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In This Issue

Senate Vote on FISA Compromise Expected

Now back from the July 4 recess, the Senate is expected to quickly take up the Foreign Intelligence Surveillance Act (FISA) compromise passed by the House in June, with a vote as early as July 9. Despite opposition to the compromise legislation, particularly from civil libertarians, and a recent court ruling that cast doubt on the main arguments for granting immunity to telecommunications companies, the legislation is considered likely to pass.

On June 20, the House passed the FISA Amendments Act of 2008 (H.R. 6304) by a vote of 293 to 129. The bill grants retroactive immunity to telecommunications companies and expands government surveillance powers of American citizens without judicial approval. In return for these provisions, the legislation achieves a few modest improvements, including establishing that FISA is the exclusive means by which surveillance may be conducted. The bill also calls for some increased oversight with a review of the wiretapping program by the inspector general of the Department of Justice.

The legislation has received strong opposition from public interest groups, many of which have mounted campaigns to oppose the legislation. Groups like the American Civil Liberties Union

and the Center for Democracy and Technology have urged the Senate to reject the legislation. OMB Watch has also opposed the bill.

Online netroots have also placed considerable pressure on Sen. Barack Obama (D-IL), presumptive Democratic presidential nominee, to reverse his stated support for the bill. Online petitions have been launched, and a group has been formed on Obama's campaign site to urge him to oppose the bill. The effort is now the largest single group listed on the site, with more than 21,000 participants. Originally, Obama had stated he would support a filibuster of immunity for telecommunications companies.

Interestingly, just days before the Senate votes on the FISA bill, a court issued a ruling on one of the cases against the NSA wiretapping program that runs counter to arguments used to justify the compromise bill. Despite the fact that Chief Judge Vaughn Walker of the U.S. District Court for the Northern District of California dismissed *Al Haramain v. Bush* in the July 2 ruling, the Electronic Frontier Foundation makes a strong case for how it still goes a long way to undermine several key arguments for the FISA bill. The case was dismissed, for the time being, because the plaintiff failed to adequately demonstrate it had been injured. However, the ruling rejected the expansive view of executive authority to go around FISA and held that FISA preempts the state secrets privilege. The decision also fully demonstrates the ability of courts to handle the questions of immunity and security involved in this issue.

Despite the opposition and the recent court decision, however, it is expected that the Senate will pass the FISA bill when brought to a vote. In February, the Senate passed, by a vote of 68 to 29, an earlier version of the bill (S. 2248), which granted immunity without any of the improvement provisions included in H.R. 6304. Another indicator that the FISA bill will likely pass is that on June 25, the Senate voted overwhelmingly (80 to 15) to limit debate on the legislation.

Only three amendments are being considered:

- Sens. Russ Feingold (D-WI) and Christopher Dodd (D-CT) have offered an amendment to strip out the immunity provision.
- Sen. Jeff Bingaman (D-NM) has offered an amendment that would place all pending lawsuits on hold until 90 days after Congress receives the inspector general report on the wiretapping program, which is required in the FISA bill.
- Sen. Arlen Specter (R-PA) has offered an amendment to require dismissal of lawsuits unless a federal district court found that the assistance of telecommunications companies violated the Constitution.

The Senate is requiring 60 votes for adoption of any of the amendments, so they all face a difficult hurdle.

FOIA Another Year Older, but Still Not Much Wiser

July 4 marked the 42nd anniversary of Congress' passage of the Freedom of Information Act (FOIA). The Department of Justice (DOJ) issued a report showing improvements in how the law is being implemented, including a reduction in backlogs of FOIA requests at agencies. Other reports, however, paint a much starker picture where backlogs continue to remain high (despite a one-year modest drop) and where the full granting of FOIA requests has dropped to the lowest level since records have been kept.

Sen. Patrick Leahy☼ (D-VT) issued a June 25 statement remarking, "As we reflect upon the celebration of another FOIA anniversary, we in Congress must also reaffirm our commitment to open and transparent government."

FOIA was signed reluctantly by President Lyndon Johnson in 1966. As Johnson's White House press secretary said years later, "LBJ had to be dragged kicking and screaming to the signing ceremony. He hated the very idea of the Freedom of Information Act; hated the thought of journalists rummaging in government closets; hated them challenging the official view of reality. He dug in his heels and even threatened to pocket veto the bill after it reached the White House." In fact, the bill was signed on July 4 without any signing ceremony.

Yet that law has become the foundation on which government transparency functions today. The law established the process by which anyone could request documents from agencies, which had to respond within 20 business days. Agencies had to make the records available unless they met certain exemptions or exclusions from disclosure under the law.

Department of Justice Thinks Things Are Looking Up for FOIA

The U.S. Attorney General's May 30 review of agency efforts to improve FOIA implementation concluded that agencies had "addressed multiple aspects of FOIA administration" and "made remarkable improvements." The review noted that all agencies reported success in meeting at least some of their FOIA milestones and that more than half met all of their milestones. The report described reducing backlogs of FOIA requests as "perhaps the single most significant improvement area addressed by agencies." The report then noted that despite more than half the agencies (49) reporting an increase in requests received in FY 2007, more than half the agencies (47) reported processing more requests than the previous year. It also found that more than 60 percent of agencies (57) reported cutting the number of backlogged requests.

The report is the third and final review required under Executive Order 13392, "Improving Agency Disclosure of Information," issued in December 2005. This same executive order requires agencies to establish improvement plans but provides no funding or enforcement to do so, stating that these goals are to be achieved "consistent with available resources."

Public access advocates never found the FOIA improvement plans all that impressive, and many also believe the Attorney General's report is misleading and overly positive about progress made to date. The report has been criticized for lacking complete specifics on all

agencies' performance, relying instead on general figures about the number of agencies reporting improvements and then providing figures only for a few individual examples to illustrate the progress.

That report was followed by the DOJ annual report on FOIA for FY 2007, which was released on July 1. The annual report was equally rosy about FOIA implementation and maintained that FOIA requests had increased over the previous year by two percent or 346,080; backlogs had declined by 14 percent; and more FOIA requests were processed than the previous year with less money (down seven percent) and fewer employees (down three percent). Like the May report, the July report provided no agency details.

Public Interest Reports Do Not Find the Same Progress

On July 3, the Coalition of Journalists for Open Government (CJOG) released its review of performance by 25 key agencies on FOIA, entitled *An Opportunity Lost*. The CJOG report paints a picture of continuing problems with agency implementation of FOIA that is in stark contrast to the DOJ reports. The CJOG report provides detailed numbers from each agency to support its conclusions. One key issue is what numbers to use when discussing FOIA implementation. DOJ includes data from the Department of Veterans Affairs and the Social Security Administration when comparing year-to-year numbers. CJOG did not include this data because the two agencies "include large numbers of first person Privacy Act requests in their FOIA reporting." The VA has the largest number of FOIA requests of any agency. According to the CJOG report, federal agencies received 63,000 fewer requests in FY 2007 than in FY 2006, which contributed to agencies being able to clear some of their backlogs. However, while the overall backlog did drop from 39 percent in FY 2006 to 33 percent in FY 2007, the change was primarily driven by a handful of agencies making vast improvements to offset the eleven agencies that showed no improvement or even larger backlogs.

The report also indicates that the improvement in handling more requests in FY 2007 may have come at the direct expense of getting any information released. The CJOG report found the percentage of requesters who received either all or some of the information requested fell to an all-time low of 60 percent — meaning that 40 percent of the requests processed were rejected entirely. The drop in the number of full grants is startling. The average between FY 1998 and FY 2002 was 51.3 percent; the average between FY 2003 and FY 2007 was 42 percent; and in 2007, just 35.6 percent of FOIA requests were fully granted, the lowest since government started tracking this information.

Many of the conclusions of the CJOG report are corroborated by the March Knight Open Government Survey, conducted by the National Security Archive. The agency-by-agency survey found that 30 percent of agencies (18) actually experienced a backlog increase in 2007, and another 15 percent (nine agencies) reported having met backlog reduction milestones but still showed an increase in the number of pending requests at the end of FY 2007. The National Security Archive report also noted that only half of the agencies even set specific backlog reduction goals. Government-wide, the number of pending FOIA requests at the end of FY

2007 was only two percent lower than before Executive Order 13392 was issued.

