Decision Opens the Door to Governmental Competition

North Carolina has a law call the *Umstead Act* that prevents the state from going into competition with private business, but that law does not apply to cities. Nonetheless, cities in our state are creatures of the legislature—they only have the authority granted to them by statute. So, in theory, at least, they would not be permitted to compete unless the statutes permitted that.

The statutes permit cities to construct "cable television systems". This provision was enacted by the legislature in 1971, at a time when there was no confusion as to what that term meant. In 2005, however, the North Carolina Court of Appeals issued a decision finding that the provision allowing cities to construct "cable television systems" should be construed to also authorize cities to build and operate basically any kind of wired system for any purpose - *BellSouth v. City of Laurinburg*, 168 N.C.App. 75, 606 S.E.2d 721 (2005). In a digital world where virtually any service can be provided using IP technology, this opened the floodgates for cities to provide telephone and broadband services, in addition to traditional video programming services. It also potentially opened the door to a wide range of other services, such as security and home monitoring services and private line telecommunications services.

The obvious problem this decision created was that, because competition was unleashed by the courts and not the legislature, cities were freed to compete against private industry without any rules ensuring fair competition with industry or with protections for taxpayers. For example, why would a city continue to be entitled to exemption from sales and other taxes with respect to a competitive, proprietary activity? Should cities be permitted to cross-subsidize their competitive activity with monopoly utility ratepayer funds? Should the taxpayers be a part of the decision to incur debt?

Various cities, urged on by broadband consultants, rushed to take advantage of the void—resulting in the construction of fiber-to-the-home systems in the City of Wilson ("Greenlight") and the City of Salisbury ("Fibrant"), as well as the acquisition of a defunct cable system by the Towns of Mooresville and Davidson ("MI-Connection"). In the case of Wilson and Salisbury, these cities were already being served by cable companies (Time Warner Cable) and incumbent telephone companies (CenturyLink and AT&T). These cities were hardly "unserved" or even broadband backwaters—instead they were being served by multiple providers over facilities comparable to those in the larger cities. These cities made the judgment that they would be better served by construction of fiber-to-the-home systems and since private industry was not willing to, in essence, overbuild themselves, the cities determined they should build the systems themselves and go into competition.

This issue was not confined to a handful of cities. In 2009, the League of Municipalities told a House Select Committee on High-Speed Internet that some 35 cities were in the process of evaluating whether to get into the business.

The Track Record of North Carolina Cities that are in Competition with Private Business

Municipal broadband proponents are fond of saying to their citizens that the broadband system with "pay for itself" and that no city funds would be used to build or operate that system. In North Carolina, we had real-time, real-world information with which to evaluate such claims.

The facts were not pretty.

MI-Connection was formed in 2007 when Davidson and Mooresville agreed to issue some $92 million in Certificates of Participation—a financing vehicle that allowed them to bypass going to the voters—to purchase a cable system that had been in bankruptcy. The system was (and is) losing money, and its citizens were being asked to fund these losses when they had been promised that the system would "pay for itself". These cities were forced to make up the deficit by raiding surplus monies, laying off employees, and imposing new taxes. Citizens in these communities were asking why they were in this business in the first place, and the leaders that had approved the purchase were left to say, "We owe the citizens an apology".

The City of Salisbury made similar statements to its citizens that the Fibrant network would pay for itself. In the original presentation on Fibrant, the city affirmatively stated that "No city funds would be used as working capital for system startup or any time". Yet as recently as September 6, 2011, the local newspaper reported on the city's plans to close Fibrant's operating deficit by taking a $1.2 million loan from the city's water and sewer capital reserve fund.

The leaders of these cities are good people who undoubtedly have been making decisions out of the earnest belief they were

[1] any opponent of industrial change or innovation

advancing the interests of their citizens. They ultimately will be accountable to their citizens for their decisions (and, if fact, the leaders responsible for the MI-Connection decision were voted out of office). But, as an elected state official, I have concerns about the implications of their decisions for the state and for the citizens.

What's at Stake?

There are a variety of issues at stake in this debate relating to the State's finances and resources.

First, there is the issue of the financial stability of the cities who wish to compete. These cities need to be assured that they operate in an environment in which they can succeed and pay back the debt they have incurred.

Second, there is a risk that governmental competition, if allowed to go unchecked and without rules, will deter private investment and initiative as scarce investment dollars are spent where the prospect of earning a fair return is not diminished by competing with the government.

Third, it was important to me that the taxpayers have a say in their leader's decisions to incur debt for the purposes of entering into competitive enterprises.

Our Legislative Approach

The bill that was filed in North Carolina was titled the "Level Playing Field Bill" (HB 129). As its title suggests, the approach of the bill was not to prohibit cities from entering into the business, but rather to adopt rules to make them enter more or less as a market participant should they decide to compete with services already being provided by private business. Cities that wish to provide phone, cable TV, or broadband services in competition with private providers may do so, but only on terms that are roughly equivalent to those applicable to a private provider. These include requirements to:

1. Comply with laws and regulations applicable to private providers;
2. Not cross-subsidize their competitive activity using taxpayer or other public monies;
3. Not price below cost, after imputing costs that would be incurred by a private provider.
4. Not discriminate against private providers in access to rights-of-way.
5. Pay fees in lieu of taxes that are roughly equivalent to those paid by private business.