Tomato, Beef Recalls Show Problems with Food Tracking

Federal officials are having difficulty providing consumers with information on two recent food-borne illness outbreaks. Investigators are still searching for the source of an ongoing salmonella outbreak, and officials have been unable to provide detailed information for consumers on a batch of *E. coli*-contaminated beef, which has spread to a number of states across the country.

More than a month after announcing a nationwide warning against the consumption of certain types of raw red tomatoes, and almost three months since the first cases of salmonella were reported, the U.S. Food and Drug Administration (FDA) still has not pinpointed the source of the contamination.

FDA announced the warning June 7 after more than 100 consumers had been sickened by a rare strain of salmonella, *Salmonella Saintpaul*. FDA's preliminary investigation linked the salmonella to red plum, red Roma, and/or round red tomatoes.

But the FDA said last week it was expanding its investigation to other types of produce commonly served with tomatoes, particularly ingredients in salsa like cilantro, jalapeno peppers, and other types of hot peppers, according to the Associated Press. FDA officials have emphasized that tomatoes are still the lead suspect in the outbreak, but many health officials are suspecting additional produce sources, because since the outbreak began in April, tomato production has shifted geographic locations. Experts say it is unlikely that two separate locations would have the same unusual salmonella strain.

Meanwhile, hundreds more cases of the outbreak have been reported. The latest tally from Centers for Disease Control and Prevention (CDC) is 943 illnesses. Experts believe the actual toll is probably much higher, possibly in the thousands, because many cases of food poisoning go unreported. With CDC revising its figures every few days, neither the spread nor intensity of the outbreak appears to be abating.

The complexity of the supply chain — which shuffles tomatoes and other produce across state and national boundaries for processing, packaging, and distribution — makes identifying the source of this or any other food-borne illness outbreak a major challenge for FDA. A retailer may buy produce from multiple distributors, each of which likely collects a variety of goods from multiple growers. Adding to the difficulty might be the faulty memory of those who become ill.

Critics say the FDA itself is at least partially to blame. Two consumer groups, the Center for Science in the Public Interest (CSPI), and the Consumer Federation of America (CFA), wrote to FDA commissioner Andrew von Eschenbach chiding his agency for its lax record on produce safety. "This massive outbreak might have been prevented if FDA had responded to the

numerous produce outbreaks that preceded it," the letter says.

The groups say FDA does not have the necessary safeguards in place to prevent and track food-borne illnesses. They said "source traceability for produce, written food safety plans for farmers, processors, and packinghouses, and tighter controls on repacking" are necessary but lacking, despite repeated pleas from food safety advocates.

Regulators are also investigating an outbreak of *E. coli* after a batch of beef was linked to at least 30 cases of the disease in Ohio and Michigan.

While federal officials quickly identified the source of the contaminated beef — Nebraska Beef in Omaha — consumers are still left largely unprotected. The contaminated beef has been further processed and possibly incorporated with other beef, making it difficult to track the ultimate location of the contaminated product.

Initially, the beef recall included only half a million pounds and covered shipments sent to processors and wholesalers in Colorado, Illinois, Michigan, Nebraska, New York, Pennsylvania, and Texas. The Food Safety Inspection Service (FSIS) — the unit of the U.S. Department of Agriculture charged with regulating meat, poultry, and egg products — announced the recall June 30.

In the recall announcement, FSIS disclosed the USDA approval code for the batches of contaminated beef. However, FSIS says product packaging will no longer bear the code since the shipments "were further processed into ground beef."

When FSIS announced July 3 that the recall had been expanded to 5.3 million pounds, it gave no further indication as to where the Nebraska company had shipped the contaminated beef or how processors, wholesalers, retailers, and consumers could identify it. FSIS does advise consumers to make sure they cook beef to an internal temperature of 160 degrees Fahrenheit.

Although it is required to physically inspect all meat and poultry destined for commerce, FSIS has been having increasing trouble ensuring the safety of those products. Over the years, FSIS's inspection staff has been dwarfed by the growing size of the meat and poultry industries, according to an OMB Watch analysis. In 1981, FSIS employed about 190 workers per billion pounds of meat and poultry inspected and approved. By 2007, FSIS employed fewer than 88 workers per billion pounds, a 54 percent drop.

CSPI and CFA, the groups that wrote to the FDA commissioner about the salmonella outbreak, are calling for federal requirements that produce be marked in order to help investigators trace the source of contamination. According to their letter, "Those marks should be specific enough to extend all the way back to the farm of origin." Produce should also bear more informative labels to enable consumers to trace food from their dinner tables all the way back to the farm, the groups say.

At least two bills in Congress focus on the issue of food tracking. One bill (H.R. 3485),

introduced by Rep. Diana DeGette (D-CO), would require the government to implement a tracking system "for all stages of manufacturing, processing, packaging, and distribution of food." Another bill (S. 1292) would require a similar system but apply only to meat and poultry products. Neither of these bills, nor the approximately ten other bills aimed at improving food safety, have cleared the committee stage.

Pentagon Refuses EPA's Pollution Cleanup Orders

The nation's worst polluter, the U.S. Department of Defense (DOD), is refusing to sign enforcement agreements with the U.S. Environmental Protection Agency (EPA) that require DOD to clean up polluted sites nationwide. The military bases covered by EPA's enforcement orders may endanger public drinking water supplies as a result of the military dumping toxic pollutants at the sites.

Under the Resource Conservation and Recovery Act (RCRA), EPA can order polluted facilities to be cleaned up and may back up the orders with court actions and daily fines. Both private and government property are subject to the act. When directed at government agencies, EPA's orders cannot become final until it confers with the targeted agencies to discuss timetables and plans for remedying the polluted facilities. These meetings generally lead to enforcement agreements under which sites are remediated.

According to a June 30 *Washington Post* article, DOD has refused to sign 12 required agreements that would cover facilities listed under the National Priorities List, better known as the Superfund list. Some of the chemicals dumped at the sites may cause cancer and can seep into drinking water supplies and aquifers, one of EPA's major concerns.

On June 25, the leaders of the House Committee on Energy and Commerce and its Subcommittee on Environment and Hazardous Materials sent a letter to EPA Administrator Stephen Johnson investigating EPA's actions in support of final RCRA orders issued for three DOD facilities. The orders were for Maguire Air Force Base in New Jersey, Fort Meade in Maryland, and Tyndall Air Force Base in Florida. Although some cleanup efforts have begun at the sites, DOD is in violation of the final orders and has sought the intervention of both the Office of Management and Budget (OMB) and the U.S. Department of Justice (DOJ).

On May 14, DOD sent a letter to OMB asking it to resolve the dispute between DOD and EPA. DOD argued that EPA does not have the authority to impose what it refers to as "additional provisions" to the model enforcement agreements that have been the bases for these interagency agreements. EPA argued in a Nov. 13, 2007, letter to DOD that the changes DOD is calling for in these agreements do not meet the standards set out in the model agreements.

The Energy and Commerce Committee is asking EPA to provide the committee with information about DOD's failure to comply with the orders. Specifically, the committee wants EPA to provide information about conversations with, and additional information provided to, either OMB or DOJ in the course of resolving the conflict. It also asks EPA to answer seven

questions related to the three facilities at the heart of the conflict and DOD's compliance with EPA orders generally. The letter notes that one of President Bush's promises when he ran for president in 2000 was to require federal facilities to meet environmental protection laws and to hold government agencies accountable for their actions. "It is long past time for this pledge to be honored," the letter states. The committee requested EPA to respond by July 7.

DOD has recently fought EPA on other environmental fronts. In April, the process for assessing the toxicity of chemicals to be added to EPA's Integrated Risk Information System (IRIS) was changed to allow OMB, DOD, and other agencies to have more influence over the assessment process. (See the April 15 *Watcher* article on IRIS.)

In 2005, the Natural Resources Defense Council (NRDC) conducted an investigation that showed DOD, with the support of the White House, pressured the National Academies of Science to downplay the adverse health effects of the chemical perchlorate. Perchlorate is an ingredient in rocket fuel. The Pentagon and defense contractors use rocket fuel for a variety of purposes. Perchlorate has been shown to cause brain damage in fetuses and infants, according to NRDC. EPA has not begun to regulate perchlorate, citing the need for more research.

Although the conflict over EPA's enforcement powers could be resolved quickly by OMB, at this late date in the Bush administration, it is unlikely that anything more than the voluntary cleanup efforts DOD has started at the sites will occur before a new presidential administration is in place.

Past, Future of Faith-Based Initiative in the News

A late June conference sponsored by the White House Office of Faith-Based and Community Initiatives (OFBCI) featured a speech by President Bush praising the faith-based initiative as "one of the most important initiatives of this Administration." On July 1, Democratic presidential candidate Barack Obama announced his plan to restructure the program, criticizing lack of funds for the current effort and promising to bar religious hiring discrimination for federally funded positions. The next day, Republican presidential candidate John McCain issued a statement disagreeing with Obama on the hiring issue.

The OFBCI conference theme, "Innovations in Effective Compassion," drew about 1,500 attendees to Washington, DC, where two days of presentations listed accomplishments and raised some questions for research. OFBCI released a report, *The President's Faith-Based and Community Initiative in 50 States* and a fact sheet summarizing the results. These include:

- Issuing 15 regulations mandating equal treatment of faith-based and secular grant applicants
- Creating new charitable deductions in the tax code to encourage private giving
- Working with 35 governors and 70 mayors with established state and local faith-based offices
- Funding a variety of programs ranging from public health to prisoner re-entry

assistance

OFBCI Director Jay Hein told the conference that $15.3 billion in federal grants was awarded to nonprofits in 2007, a 3.9 percent increase over 2006. However, a 2006 study by the Roundtable on Religion and Social Welfare Policy (Roundtable) found that total federal spending on social services declined between 2002 and 2004, as well as total dollars granted to faith-based groups. However, the number of grants awarded increased during that same period.

The faith-based initiative has been controversial since its inception in 2001. Studies by the Roundtable have pointed to lack of oversight, implementation of new rules through Executive Orders and regulations without new legislative authority, and funding cuts for programs open to grant competition. In addition, there is ongoing debate about whether faith-based grantees should be able to take religion into account when hiring for publicly funded positions.

The initiative has generated vigorous litigation, resulting in some clarification and changes in constitutional law defining separation of church and state. The Roundtable provides a helpful summary in an interview with law professors Chip Lupu and Bob Tuttle on "Changes in Rules Governing the Faith-Based and Community Initiative," posted July 1. They note basic constitutional law principles that govern federal funding of faith-based organizations:

- The courts have moved from a ban on government funding for religious *organizations* to a ban on government funding of religious *activities*
- Religious content in programs can only be paid for with government funds when a person in need of service has meaningful choices of providers, including secular providers, and
- The government has an obligation to monitor use of government funds when grants are given to faith-based groups. They cite the Department of Health and Human Services guidance for healthy marriage programs as an example of clear rules. It is based on settlement of litigation brought by the American Civil Liberties Union

Obama Proposal

On July 1, Sen. Barack Obama (D-IL) announced that if he is elected president, he will restructure OFBCI into a President's Council for Faith-Based and Neighborhood Partnerships. Obama made his announcement at East Side Community Ministry in Zanesville, OH, and criticized the Bush administration's efforts for being "consistently underfunded." The fact sheet noted that Bush has proposed "elimination of the Commodity Supplemental Food Program which benefits an average of 433,000 low-income seniors every month." In addition, Obama said Bush has used the faith-based initiative for partisan purposes, quoting a former OFBCI deputy director who said the office held conferences in battleground states ten days before the 2004 election.

The fact sheet accompanying Obama's proposal spelled out his guiding principles for faith-

based organizations to receive federal grants:

- Only secular programs, not proselytization or sectarian religious instruction, can be paid for with federal funds
- Religious discrimination in providing services or hiring for government-funded positions would be banned
- Programs must prove their effectiveness and demonstrate results

Early press reports incorrectly reported that Obama was endorsing religious criteria for hiring in government-funded positions, creating some confusion and mixed reactions. Later news stories corrected the error, and a *New York Times* article described "heated reactions" to the hiring issue.

McCain Critical of Obama Plan

On July 2, Sen. John McCain (R-AZ) issued a statement, which said, "John McCain supports faith based initiatives, and recognizes their important role in our communities.... He also believes that it is important for faith-based groups to be able to hire people who share their faith, and he disagrees with Senator Obama that hiring at faith-based groups should be subject to government oversight."

Audit Faults IRS Political Activities Enforcement

The Treasury Inspector General for Tax Administration (TIGTA) released an audit report on June 18 that found Internal Revenue Service (IRS) employees have an inconsistent understanding of prohibited political intervention by charities and religious organizations. It also found the IRS has not been timely in evaluating cases under investigation. The report acknowledged improved educational efforts but failed to recognize the inherent difficulty in explaining the overly vague "facts and circumstances" test the IRS uses to determine if prohibited partisan activity has occurred.

The IRS began the Political Activities Compliance Initiative (PACI) in June 2004 to educate charities about the ban on 501(c)(3) organizations from participating or intervening for or against candidates for office and to improve enforcement against such violations. In April, the IRS announced it would continue the PACI program this election cycle and included new education efforts and increased examinations of charities believed to be violating the ban, including assessment of referrals made to the IRS.

The audit report, *Improvements Have Been Made to Educate Tax-Exempt Organizations and Enforce the Prohibition Against Political Activities, but Further Improvements Are Possible*, is intended to determine the effectiveness of PACI and the IRS's ability to address alleged political campaign intervention. It details the process involved when the IRS considers taking on an investigation. Employees research the issue in each referral of alleged activities, gathering evidence which is then provided to an independent group of Exempt Organizations

(EO) employees, known as the Referral Committee. The Committee considers the referral and evidence to decide whether the referral calls for an examination. Those that will be examined are forwarded to an EO Examination group that notifies the tax-exempt organization that it will be investigated for potentially prohibited political activity.

The audit found that employees did not always understand why certain referrals were included within PACI and that employees interpreted the criteria differently for evaluating referrals. In fact, employees did not receive the same training. TIGTA states, "Providing the same training to all employees involved in the Initiative and ensuring adequate feedback from the Committee as to why a referral is not selected would clarify what constitutes prohibited political activity and provide better assurance that all organizations potentially involved in prohibited political activities are being treated consistently and fairly."

TIGTA found that IRS employees do not always understand why some referrals are included in the initiative and why others are not. This lack of clarity is a problem for all parties. As an updated Congressional Research Service report from April continued to assert, the "line between what is prohibited and what is permitted can be difficult to discern." OMB Watch supports the creation of a bright-line definition of prohibited political intervention, which IRS employees seem to also need, considering the finding that employees examining cases need clarification as to what constitutes prohibited political activity.

The report found problems with the length of time it took for employees to handle the cases and that referrals were not always researched in an acceptable time frame. "Overall, 63 of the 100 referrals selected for examination in the 2006 Initiative were not processed in a timely manner using the established expedited process." It made two overall recommendations:

- Evaluate all referrals of potentially prohibited political activities in a timely manner by monitoring all significant activities and analyzing collected data to ensure that appropriate staffing is available
- Improve the understanding of prohibited political intervention criteria by providing the same training for all employees

The audit did find improvement in IRS education for tax-exempt organizations on the types of prohibited activities. These educational activities include publishing the results of the 2006 Initiative, publishing a Fact Sheet in February 2006, a new Revenue Ruling in June 2007, and updating an IRS webpage specific to political campaign intervention. The audit reports, "While educational efforts and streamlined processes enabled the IRS to make substantial improvements to the Initiative, the IRS could make further enhancements by having data readily available to pinpoint the reasons why timeliness goals are not always met and by ensuring that all employees clearly understand what should be included in the Initiative."