In addition to these "level playing field" requirements, the bill also required cities to submit the issue to a vote of the people. Also, the bill requires cities to explore the feasibility of entering into public-private partnerships before making the decision to "go it alone."

The bill expressly exempted those cities already competing from the new provisions.

The bill's competitive restrictions do not apply to the provision of services in unserved areas (i.e., areas where 50% of the households do not have access to broadband).

The bill also made clear that it does not apply to a city's operation of a communications network for its own internal governmental purposes such as police, fire, rescue, water, etc. (including smart grid services) or to a city's provision of free services such as free wireless.

Common Ground and Lessons Learned

Having been through the broadband wars, I would observe that there are a number of issues on which there is common ground.

- *Broadband is good; we need more of it.* Proponents of municipal broadband talk about the need to get broadband out to people who do not have access to it. This is an important issue of public policy, but it is a multi-dimensional problem, involving both supply (whether service is available) and demand (the financial ability and resources of citizens to subscribe) components—and it is an issue that is a different issue from whether there should be rules around local governments that want to enter into competition with private enterprise.
- *Voters should have a say.* These projects are, by any measure risky. They are expensive; they involve governmental involvement in a technology-based, rapidly changing arena; and they involve the government engaging as a competitor, not as a supplier of monopoly service.
- *Private industry should have the first opportunity to provide service.* After fighting any attempt to establish rules in this area for seven years, when finally forced to the table, the cities lobbying association suddenly favored a "right of first refusal" approach—i.e., an approach that ensures that private industry has the first opportunity to provide services that are desired by a community. This was a concept that, in the end, was endorsed by all the stakeholders to the bill.

Make no mistake, the opposition will be well organized and fierce. In North Carolina, the lead opponent was the League of Municipalities. Although unaffected, county governments voiced opposition as did some companies who are suppliers to municipalities. Former cable consultants also lobbied against the bill while creating a massive amount of misinformation through anti-cable/telecom bloggers not only from North Carolina but across the US.

If this policy is needed in your state, I recommend doing your homework and be prepared to stand strong.

MARILYN AVILA represents House District 40 in the North Carolina General Assembly and is a member of ALEC's Telecommunications & Information Technology Task Force.

Wirelessly Connected to Your Wallet

BY ANDREW MOYLAN

There's an old saying in the betting world that, to use a sanitized version, "money talks and baloney walks." To listen to the public pronouncements of most elected leaders, you'd think that harnessing wireless technology in order to enable phone calls and Internet connections at blazing fast speeds is absolutely crucial to our economic recovery. But a look at the wireless tax structure those very same politicians have created reveals a different story altogether.

According to research by the Mercatus Center, cellular phone service faces a combined federal and state tax burden more than twice as heavy as what's heaped upon ordinary consumer purchases.[1] Wireless suffers an average combined rate of 15.4 percent, while the comparable general sales tax rate averages "just" 6.83 percent in comparison. Part of the gulf between those two numbers is explained by the fact that the federal government imposes no general sales tax (yet), but it does charge a special "universal service" fee on voice services (which amounted to 5.5 percent for end-users in mid-2011). But even if one focuses just on treatment at the state level, cellular service must bear a tax load of 9.9 percent – still weighty compared to the aforementioned general sales tax average of 6.83 percent.

As one might expect, these burdens vary widely from state to state. Data from the non-partisan Tax Foundation reveals that the state of Oregon applies the lightest touch with a combined federal, state, and local rate of 6.86 percent.[2] Meanwhile, those who've dreamt about running through Nebraska's vast cornfields may not want to stay there too long: the state has a stunning combined burden of 23.69 percent, earning it the ignominious title of worst in the nation. All but three states nationwide levy taxes in the double-digits, and five of them hit consumers with rates of more than 20 percent. Despite the lip service it's often paid in politicians' press releases, wireless technology groans under a tax system that looks disturbingly like the steep "sin taxes" levied on products like cigarettes and alcohol.

Wireless tax rates are not only extraordinarily high, they are often hidden from the consumers that ultimately pay them. Companies are prevented from listing some charges on a customer's bill and in some cases, there are so many different layers of fees and taxes that it would be virtually impossible to exhaustively catalog them. This lack of transparency allows politicians to rake in cash without necessarily having to face the full wrath of voters.

This is, of course, not the kind of taxation structure one would design in order to foster growth in a vital area of the burgeoning tech sector. Economics 101 tells us that when you tax something, you get less of it. Punitively high tax rates increase costs for consumers and place a particular burden on low-income individuals and others who have turned to wireless devices for their only phone service. These unfair burdens also lead to fewer dollars invested in the building of broadband infrastructure deemed so important by policymakers on the left and right.