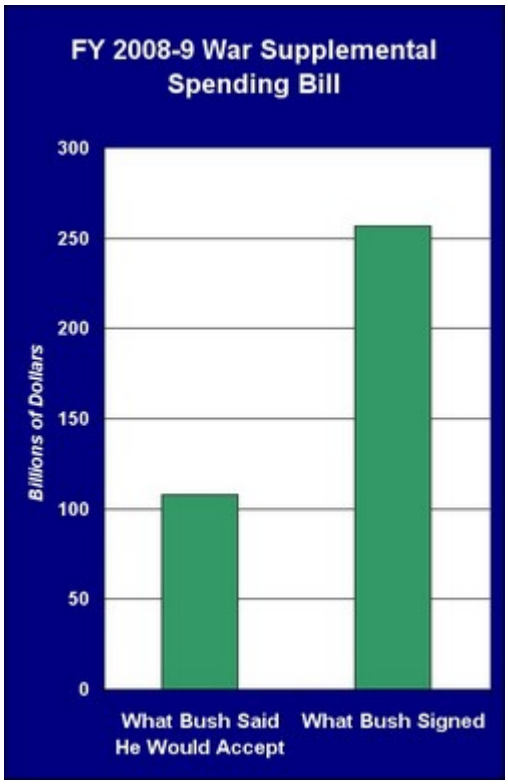
TIGTA cited materials with examples of prohibited activities as a sign of improved educational material. However, Lois Lerner, the director of Exempt Organizations, posted a program letter to EO employees in April, which stated that "the IRS has encountered a number of cases with varied fact patterns not directly covered by those examples." The guidance that has been

provided leaves many situations in gray areas, which contributes to an increasing number of complaints to the IRS, as well as confusion and apprehension on the part of organizations who want to be otherwise engaged in civil society at election time.

Bush Signs War Supplemental, Cements Fiscal Legacy

Contrary to his assertion that he would "not accept a supplemental over $108 billion," President Bush signed a $257 billion war supplemental spending package on June 30. The bill will fund the wars in Iraq and Afghanistan for the remainder of the fiscal year (ending Sept. 30) and through the first several months of the next president's term.

In addition to war appropriations, the quarter-trillion dollar measure includes funds for a 13-week extension of unemployment insurance benefits; expansion of the GI bill; aid for Midwest flooding victims; and a collection of various domestic, non-defense discretionary programs. (For a more detailed breakdown of the various components of the bill, read our June 24 *Watcher* article on the war supplemental). The supplemental package also blocks a set of new administration Medicaid rules that would cut funding to states for the low-income health care program.



Bush did not merely accept additional funding in this legislation in order to get approval for war funds. He advocated for increases in spending for some of the domestic items as well. In fact, at the president's insistence, Congress added a provision to the enhanced GI bill that would allow unused benefits to be transferred to a service member's spouse and children. With this provision, the cost to enhance the GI bill climbs by $10 billion (from $52 billion to $62 billion over ten years). Unfortunately, Bush demanded that Congress expand the education funding program without increasing revenue to pay for it.

The president approved some $67 billion in unrequested expenditures in the bill, which stands in stark contrast to his statements earlier this year about the bill and his obdurate refusal last year to approve $22 billion in spending in excess of his FY 2008 budget request.

But his trenchant position at that time was a transparent attempt to signal to his political supporters that his profligate ways had come to an end — coincidentally just as the Democrats took control of Congress. His reversal of that promise in the recently signed supplemental bill is emblematic of the disastrous fiscal policies of his two terms as president. Claims that tax cuts and the Iraq war would pay for themselves remain empty, while the cost of the new

unpaid-for Medicare drug benefit will surpass Social Security's unfunded liabilities. As the forty-third presidency winds down, this latest bill will stand as a succinct recapitulation of Bush's fiscal policy — a deluge of spending lacking any meaningful attempt to confront the tradeoffs that must be made to safeguard the nation's finances beyond January 2009.

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In This Issue

White House Climate Change Policy -- Delay, Delete, and Deny

The Bush administration continues its strong efforts to censor climate change information that reaches the public and Congress. Recent reports indicate that the White House pressured the U.S. Environmental Protection Agency (EPA) to make changes to its regulatory process regarding climate change and that Vice President Dick Cheney's office was responsible for suppressing key sections of the congressional testimony of a high-level official at the Centers for Disease Control and Prevention (CDC).

Full Stall Ahead

In April 2007, the U.S. Supreme Court ruled in *Massachusetts v. U.S. Environmental Protection Agency* that greenhouse gas emissions are eligible for regulation under the Clean Air Act — a position previously rejected by the administration. Subsequently, EPA would have to either regulate greenhouse gases under the Act or prove emissions are not a risk to public health and welfare and therefore not in need of regulation.

In May 2007, the White House ordered the EPA, along with other agencies, to prepare regulatory responses by the end of the year. According to EPA officials, the agency's draft finding and recommendations on the dangers of CO2 emissions, entitled, "Control of Greenhouse Gas Emissions from Motor Vehicles," were sent to the White House Office of Management and Budget (OMB) in a December 2007 e-mail. Since the Clean Air Act requires EPA to regulate emissions that endanger the public, the so-called endangerment finding carries a legal obligation that the agency take action. Officials at OMB refused to open the e-mail or the draft document, knowing that it may trigger regulatory action on climate change. Climate change is being caused by high concentrations of greenhouse gases in the earth's atmosphere.

Investigations conducted by two committees in the House found that the administration delayed acting on the EPA findings. In fact, despite repeated requests for the EPA information, the White House refused to share any related documents until the records were subpoenaed in April by the House Select Committee on Energy Independence and Global Warming.

After reviewing the subpoenaed records, Rep. Edward Markey☼ (D-MA), Chair of the House Select Committee, charged the administration with discarding EPA's science and legally based recommendations to address climate change. Markey reported that the EPA documents supported scientific conclusions that greenhouse gas emissions may "endanger public welfare" and that motor vehicle emissions do contribute to global warming.

Rep. Henry Waxman☼ (D-CA), Chair of the House Oversight Committee, declared the administration's lack of action to be "in violation of the Supreme Court's directive." According to his committee, the draft was the product of about 500 comments from internal EPA review, external federal expert review, and other interagency comments.

Changing Facts

The *Wall Street Journal*, which claimed to have obtained a copy of the original EPA documents, reported that the White House had done more than delay the information — it appeared the administration had attempted to remove entire findings. According to anonymous officials quoted by the paper, the White House pressured EPA to remove conclusions that greenhouse gases endanger public welfare, information on how to regulate the gases, and an analysis of the cost of regulating greenhouse gases. The draft of EPA's findings affirmed "the agency's authority to tackle climate change, and suggest[ed] a variety of regulatory avenues" and concluded that the "net benefit to society" of regulating automobile emissions "could be in excess of $2 trillion." However, the cuts the White House pushed were reportedly intended to rework EPA's findings to indicate that the Clean Air Act is a flawed vehicle for regulating greenhouse gas emissions and that separate legislation is needed.

On July 11, EPA released an Advanced Notice of Proposed Rulemaking (ANPR) on climate change that appears to confirm that the White House changes had been made. The ANPR included conclusions that differed starkly from those listed by the *Journal* and congressional committees. For instance, the ANPR states that the "net present value to society could be on

the order of $340 to $830 billion."

Despite the Supreme Court ruling that the administration has the authority to regulate greenhouse gas emissions, the administration continues to deny the Clean Air Act should be used. Unlike the original draft, the ANPR was accompanied by 85 pages from other department secretaries aimed at attacking the act and included no finding of endangerment or regulatory recommendations. The Department of Energy called the act a flawed vehicle for regulating greenhouse gas emissions, stating that it was "unilateral and extraordinarily burdensome."

The ANPR marked the opening of a 120-day public comment period. EPA is soliciting views on the current state of climate science, regulatory options for curbing greenhouse gas emissions, and the appropriateness of developing greenhouse gas regulations under the authority of the Clean Air Act. Markey called the ANPR "a plan for no-action." Markey's committee asserts that the White House is handing off the responsibility of addressing urgent emissions regulations tasks to the next administration due to special interest influence.