President Obama's Federal Communications Commission, in its "National Broadband Plan", set the ambitious goal of nearly ubiquitous access to high-speed wireless networks.[3] If this worthy goal is to be achieved, it will not be through the mixture of heavy taxes and bureaucratic management that has contributed to stagnation in so many other areas of our economy. A logical and efficient wireless taxation structure that minimizes economic distortions will be a necessary element.

Despite all of the bad news for consumers, there is some reason for optimism. A bipartisan piece of legislation called the "*Wireless Tax Fairness Act*"[4] has been introduced in the United States Congress to address some of these concerns. The bill, introduced by Representatives Zoe Lofgren (D-CA) and Trent Franks (R-AZ), would utilize Congress' authority to prevent burdens on interstate commerce by implementing a moratorium on discriminatory wireless taxes across the country. While no federal bill can do the hard work of rewriting messy and onerous state and local tax rules, the *Wireless Tax Fairness Act* would at least allow for a sensible "time-out" to prevent any new and damaging levies from being imposed.

If we are to enjoy the benefits of a better wireless future, we'll have to demand that our leaders do more than just say the right words. They'll have to do the right deeds as well, by helping to establish a more solid foundation upon which that future will be built.

ANDREW MOYLAN is Vice President of Government Affairs for the 362,000-member National Taxpayers Union (NTU), a grassroots taxpayer advocacy organization founded in 1969 to fight for limited government, lower taxes, and more economic freedom at all levels. Learn more at http://www.ntu.org/

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1 http://mercatus.org/publication/case-against-taxing-cell-phone-subscribers

2 http://www.taxfoundation.org/research/show/27059.html

3 http://www.broadband.gov/plan/

4 Bill passed House of Representatives Nov. 1, 2011

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In a Battle Over Internet Taxes, Both Sides Invoke States' Rights

BY STEVE DELBIANCO

It's hard enough to wade through political rhetoric to get to the core issues of a legislative debate, but that becomes much harder when both sides sing the same tune to rally support for opposite positions.

At their annual meetings in August, two national groups focused on state legislation—the American Legislative Exchange Council (ALEC) and the National Conference of State Legislatures (NCSL)—took up the thorny issue of helping states collect more taxes on Internet transactions. One group opposed the national "streamlined" sales tax proposal and the other endorsed it.

And they both invoke the same reason for these opposing views: States' rights.

At the center of the debate is the *Main Street Fairness Act* introduced in Congress during the heat of July's debt ceiling debate. This legislation would let states collect more taxes on Internet sales, by establishing a "streamlined" collection system for sellers. But Internet advocates, my organization among them, point out that the measure imposes severe collection burdens, and actually swings the fairness needle in the wrong direction, helping big box retailers, while imposing new costs on small businesses who use the Internet to find new customers.

The real question though, is how such a law could at the same time undermine and uphold states' rights, one of the most valued legal concepts in our republic?

For the answer, we need a little background. Article 1 of the U.S. Constitution has a key provision known as the Commerce Clause, which precludes states from impeding interstate commerce. That was an essential condition of unifying the independent states back in 1787, as a way to prevent tariffs and trade barriers favoring in-state businesses.

Fast-forward to the 1960s when states demanded that catalog retailers collect their sales taxes, even where those catalogs had no operations in the state. The Supreme Court ruled then—and later affirmed in the *Quill* case—that state sales tax regimes were so complicated that they presented an unreasonable burden on interstate commerce.

Consequently, businesses are required to collect sales taxes only for states where they have a physical presence. So while consumers owe a "use tax" for out-of-state catalog and online purchase, states cannot force the businesses to collect the tax. However, when the business has physical presence, they must collect the sales taxes. That's why Amazon, for example, collects sales tax for only the five states where they have a physical presence.

Most ALEC members look at *Quill* and see a Constitutional way to protect their state's businesses and citizens against tax burdens imposed by foreign states. But lawmakers and tax collectors at NCSL say *Quill* impairs them from collecting all the sales tax due on Internet and catalog purchases. And they want Congress to overturn *Quill* so that Amazon and others will start moving that money from consumers' pockets to the state treasury.

Just how much money are we talking about here? The U.S. Commerce Department reports that 93 percent of e-commerce is business-to-business, where state tax auditors already collect any unpaid sales tax. Another 4 percent of e-commerce goes to government customers, who don't typically pay sales tax. That leaves just 3 percent of total e-commerce on which sales tax is due from everyday consumers.

> *"The real question though, is* ***how such a law could at the same time undermine and uphold states' rights****, one of the most valued legal concepts in our Republic?"*

But every day, consumers are doing more of their online shopping at websites of multi-channel retailers like Walmart and Target, for the added convenience of in-store pickups and returns. Under *Quill*, these websites already collect sales tax for all states where they have stores or other facilities. In fact, 17 of the top 20 e-retailers are already collecting sales tax for at least 38 states.

So, if Congress overturned *Quill* and forced retailers to collect on all consumer e-commerce, the extra sales taxes would add only half of one percent to total state & local tax revenue.