The release is highly indicative of a larger struggle between appointed officials and agency career staff. In his comments on the ANPR, EPA Administrator Stephen Johnson, who had initially supported the original draft findings, referred to the Court decision, stating, "At this point, it is impossible to simultaneously address all of the agencies' issues and continue to respond to our legal obligations in a timely manner."

Although EPA is accepting comment on the ANPR, the content of the notice was immediately condemned by senior White House officials. Susan Dudley, head of the White House's regulatory clearinghouse, the Office of Information and Regulatory Affairs, said the policy "cannot be considered Administration policy or representative of the views of the Administration." Other letters of disapproval came from the White House Council of Economic Advisors and the Office of Science and Technology Policy, the Small Business Administration Office of Advocacy, and the White House Council on Environmental Quality.

The Vice President's Black Marker

A July 18 report released by the Select Committee indicated that departmental criticism was at the behest of Vice President Dick Cheney's office. According to the committee, documents obtained by subpoena and further testimony revealed that pressure from the oil industry, most notably ExxonMobil, drove the administration's decision to reject the EPA's pre-ANPR recommendations and findings, ultimately explaining Johnson's reversal.

Evidence of alterations by the vice president's office is indicative of a larger pattern of high-level administration officials exercising influence over expert recommendations by withholding information. *The Washington Post* recently revealed that the vice president's office was responsible for cutting statements regarding the health risks of climate change from the October 2007 congressional testimony of Dr. Julie Gerberding, director of the CDC. While it had been known that the testimony was altered, the public was not aware that the

interference had come from so high in the administration. The vice president's office removed sections of the original testimony that declared climate change a serious public health concern due to its influence on the spread of disease. The final testimony lacked any such statement.

Implications of Denial and Delay

These incidents indicate a behavior of censorship targeting the scientific community and the government's career staff. One would think that with such cross-agency expert opinions behind the endangerment findings and climate change science, the administration would act quickly to seek out and implement policy changes rather than hide science behind a cloak of secrecy. Sen. Barbara Boxer☼ (D-CA) said of the administration's actions, "This means that the Clean Air Act, signed by Richard Nixon and carried out by every President since, has been shredded by President Bush, who will go down in history as the first president to so gravely endanger the health and safety of the American people."

EPA and Union Agree on Process for Reopening Libraries

In response to a federal arbitrator's decision in February, the U.S. Environmental Protection Agency (EPA) and the American Federation of Government Employees (AFGE) recently signed a memorandum of agreement (MOA) establishing procedures for the reopening of recently closed EPA libraries and bringing the union to the planning table for any future changes to the library network.

The agreement, which takes effect upon review by the head of EPA or within 31 days of its July 10 signing, addresses some of the concerns raised by Congress and watchdog groups over EPA's library plans.

In 2006, the EPA closed libraries in three regional offices and its Washington, DC, headquarters in a purported effort to reduce costs by up to $2 million. The closings included the specialized Chemical Library located in Washington, DC. EPA also reduced operating hours and public access to several remaining libraries. The closings generated substantial controversy and opposition within Congress and among EPA staff, as well as a highly critical report from the Government Accountability Office (GAO). Congress ordered the reopening of the libraries and appropriated $1 million to that goal in December 2007.

The EPA's network of libraries provides the public and EPA staff with technical information and documentation used in enforcement of regulations and the tracking of health risks associated with various chemicals. The scientific information held in these libraries is used in the development and refinement of health and safety rules and regulations by the EPA and state and local governments. Much of the material is unique to the EPA and is not available elsewhere.

The MOA establishes the American Federation of Government Employees, Council #238 as a negotiating participant in any changes to EPA library network operations. The agreement

draws heavily on the EPA's March Report to Congress, outlining how EPA would use the $1 million appropriation to reopen the libraries. The agreement expands upon the agency's plan and elaborates on several parts.

The libraries are still scheduled to reopen by Sept. 30. Each location will be equipped with computer workstations for EPA staff and the public and will be staffed by trained librarians. Libraries must have "appropriate" shelving, space for microfilm and microfiche equipment, and "reasonable square footage" to meet the users' needs. Additionally, space must be provided in regional libraries for local and region-specific environmental materials.

Although several of the concerns expressed by watchdog groups are mentioned in the agreement, many remain unaddressed or unclear. Beyond inclusion of the employee union, there is no mention of additional stakeholder input in the planning process for the library network. The exact amount of physical space and other resources that will be allotted to the libraries is not clear, and the plans for digitizing the library materials remain uncertain. In June, Public Employees for Environmental Responsibility (PEER) reported that the EPA's plans for reopening the libraries provided significantly less space for the remaining materials, and, in the case of the Chemical Library, would amount to just one six-shelf bookcase housed in a 150-square-foot space.

The agreement supports EPA's decision to consolidate the Washington, DC, Headquarters Repository and the Chemical Library into one unit overseen by the Office of Environmental Information (OEI) and the Office of Prevention, Pesticides, and Toxic Substances (OPPTS). Public interest groups have raised concerns about the potential for political interference in library operations resulting from control by the OEI, which is headed by a political appointee. The new inclusion of the employee union in the planning process may serve to address the concerns of stakeholders like PEER and other groups.

The MOA also creates a six-member Union Management Advisory Board, with equal representation by the union and EPA management. The Advisory Board will review and make recommendations on the operations and development of the library network. The board will conduct a formal needs assessment of the library network and develop recommendations for its strategic direction. The EPA's Office of Environmental Information will review and "seriously consider" the Board's recommendations. The Board's first meeting will be within 90 days of the enactment of the MOA. The union and EPA also agree to collaborate to achieve "balance and cost efficiency" when considering the structure of the library network.

EPA will report within two weeks of the MOA's enactment on the status of its efforts to digitize the library holdings. The agency has agreed to report on digitization every three months after this initial report for the next two years, and then annually.

The American Federation of Government Employees played a significant role in the effort to reverse the decision to close the libraries. In 2006, the union filed a grievance because EPA refused to negotiate with the union over the library closures and reduction in library services. The union sought arbitration to resolve the dispute, which was refused by EPA. In February

2007, AFGE filed an Unfair Labor Practice (ULP) charge with the Federal Labor Relations Authority (FLRA) because the EPA would not select an arbitrator. In May 2007, the FLRA found merit with the union's ULP, concluding that EPA had committed an act of bad faith by not selecting an arbitrator. This decision pressured EPA into agreeing to the selection of an arbitrator. In September 2007, the Agency and union presented their cases to the arbitrator.

In February 2008, the arbitrator ruled against EPA, determining that EPA violated the Master Collective Bargaining Agreement with AFGE and ordering EPA to negotiate with the union on any library network reorganization. The MOA completed on July 10 is the culmination of weeks of negotiations between AFGE and EPA and comes more than two years after the EPA began closing libraries.

House Decides Saving E-mails is a Good Thing

The White House has threatened to veto an already weak bill targeted at preserving electronic records, despite legal action and recommendations from the Government Accountability Office (GAO) on the need for such accountability. On July 9, the House passed the Electronic Communications Preservation Act (H.R. 5811) by a veto-proof margin of 286-137. While targeted at the White House, this legislation will have an impact throughout executive branch agencies.

Under current law, federal agencies have broad discretion to determine how electronic records, such as e-mail, are preserved. This flexibility, however, has led to a number of recent problems, including the loss of e-mails due to poor archival management systems and the use of outside accounts to conduct federal business. The legislation, sponsored by Reps. Henry Waxman (D-CA), William Lacy Clay (D-MO), and Paul Hodes (D-NH), seeks to solve such problems by charging the Archivist of the United States with the responsibility of setting uniform standards for the preservation of electronic records.