Clearly, overturning *Quill* is no silver bullet for strapped state budgets, but it's become a major lobbying campaign for some state legislators and big-box retailers.

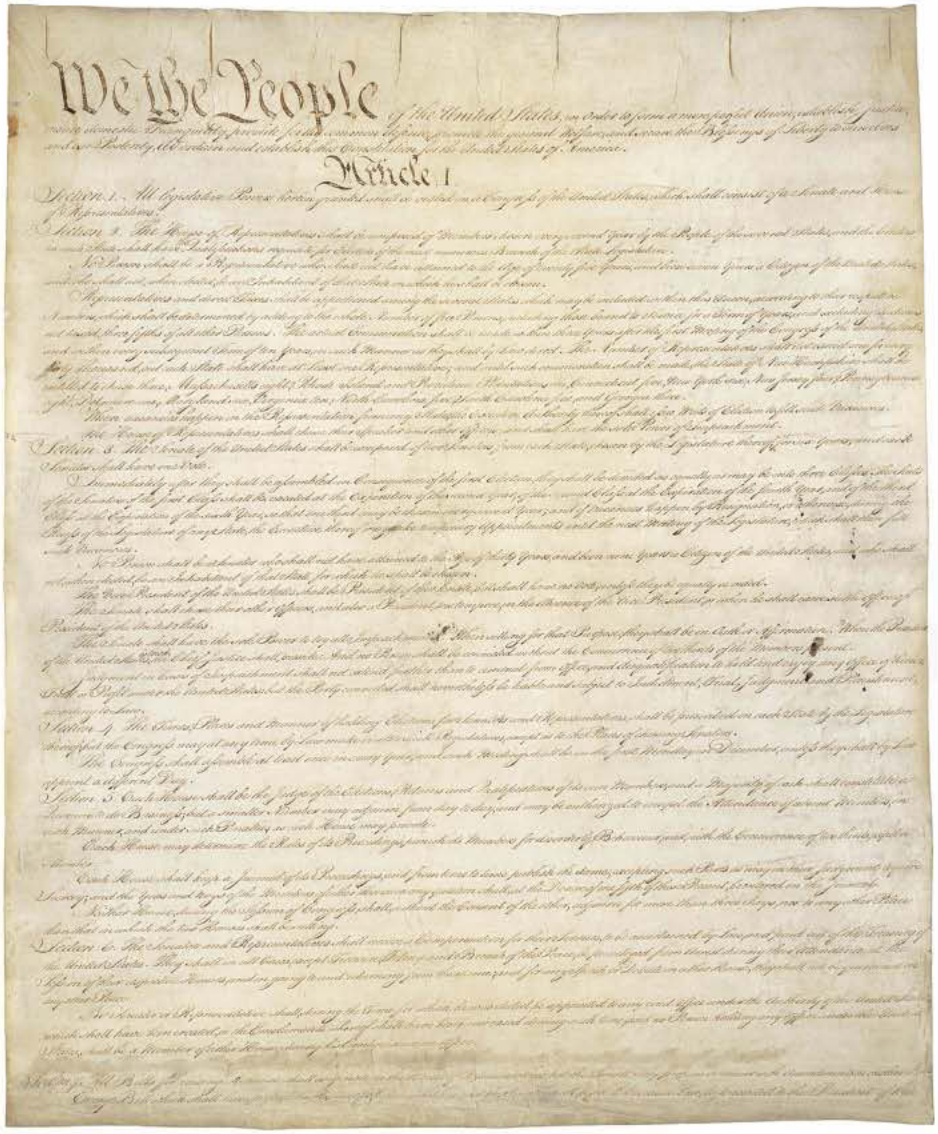
And both sides have some basis to cite "states rights" to either uphold or upend the *Quill* standard of physical presence. But in this summer's debate among legislators, not once did a sales tax advocate acknowledge that *Quill* and the Commerce Clause arose from necessary constitutional protections for interstate commerce.

Reasonable people on both sides can disagree on whether a voluntary group of states have sufficiently simplified their sales tax systems to justify overturning *Quill*. We're talking here about the *Streamlined Sales Tax Project (SSTP)*, a 10-year effort to simplify state and local sales taxes and get Congress to require retailers to collect for SSTP member states.

But SSTP advocates seldom acknowledge that this federal law would impose collection burdens on businesses in all 50 states—including those in states that don't join SSTP and those in states that don't even have a sales tax. To the contrary, many pro-tax advocates sought to reassure legislators that they would retain their state sovereignty, telling them, "you don't have to join SSTP," and "you can drop out any time you want."

But if Congress mandates SSTP, lawmakers in all 50 states would lose the sovereign right to protect their citizens and businesses from tax burdens imposed by other states. If these new collection burdens are hurting businesses in a state, their legislators won't be able to rescue them once Congress makes it mandatory.

This comes as a surprise to many lawmakers who are just getting their arms around the SSTP and its accompanying



We the People of the United States

Article I

Congressional mandate. And it will come as a complete shock to businesses all around the country if they have to start collecting for 9,000 tax jurisdictions.

That's when lawmakers and retailers will be singing the blues over the loss of constitutional protection from foreign state tax burdens. SSTP advocates, however, will be singing the refrain from *Hotel California*, where "You can check-out any time you like, but you can never leave".

STEVE DELBIANCO is the Executive Director of NetChoice, a leading coalition of e-commerce and online services – plus several thousand small online businesses – and a member of ALEC's Telecommunications & Information Technology Task Force.

Protecting Consumer Privacy Requires a Steady Head and Steady Hand

BY BARTLETT CLELAND AND REP. BLAIR THORESON (ND)

Privacy in the digital world, citizen and consumer, is one of the important public policy issues of the 21st century. Users of technology want tools that provide great service and that work with ease and efficiency, but they don't necessarily want their lives tracked by marketers or government without their knowledge and consent, their email plagued with spam, or to necessarily have their social media information automatically made available to everyone on the network. And nobody wants their credit information exposed without their express consent.

State and federal legislators are struggling with the proper balance of consumer and citizen protection on the one hand and economic growth and government efficiency on the other. The combination of the explosive growth in the use of the Internet, the advent of social networking like Facebook and Twitter, and the spread of the mobile Internet has connected scores of people like never before, in ways inconceivable not long ago. Combine this rapid growth with consumers' sudden desire to be anonymous and "privacy" is one of the most challenging issue facing policymakers.

One reason why privacy is such a challenge for policymakers is because the concept is so difficult to define. Does it really mean "privacy" or "anonymity" or "confidentiality" or even something else.

Even different cultures and social groups have different understandings about the meaning of privacy based on their traditions and experiences.

In addition, our ability to seclude either ourselves or information about ourselves from others has been altered in many ways, some of which we do not yet fully understand, due to rapidly-changing technologies. That trend will only continue, and this causes fear in many.

Uninformed media-spun hyperbole about "invasions of privacy" that restrict freedom and assert Orwellian-style control make matters worse. Public opinion surveys by a variety of organizations show that vast majorities of Americans are concerned about online privacy.

While concerns about privacy are understandable, those concerns are not an excuse for hasty policymaking. Regrettably, policymakers' reaction to increased public concerns about privacy has been to introduce legislation or pursue regulations that ultimately can cause more problems than they will remedy.

At least half-a-dozen bills related to privacy, including a "Do Not Track bill" that would require express consent for all website tracking (even for basic usage information), are pending in Congress. Additionally, there have been several Congressional hearings on the topic of privacy and individual Members of Congress have called on regulators to investigate invasions of privacy. In the states, legislators and regulators from California to Indiana to Puerto Rico are trying to address concerns about privacy with their own laws and rules. In California, for example, legislators introduced two bills – SB242, *The Social Networking Privacy Act*, and SB761, a Do Not Track bill – to address recent concerns about privacy.

That is not to say that people should not be able to protect their privacy. In fact, as active participants in the digital world, we value privacy for ourselves. But much of the "privacy" legislation and regulations being proposed are unworkable and ultimately detrimental to the digital world. A more thoughtful approach to policymaking about privacy is critical.

Recently proposed laws raise a number of significant compliance, economic, and constitutional problems that should concern the private sector and policymakers. For example, how exactly would the identity verification system work? Such systems are not currently widely available due to technological hurdles and high costs. Additionally, restrictions to prevent adolescents from going online could lead to increased incidence of rule-breaking among teenagers as they engage in deception and devise other ways to evade the restrictions, thereby rendering them useless. Policymakers must think about what is workable, not just that which is politically expedient.

The Social Networking Privacy Act would mandate privacy by requiring social networking sites like Facebook and MySpace to take down personal information at the request of users or the parents of users under 18 years of age. Similarly, the Do Not Track (DNT) bill, as its name suggests, would require an opt-out for any data collection from visitors to a website. The regulations necessary to fulfill these mandates would likely mean a system of identity verification for all social network users and a new technology added to all websites and a possible government registry.

A DNT scheme would seriously jeopardize the substantial and growing digital economy, and consumers' ability to obtain goods at services online at no or low cost. Many of the "free" services, such as e-mail, search, and even news that consumers use and depend on are of no-cost to them because advertisers subsidize the websites we use. In exchange, advertisers collect data on where we go and what we do to design and target advertising for companies. But DNT would prevent this arrangement on a wide scale, thus forcing consumers to have to pay for the services.

"Market-based solutions to privacy concerns ***should continue."***

Introducing new costs into the digital economy could seriously hamper economic growth and job creation, especially among small and new businesses. A recent study by the Massachusetts Institute of Technology and the University of Toronto compared the purchase intentions of 3.3 million individuals across five European Union (EU) and five non-EU countries over the eight-year period after EU nations began implementing opt-in requirements to follow the European's DNT Privacy Directive, the most stringent privacy mandate in the world and the model for the DNT idea in the United States.[1]

What the study found was that "after the Privacy Directive was passed, advertising effectiveness decreased on average by around 65 percent in Europe relative to the rest of the world."[2] This is to say that individuals received a vastly higher percentage of completely irrelevant information to them. Net Choice, a trade association representing e-commerce and Internet companies, estimates that an EU-style "opt-in" requirement could cost U.S. companies $33 billion over five years.[3] While large companies might be able absorb these new regulatory and compliance costs, smaller companies and startups, one of the few bright spots in the economy, could be forced to shut down or flee.