The investigation into the leak of CIA operative Valerie Plame's identity first uncovered the loss of White House emails. Citizens for Responsibility and Ethics in Washington (CREW) filed a request under the Freedom of Information Act to discover the extent of the problem, and in May 2007, filed suit against the White House Office of Administration for not complying with the request. The National Security Archive followed with a September 2007 suit against the White House seeking the preservation and restoration of millions of e-mails. Court filings by the White House revealed that the previous administration's electronic recordkeeping system was abandoned without implementing an adequate replacement for years, which resulted in the loss of approximately 10 million e-mail records. On June 16, U.S. District Court Judge Colleen Kollar-Kotelly dismissed CREW's suit, ruling that, despite having responded to FOIA requests for years, the Office of Administration is not an agency and therefore is not subject to FOIA. CREW is appealing the decision.

Also in 2007, a congressional investigation into the firing of eight U.S. attorneys discovered that the White House had used Republican National Committee (RNC) e-mail accounts for

some official business. The RNC regularly deletes e-mail from its servers and is not subject to the Federal Records Act. As a result, at least four years of e-mails sent through the RNC from White House senior adviser Karl Rove have been lost. Over the course of administration, approximately 50 White House officials have received such RNC e-mail accounts.

On July 8, the day before the House passed H.R. 5811, the White House issued a Statement of Administration Policy about the bill. The administration argues that H.R. 5811 would create a costly and inefficient recordkeeping system. It suggests that, "Congress should reconsider whether mandating that all government e-mail records be preserved in electronic form is consistent with the greater goals of the Federal Records Act."

The Congressional Budget Office (CBO) has estimated that implementing H.R. 5811 would cost $13 million in 2009 and approximately $155 million over five years. However, it should be noted that the current search and review process for documents kept in paper form is also a costly burden on the government, one that could be reduced with improved management of electronic records.

A number of open government advocates were disappointed in the White House response to the bill. Some noted that the White House reluctance to support the bill would have grave implications for accountability. National Security Archive director Tom Blanton commented, "What is most shocking is that if anyone at the White House was deleting their e-mails during the invasion of Iraq, those e-mails are not on any back-up tapes."

The goal of H.R. 5811 is supported by a June Government Accountability Office (GAO) report, which recommends that the National Archive and Records Administration (NARA) take stronger oversight and enforcement measures to see that electronic records are properly preserved under the Presidential Records Act and the Federal Records Act. The GAO report also criticized the recordkeeping practice used by many agencies, including the Department of Homeland Security, of "print and file" rather than electronic archiving. The report found the paper archiving process to be "unreliable."

While H.R. 5811 takes important steps toward addressing current problems, it also seems to be a continuation of a pattern of making strong plans for better electronic recordkeeping, with little follow through. In 1998, NARA endorsed the Department of Defense (DOD) electronic records management design for software applications (DOD 5015.2-STD), meaning that it officially recommended the DOD records management applications for agency use. Little has been done since to create a standardized system or to promote standing recommendations. The bill grants NARA 18 months to establish minimum functional requirements and software certification.

Patrice McDermott of OpentheGovernment.org stated in testimony to Congress that "the blame in terms of compliance falls most squarely on NARA, which ... has a statutory obligation to promulgate standards, procedures, and guidelines."

Life's Value Shrinks at EPA

An Associated Press (AP) investigation released July 10 showed that the U.S. Environmental Protection Agency (EPA) has been devaluing human life when it prepares cost-benefit analyses for new regulations. Federal agencies such as EPA use the life value, an inaccurate statistic, to help them determine whether a proposal's benefits will outweigh compliance costs to industry.

The AP investigation found EPA's most recent life value, $6.9 million, to be about $1 million lower than it was five years ago. According to AP's Seth Borenstein, "[I]n 2004, the agency cut the estimated value of a life by 8 percent." Then, in a May 2008 regulation for train and ship pollution, EPA failed to adjust the value for inflation. "Between the two changes, the value of a life fell 11 percent, based on today's dollar," AP says.

When preparing to release a proposed or final rule, EPA counts as many of the potential benefits as it can, such as reduced incidences of asthma attacks, averted toxic spills, or lives saved. The agency also estimates the costs that will be levied upon industries expected to comply with the new policy.

In order to compare costs and benefits on the same scale, EPA translates benefits into dollars. Since lives saved are the greatest benefit of regulation, they also become the benefit of the highest value after the so-called monetization.

EPA uses a figure called a Value of a Statistical Life (VSL) to assign a dollar value to each life it expects a regulation will save. Technically, the VSL approach does not value a human life but rather a "statistical life." The benefit to society, which is monetized in the approach, represents a reduced risk of death for a population, not the certainty of avoiding death for any given individual.

But for decision making purposes, there is little difference. When it's time to study the potential effects of a regulation, EPA estimates the number of lives the regulation will save, then multiplies that figure by the VSL.

EPA is not the only federal agency to use a VSL, but the statistic is not consistent across the federal government. Although EPA has been the subject of criticism in the wake of the AP investigation, its sinking VSL is still higher than that of most other agencies.

In March 2008, the U.S. Consumer Product Safety Commission used a life value of $5 million in a proposal to reduce the risk of furniture fires. In a September 2007 Department of Homeland Security proposal to expand air travel security, the U.S. Customs and Border Patrol estimated life-saving benefits using two separate life values: $3 million and $6 million. New guidance from the Department of Transportation (DOT), sent to DOT subagencies in February, sets a VSL of $5.8 million for current and future transportation safety proposals.

One of the most common ways to distill market data into a VSL is to use so-called willingness-to-pay measures. In the willingness-to-pay approach, economists measure wage differences

among industries of varying risk. For example, if an individual requires a higher wage to find employment as a firefighter, rather than as an administrative assistant, at least part of that wage increase must be due to demand for compensation in the face of a higher risk of death, analysts believe.

But why do regulators feel compelled to use VSL in the first place? Agencies must comply with the analytical requirements put in place by the White House Office of Management and Budget (OMB). President Bill Clinton's Executive Order 12866 says, "Each agency shall assess both the costs and the benefits of the intended regulation." The Clinton White House also issued a memo on how costs and benefits should be assessed, including guidance on using VSL. Prior to the Clinton order, previous administrations had their own policies for mandatory cost-benefit measurements.

Under President George W. Bush, cost-benefit analysis's importance has expanded. The Office of Information and Regulatory Affairs (OIRA), an OMB office responsible for reviewing and approving regulations, has used its position as regulatory gatekeeper to expand the role of cost-benefit analysis as a regulatory decision making tool.

Under the Clinton order, OIRA reviews agency regulations before they can be proposed, and again before they can be finalized. Bush's OIRA has placed even greater significance on the quality and conclusions of agency cost-benefit analysis by providing greater detail on how to conduct cost-benefit analysis and elevating its importance in a January 2007 executive order. If monetized costs and benefits cannot prove a proposal will yield a net economic gain to society, the proposal may not clear OIRA review.

For example, OIRA recently rejected an EPA proposal because EPA's cost-benefit analysis showed compliance costs may outweigh benefits once the proposal takes effect. The rule would have established a national program for the recycling of pesticide containers and is widely supported by the pesticide industry and state environmental administrations. But in a July 3 letter, OIRA administrator Susan Dudley sent the proposal back to EPA for reconsideration, saying the rule would be too costly and that the cost-benefit analysis did not adequately assess alternatives to EPA's proposal.

Although agencies must assess costs and benefits and attempt to monetize lives saved to satisfy White House requirements, the laws passed by Congress sometimes prohibit regulators from even considering the conclusions of the economic studies. For example, the Clean Air Act prohibits EPA from considering economics when setting national air pollution standards. Instead, the Act mandates EPA only consider factors related to public health based on the latest and best available scientific research. Nonetheless, EPA prepares a cost-benefit analysis, and uses VSL, when proposing new air pollution standards.

It remains unclear how OIRA resolves conflicts with laws mandating standards other than cost-benefit analysis, such as use of best available technology or putting safety first. However, there are cases where it appears that cost-benefit considerations trump statutory standards.

Despite the drawbacks of the VSL approach, for now, agencies will have to live with it. If agencies failed to monetize lives saved — the greatest benefit of public health and safety regulations — their proposals might not pass the White House's cost-benefit litmus test.