Constitutional jurisdiction is another potential problem. Because virtually all aspects of the digital world are interstate, these laws could be challenged in court on interstate commerce grounds with unpredictable consequences for the state's legislative and regulatory structures.

Rather than problematic and unrealistic mandates, what consumers and policymakers really need to help ensure better protection of privacy is continued education and transparency by internet service providers, social networks, and website owners on how their information is collected and used.

There are tremendous efforts on this front underway. Dynamic market forces have encouraged companies to alter how they collect and use information. Online markets have responded very quickly to consumers' concerns about privacy. Companies like Facebook, Google, and Microsoft have published more thoroughly-developed guidelines and made available easy-to-use tools enabling users to better control their information. Apple changed how it collects geo-location data, not because of a government mandate, but because the public expressed its concern directly to the company. Market-based solutions to privacy concerns should continue.

Moreover, it may be worth considering how we think about privacy and how that value interacts with our other cherished American values about limited government and individual liberty that ALEC members hold dear. Adam Thierer, a senior research fellow at the Mercatus Center at George Mason University, has written that "a good case can be made for restraint when it comes to legislating to define and protect privacy. That doesn't mean privacy isn't important—it is. But how we go about 'protecting' it needs to be balanced against other rights and responsibilities."[4]

This is a conversation we look forward to having here at ALEC and in our professional lives.

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[1] http://www.netchoice.org/library/estimate-of-us-revenue-loss-if-congress-mandated-opt-in-for-interest-based-ads/

[2,3] Ibid.

[4] http://www.forbes.com/sites/adamthierer/2011/09/25/is-privacy-overrated/2/

Game Over for Video Game Censorship

BY ADAM THIERER

On June 27, the U.S. Supreme Court handed down a historic First Amendment decision in *Brown v. EMA*, striking down a California law governing the sale of "violent video games" to minors. By a 7-2 margin, the Court held that video games have First Amendment protections on par with books, film, music and other forms of entertainment.

The Court made it clear that governments may not regulate the sale of such content simply by blithely referring to traditional "it's for the children" rationales for content control. "California's effort to regulate violent video games is the latest episode in a long series of failed attempts to censor violent entertainment for minors," noted Justice Antonin Scalia, who wrote the majority decision, but "even where the protection of children is the object, the constitutional limits on governmental action apply."

The ruling comes on top of a growing string of recent First Amendment decisions from the Court that tightly limit legislative efforts to regulate electronic speech and expression in the information age. Going forward, this ruling will force state and local governments to change their approach to regulating all modern media content. Education and awareness-building efforts will be the more fruitful alternative since censorship has now been largely foreclosed.

Games Now on Par with Older Media

"Like protected books, plays, and movies, [video games] communicate ideas through familiar literary devices and features distinctive to the medium," Scalia wrote. Moreover, "the basic principles of freedom of speech do not vary with a new and different communication medium."

The Court also rejected the argument put forth by the State of California and many other regulatory advocates that depictions of violence in video games should be treated as "obscenity" and regulated under a lesser First Amendment standard. The Court held that "speech about violence is not obscene" and noted that "the State of California wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children. That is unprecedented and mistaken," said Scalia. "This country has no tradition of specially restricting children's access to depictions of violence."

Advocates of California's regulatory approach had also argued that some psychological studies had proven that exposure to violent video games led to aggressive behavior by children. The Court was unconvinced. "Psychological studies purporting to show a connection between exposure to violent video games and harmful effects on children do not prove that such exposure causes minors to act aggressively. Any demonstrated effects are both small and indistinguishable from effects produced by other media."

Parental Responsibility and User-Empowerment Trumps Regulation

The Court also held that regulation must yield to private empowerment solutions and parental responsibility when less-restrictive means exist for dealing with access to objectionable content. The video game industry offers a robust content rating system and outstanding parental control technologies that make it quite easy for parents to set firm limits on what can be viewed or played on gaming consoles.

Although it is the newest of all industry content rating and labeling schemes, the video game industry's system—the Entertainment Software Rating Board (ESRB)—is in many ways the most sophisticated, descriptive, and effective ratings system ever devised by any major media sector in America. Virtually every title produced by major game developers today carries an ESRB rating and content descriptors. The ESRB applies six different rating symbols to the games it rates, as well as 30 different "content descriptors" to give consumers highly detailed information about games. Using these ratings and labels, parents can quickly gauge the appropriateness of the title for their children. If parents wish to do additional research in advance of a purchase, the ESRB's website allows them to enter the name of any game and retrieve its rating and various content descriptors.

Most parents say they find the ratings and labels very helpful. Surveys by Hart Research Associates reveal that 85 percent of American parents of children who play video games are aware of the ESRB ratings and most consult the ratings regularly when buying games for their families. In 2009, the Federal Trade Commission (FTC) concluded that "the video game industry continues to do an excellent job of clearly and prominently disclosing rating information in television, print, and Internet advertising and on product packaging."

Importantly, the industry takes additional steps to enforce its rating system at the point of sale. The ESRB works with major game retailers to display information about game ratings and then to limit the purchase of games rated above the age of the buyer. The FTC occasionally conducts "secret shopper" surveys to see how well these voluntary media rating systems are being enforced at the point of sale by the video game industry. The FTC recruits a number of 13 to 16-year-olds who make an attempt to purchase such media without a parent being present. The agency's latest report from April found that only 13 percent of teens were able to buy an "M" rated game, compared to 20 percent in 2008 and 42 percent in 2006. Industry self-regulation is clearly working and constantly improving.

These facts obviously weighed on the minds of the majority in *Brown*. Commenting on the video game industry's self-regulatory efforts, Scalia noted, "This system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home. Filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest."

Misplaced Criticisms

Predictably, some critics lambasted the Court's decision in *Brown*. California Senator Leland Yee, the author of the law that the Supreme Court struck down, and James Steyer, CEO of the advocacy group Common Sense Media, both accused the Court of putting game industry profits ahead of the interests of parents and children.

By that logic, however, every law and regulation struck down on First Amendment grounds is little more than the Supreme Court looking out for corporate interests. In reality, the Court is upholding the rights of all Americans to enjoy the maximum freedom of speech and expression, free from the fear that government will dictate what we can see, read, hear—or, in this case, play.

Upholding the First Amendment against encroachment isn't some nefarious scheme by judges to defend corporate interests. Nor is it an endorsement of any particular type of content. Rather, it is an assertion that citizens should be at liberty to make these determinations for themselves and their families. That is the proper approach for a society that cherishes free speech, freedom of expression, and personal responsibility.

Education, Not Regulation, is the Path Forward

Following *Brown*, state and local governments will need to adopt a very different approach to dealing with concerns about underage access to media content, at least as it pertains to violently-themed content. It is difficult to envision any restrictions on the sale of such media that will be constitutionally permissible going forward.

To the extent lawmakers feel compelled to take steps to help parents in this regard, those efforts will need to be focused on education and awareness-building. For example, state and local government could run public service announcements and distribute information about the content of video games (and other media) without running afoul of the First Amendment.

However, mandatory government labeling of such content with a state-approved rating system would likely be constitutionally impermissible (not to mention a bad use of taxpayer dollars). Instead, lawmakers will need to focus on educating the public based on industry-based ratings and third-party ratings and information (such as the excellent advice offered by Common Sense Media), while also promoting awareness of existing parental control tools.

Simply put, following the Supreme Court's decision in *Brown*, there'll be no more playing games with the First Amendment.

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Where's the Line, America?

BY REP. KEN IVORY (UT)

It's as if John Adams and his contemporaries are asking this question all over again from the grave of today's state legislators and leaders. In a 1773 debate with the royal governor of Massachusetts, Thomas Hutchinson, regarding the Colonies' desire for a defined measure of self-governance, the governor quipped:

> *I know of no line that can be drawn between the supreme authority of Parliament and the total independence of the colonies.*

To which, Adams retorted,

> *If there be no such line, the consequence is either that the colonies are vassals of Parliament, or that they are totally independent.*[1]

The Line: A Governing Partnership

Upon securing the revolutionary right of self-governance, the Framers grappled with this same question regarding the line between federal and state governments in what was to be the world's most unprecedented governing partnership.[2]

James Wilson, a signer of the Declaration of Independence and a major force in drafting the Constitution, declared that this Constitution deserves praise for *"the accuracy with which the line is drawn between the powers of the general government and those of the particular state governments ... Whoever views the matter in a true light, will see that the powers are as minutely enumerated and defined as was possible."*[3]

James Madison described the purpose for such a dividing line in our "compound republic" in these words:

> *In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments ... Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.*[4]

The Duty of States to Hold the Line

In our constitutional partnership it was never intended that the states were to be silent or minority partners.[5] To the contrary, under Article VI, state legislators and officers swear an oath to uphold and defend the United States Constitution (not just their respective state constitutions) as the senior partners, creators, and "sure guardians" of this partnership. Clearly, in the economy of words that characterize our founding document, such a prescribed oath was not a mere perfunctory matter of ceremony. Regarding this fundamental, constitutional duty of the states to maintain "the constitutional line," Thomas Jefferson admonished:

> *It is important to strengthen the State governments; and as this cannot be done by any change in the Federal Constitution (for the preservation of that is all we need contend for), it must be done by the States themselves, erecting such barriers at the constitutional line as cannot be surmounted either by themselves or by the General Government.*[6]

John Dickinson, a major founder too little recognized today, warned of the states:

> *In short, the government of each state is, and is to be, sovereign and supreme in all matters that relate to each state only. It is to be subordinate barely in those matters that relate to the whole; and it will be their own FAULTS, if the several states suffer the federal sovereignty to interfere in the things of the irrespective jurisdictions.*[7]