Congress Votes to Reauthorize Administrative Conference of the United States

The House voted July 14 to reauthorize the Administrative Conference of the United States (ACUS) by accepting an earlier Senate-passed bill. The bill now moves to the White House, where President Bush is expected to sign the legislation. ACUS was a small government agency, abolished in 1995, that advised Congress on reforms to administrative and regulatory processes and saved the government millions of dollars over its life.

ACUS was created in 1968 as an independent agency with a small staff assisted by outside experts in administrative law, government processes, judicial review and enforcement, and agency regulatory processes. The conference had a reputation for producing high-quality, independent, nonpartisan analysis and is credited with issuing more than 200 recommendations, many of which were implemented, as well as a variety of reports and studies on how to improve government.

ACUS was dismantled in 1995 as part of the new Republican agenda to reduce the size of government. At the time, the ACUS staff numbered approximately 20, and its budget was about $1.8 million, according to a July 16 article in BNA (subscription). Although estimates of the savings achieved from implementing ACUS recommendations are not well documented, at the time the agency was abolished, there were estimates that some recommendations saved millions of dollars from just a few program improvements.

Congress initially reauthorized ACUS in 2004 but failed to appropriate any funding for the conference to reorganize and begin work. That authorization expired in September 2007. The current reauthorization effort began in 2007, when Rep. Chris Cannon☼ (R-UT) introduced H.R. 3564. The bill passed the House on Oct. 22, 2007, but the Senate did not take any action on the bill until June of 2008.

According to the BNA article, the bill "also enjoyed bipartisan support in the Senate where it was pushed by Sen. Patrick Leahy☼ (D-VT), chairman of the Senate Judiciary Committee, and Sen. Arlen Specter☼ (R-PA), the Judiciary Committee's ranking member." Sen. Tom Coburn☼ (R-OK) introduced an amendment to the House bill that extended authorization of appropriations for FY 2009 through FY 2011. The amendment was accepted by the Senate on June 27 and sent back to the House, which gave its approval a few weeks later.

The bill that is headed to the White House authorizes appropriations of $3.2 million each year. BNA reports that Cannon and Rep. Linda Sanchez☼ (D-CA), one of the co-sponsors of the bill, are trying to secure appropriations in this Congress. Cannon was the chair of the Commercial and Administrative Law Subcommittee of the House Committee on the Judiciary in the 109th

Congress; Sanchez is the current chair.

However, current disagreements in Congress between the political parties and between Congress and the White House put the ACUS appropriations at risk, even with widespread bipartisan support for the agency. Few appropriations bills are expected to be passed in the House and the Senate. The result of the appropriations process this election year is likely to be a continuing resolution to keep government operating until a new president takes office. An alternative might be to extend the continuing resolution for the entire fiscal year, giving the new president and a new Congress room to begin the next budget year's fiscal cycle. Although any continuing resolution could contain the necessary appropriations language to fund ACUS, especially given its broad support, Congress may seek to fund only ongoing government activities.

The recommendations developed by ACUS during the years it operated are available online at Florida State University's College of Law ABA Administrative Procedure Database.

Appropriations Breakdown Threatens Federal Investments

As the FY 2009 appropriations process grinds to a halt, a new OMB Watch analysis of the past nine fiscal years reveals that the nation's priorities are better served when Congress and the president work together to complete the annual appropriations process. Congress's abandonment of the FY 2009 appropriations process increases the risk that the resources critical to vital government supports will be further constrained as both sides of the aisle simply refuse to work toward agreement on FY 2009 appropriations legislation.

The analysis looked at a sample of health, education, and labor programs and found that those programs received funding increases when individual appropriations bills are passed by Congress and signed by the president. However, these same programs are cut when Congress and the president rely on consolidated appropriations ("omnibus" bills) because they cannot enact specific appropriations bills.

In the nine fiscal years — FY 2000 through FY 2009 — consolidated appropriations were used in six to fund the operations of most non-defense governmental programs and operations. Looking at a random selection of 12 labor, health, and education programs for those years shows that they were cut, on average, by 0.5 percent (see table below). When adjusting for inflation, those programs were cut by 3.5 percent. However, in the three fiscal years in which all of the appropriations bills were signed into law, those programs saw their funding increased by 17.8 percent, or 14.9 percent after adjusting for inflation.

The Department of Defense was the only federal agency to see its funding approved as a stand-alone bill in all nine years. From FY 2000 to FY 2008, the Pentagon saw its funding increase from $287.2 billion to $600.9 billion. After adjusting for inflation, the Defense Department averaged annual increases of 7.5 percent.

Changes in Funding for Selected Labor, Health, and Education Programs, FY 2000 - FY 2008 *(percent)*		
Program	**Funded Through Consolidated Appropriations**	**Funded Through Individual Bills**
Adult Employment and Training Activities	-15.9	93.5
Dislocated Worker Employment and Training Activities	-11.0	38.7
Community Service Employment for Older Americans	0.0	-2.4
Maternal and Child Health Block Grant	-3.5	-2.9
Healthy Start	-4.7	0.2
Preventive Health and Health Service Block Grant	-6.8	-5.7
Community Services Block Grant	-2.0	4.9
Head Start	-4.8	18.9
Child Care and Development Block Grant	-0.3	19.7
WIC (Special Supplemental Nutrition/Women, Infants and Children)	3.5	0.6
Even Start	-10.0	1.8
Education for Homeless Children	1.3	18.3
Pell Grants	10.2	7.9
Average	-3.4	14.9
Department of Defense	*N/A*	7.5

It is how programs are funded (consolidated appropriations or regular appropriations bills), not which party controls government, that impacts whether funding for the programs above is increased or cut. Every year in which an omnibus spending bill was passed to fund the government for the entire year (FYs 2000, 2003-2005, 2007, and 2008), the programs saw a reduction in funding. Of the three years that were not financed through an omnibus measure (FYs 2001, 2002, and 2006), only two saw an appropriations process that boosted funding for the programs.

In all of the years, a Republican was president, but party control of Congress varied. Republicans controlled the House in FYs 2001, 2002, and 2006. (In calendar years 2000, 2001, and 2005, they determined FYs 2001, 2002, and 2006 spending levels.) But Republicans shared control of the Senate with Democrats when funding bills for FY 2002 were signed into law. In 2007, Democrats controlled both houses of Congress, but they passed a consolidated appropriations bill that reduced the programs' funding by 8.3 percent.

It is the president who seems to wield considerable power over the appropriations process. Without the two-thirds majority necessary to override a presidential veto, Congress risks playing a game of fiscal chicken with the president. In 1995, a Republican Congress and a Democratic president could not agree on appropriate funding levels, and without the necessary spending bills signed into law, the government ceased most day-to-day operations for several weeks. The public overwhelmingly sided with Democratic President Bill Clinton over GOP Senate Majority Leader Bob Dole (R-KS) and House Speaker Newt Gingrich (R-GA). Both Democrats and Republicans apparently learned the same lesson from that episode: better to submit to the president's demands than risk a similar political train wreck. This political calculus can explain why, in 2007, Democratic leadership in the House and Senate approved a continuing resolution (CR) for FY 2008 that called for an appropriations "top-line" funding level identical to the President Bush's budget request — only $22 billion below that of the congressional budget resolution.

There are additional disadvantages when the normal appropriations process breaks down. If Congress and the president cannot agree on spending levels before the end of the fiscal year (Sept. 30), Congress must pass a CR to fund government operations until spending bills for the remainder of the year can be enacted. Because continuing resolutions typically either "flat fund" (i.e., keep a program's funding for the new year at the same level as the current year) or reduce spending on existing programs, new programs may end up not being funded at all. Consolidated spending bills, on the other hand, can increase funding for specific programs by adjusting spending levels for inflation and population growth. The result of employing CRs is that for part of the fiscal year — or in the case of FY 2007, an entire fiscal year — programs are deprived of a certain amount of funding that Congress intended for them to spend. On July 9, the Senate Appropriations Committee added a provision to the Transportation-HUD FY 2009 appropriations bill that would transfer $8 billion from the General Fund to the Highway Trust Fund to ensure adequate funding for the nation's transportation's needs. This funding shift may not be continued in an anticipated FY 2009 CR, because the provision simply did not exist in FY 2008 and therefore cannot be continued.