For more than 140 years, the line between the governing partnership roles of Washington and the states was clear. In 1930, Governor Franklin Delano Roosevelt declared:

> *As a matter of fact and law, the governing rights of the States are all of those which have not been surrendered to the National Government by the Constitution or its amendments ... Congress has been given the right to legislate on ... particular subject[s], but this is not the case in the matter of a great number of other vital problems of government, such as the conduct* ***of public utilities, of banks, of insurance, of business, of agriculture, of education, of social welfare and of a dozen other important features****. In these, Washington must not be encouraged to interfere.*[8]

The Trampled Line

From 1792-1930, federal spending as a percentage of GDP averaged 3 percent. Today, federal spending is nearly 26 percent of GDP, the "official" national debt is approaching $15 trillion, unfunded federal obligations are north of $60 trillion, and the federal government is overspending at the rate of more than $1 trillion per year. Additionally, the cost of complying with the metastasizing mountain of federal regulations is more than $2 trillion per year.[9]

From *No Child Left Behind* to *National Health Reform* (ObamaCare), from the EPA to the NLRB, the federal government is intruding into virtually every aspect of American's daily lives. There were only three federal crimes originally authorized under the Constitution (piracy, treason and counterfeiting). Today, there are innumerable federal laws and regulations[10] (many of which criminalize conduct without any criminal intent).[11] It is now estimated that the average citizen unknowingly commits three federal crimes a day.[12]

States: "Sure Guardians" of People's Liberty

While introducing the Bill of Rights, Madison expressed what teachers and farmers, businesspeople and citizens expect of their state legislatures in the face of such unbridled consolidation of power[13]:

> *[T]he State Legislatures will jealously and closely watch the operations of this Government, and be able to resist with more effect every assumption of power, [better] than any other power on earth can do; and ... be sure guardians of the people's liberty.*[14]

Holding the Constitutional Line

This year, Utah responded to citizens' yearning for a "sure guardian of the people's liberty" by passing two innovative pieces of legislation, now signed into law. The Federal Receipts Reporting Requirements Act (HB138) requires all state agencies to report (i) total federal receipts, (ii) the percentage such receipts are of their budget, and (iii) what their contingency plan is if federal funds are diminished for any reason. Moody's, in its recent review of the bond rating of states, acknowledges this bill in its decision not to review Utah for downgrade stating that Utah was the only state in the nation actively preparing in such a manner to stand independent of federal funds.

The Federal Law Evaluation and Response Act (HB76) defines "the constitutional line" as only those original powers delegated to the federal government in the Constitution, as amended. The law establishes and funds a federalism committee to monitor, review, and respond to federal action (defined as legislation, executive order or agency action) that crosses this constitutional line. Think of it as a mechanism for calling regular "partnership meetings" to address the proper roles, responsibilities (and intrusions) of the partners.

The pattern for HB76 is found in the charge to states from Madison in Federalist 46 and Alexander Hamilton in Federalist 28 concerning the manner in which they are to "erect barriers against the encroachments of the national authority."[15] Specifically, they directed the states to "readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty."

The System is the Solution

Samuel Adams (the "Father of the Revolution") affirmed that the sovereignty and jurisdiction of the states is not merely a matter of political jealousy, but is the indispensable linchpin to our unprecedented governing partnership:

> *I was particularly afraid that unless great care should be taken to prevent it, the Constitution in the Administration of it would gradually, but swiftly and imperceptibly run into a consolidated Government pervading and legislating through all the States, not for federal purposes only as it professes, but in all cases whatsoever: such a Government would soon totally annihilate the Sovereignty of the several States so necessary to the Support of the confederated Commonwealth, and sink both in despotism.*[16]

Utah invites state legislators and leaders nationwide to join us in exercising our unique constitutional duty to stand as "the sure guardians of the people's liberty, "to restore the balance and maintain the line in our unprecedented governing partnership, because:

Where there's No Line,
There's No Limit.
Where there's No Limit,
Ultimately, there's No Liberty.

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[1] John Adams, Letter to Royal Governor Thomas Hutchinson, 1773.
[2] Dallin H. Oaks, "The Divinely Inspired Constitution," Ensign, February 1992, 68–74.
[3] James Wilson, Pennsylvania Ratifying Convention, December 1787.
[4,5] James Madison, Federalist 51, 1788
[6] Thomas Jefferson, Letter to Archibald Stuart, 1791 (emphasis added).
[7] John Dickinson (Fabius), Letter III, 1788 (all caps emphasis in original)
[8] Gov. Franklin D. Roosevelt (D-NY, 1928-1932), On States' Rights and Constitutional Authority, March 2, 1930.
[9] Gov. Franklin D. Roosevelt (D-NY, 1928-1932), On States' Rights and Constitutional Authority, March 2, 1930.
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[12] http://online.wsj.com/article/SB10001424052748704471504574438900830760842.html
[13] Letter to Charles Hammond, 1821
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