Another disadvantage is that non-spending policy provisions included in individual funding bills may not be included in a CR. For example, both the House and Senate Appropriations Committees have both approved language that would effectively end the IRS's wasteful private debt collection program by zero-funding it. However, because controversial policy changes are unlikely to be tucked inside must-pass spending legislation like a CR or consolidated appropriations bill, the problematic program will likely continue to operate for at least another year.

At this point, most in Washington have acquiesced to the idea that appropriations bills will not be completed before the start of the new fiscal year on Oct. 1. Like any other year where a CR will be used, the breakdown in the current appropriations process will create difficulties at federal agencies in planning staffing levels, managing program resources, and continuing to implement federal programs. The White House recently admitted as much in their pleas for Congress to enact a Department of Defense spending bill before they recess for the year.

This political breakdown also comes at a difficult time for the nation's economic condition. As the country's housing values have plummeted and state tax revenues have shrunk, important infrastructure and human needs investments have been pared back at the state level. Most states have a constitutional requirement to pass a balanced budget each year, and they cannot run deficits to continue important investments during difficult economic times. As the Center on Budget and Policy Priorities has documented since the beginning of the year, struggling state budgets exacerbate economic hardship, usually at exactly the point when help is needed most.

Although the president has yet to officially threaten a veto, his adamant insistence in 2007 that Congress hew to his budget's top-line figure seems to indicate that he will take a similar stance this year. Yet because President Bush will leave office in January 2009, Congress will have a new partner with whom to bargain for their preferred spending levels — a negotiation their actions show they would prefer. While a partial CR may be all but inevitable, federal programs face a more favorable budgeting environment should the next president be willing work with Congress and sign into law the 12 appropriations bills as prescribed by regular budget process. The ensuing uncertainty, however, will continue to limit the resources federal employees will have to implement federal priorities.

Hill Briefing Addresses Impacts of Counterterrorism Measures on Nonprofits

On July 14, Grantmakers Without Borders and OMB Watch released a paper, *Collateral Damage: How the War on Terror Hurts Charities, Foundations, and the People They Serve*, and hosted a panel discussing the topic. Six experts all agreed that shortsighted, undemocratic policies are stifling free speech, constraining the critical activities of the charitable and philanthropic sectors, and ultimately impeding the fight against terrorism. OMB Watch and Grantmakers Without Borders were lauded by many speakers and attendees for drawing attention to this issue.

At the briefing, Kay Guinane, Director of Nonprofit Speech Rights at OMB Watch, recognized nonprofits and charities as "a key to helping democracy." She noted that Grantmakers Without Borders and OMB Watch collaborated to write the paper because very little public attention has been paid to how charities and foundations are affected by counterterrorism laws. The public mostly only hears about how individuals are affected, such as when people are wrongly tagged on no flight lists or detainees at Guantanamo are not afforded due process, Guinane

said.

Guinane said that short-term solutions are now having harmful, long-term consequences. As a result of the "war on terror," the work of humanitarian aid, development, and conflict resolution programs is hindered at best, politicized at worst. She noted, "This counteracts the positive role charities and foundations can play in fighting the root causes of terrorism. Freedom of speech and association are undermined by policies that equate dissent with terrorism. Congress has not utilized its oversight powers to review counterterrorism programs and weigh the pros and cons of alternative approaches."

The six speakers included:

- David Cole, Professor of Law, Georgetown University Law Center
- Rob Buchanan, Director of International Programs, Council on Foundations
- Todd Shelton, Senior Director of Public Policy and External Affairs, InterAction
- Jim Harper, Director of Information Policy, Cato Institute
- Nimmi Gowrinathan, Director of South Asia Programs, Operation USA
- Lisa Graves, Deputy Director, Center for National Security Studies

Cole compared the current situation to the McCarthy era, stating that both are "driven by a fear of the unknown." He described the constitutional issues surrounding the government's expanding interpretation of what is considered prohibited "material support" of, or "otherwise associat[ing] with," designated terrorist organizations or individuals. For example, in the criminal prosecution of the Holy Land Foundation, the prosecution argued that by providing $12.4 million for the charitable activities of non-designated zakat committees in the West Bank and Gaza Strip, Holy Land gave indirectly to Hamas, a designated organization. Prosecutors argued that although the zakat committees were not designated organizations, the defendants "should have known" they were "otherwise associated" with Hamas.

Harper pointed out how illogical this anti-terrorism strategy is for charities. Due to bureaucracy, it is next to impossible to get off any terrorist watch list. He said the margin of security benefit is heavily outweighed by financial costs and loss of personal freedoms.

Buchanan spoke to the concerns facing the grantmaking community. He pointed out that the charitable mission of grantmakers counters terrorism, and foundations already effectively demonstrate due diligence. Buchanan also noted the frustrations the nonprofit community faces when dealing with the Department of Treasury. Treasury continues to assert that charities are a problem without providing any details, and it continues to stand by flawed guidance, such as its Anti-Terrorism Financing Guidelines, which have been called unworkable by many in the charitable sector.

Shelton described concerns surrounding the U.S. Agency for International Development (USAID) plan to move forward with the implementation of a new Partner Vetting System (PVS). Under the proposed PVS, every organization that applies for USAID funding would have to collect and submit highly personal information to the U.S. government. The objective

is to ensure that neither USAID funds nor USAID-funded activities provide support to individuals associated with terrorism. However, Shelton pointed out practical problems with watchlists used for such vetting, as well as the danger such information sharing could create for aid workers, if they are perceived as agents of U.S. security and intelligence agencies. InterAction is a leader in the opposition to the PVS program.

Gowrinathan discussed on-the-ground impacts that organizations operating overseas face regarding these new counterterrorism policies. She said her organization tries to stay under the radar, out of the concern that publicizing the programs in conflict areas would place them at risk of being shut down. An environment of fear has impacted donor confidence, and her organization has experienced delays in funding due to ethnicity of donors. She also noted the danger associated with ambiguity in the PATRIOT Act, which has been reproduced by some other governments.

Graves noted problems with the definition of prohibited "material support" of terrorism and the fact that the only exceptions are for medicine and religious material. She said the same "association with" language Cole discussed puts peace organizations at risk to be placed on terrorist lists. She further discussed the chilling impact of surveillance of organizations that dissent and how spying on peace groups is a waste of money.

The panel and the paper raised the need for congressional oversight and action. Speakers argued that government unfairly characterizes nonprofits as conduits for terrorist funding and a breeding ground for aggressive dissent. Instead, government should recognize the nonprofit sector as a valuable ally in the war on terror and build policies that enable rather than hinder its work.

House and Senate Release Updated Lobbying Disclosure Guidance

On July 16, the House Clerk and Secretary of the Senate released updated guidance that applies to any organization that registers as a lobbyist under the federal Lobbying Disclosure Act (LDA), as updated by the Honest Leadership and Open Government Act (HLOGA). House and Senate leaders directed the Secretary of the Senate and the Clerk of the House to rewrite the guidelines in response to complaints about the original guidance.

HLOGA, passed in 2007, requires all individual lobbyists and lobbying organizations to disclose any campaign contributions of more than $200, connections to any political action committees, and expenditures for certain events that honor covered officials. The form to report such information, Form LD-203, was made available on June 30. The Secretary and Clerk originally issued updated LDA Guidance on May 29 to provide a number of examples of reportable expenditures. This interpretation for when lobbyists must report was criticized as extremely broad. For example, lobbyists had to report the fee involved if a "covered official" was simply in attendance at an event. This would have required a lobbyist who paid for a table at a charitable event to report the cost if a member of Congress appeared at the event, even if it

was a surprise appearance.

Legal counsel representing labor and nonprofit organizations who register under the LDA wrote July 8 to the Secretary and the Clerk regarding the LD-203 Contributions Reporting System and the new LDA guidance. They expressed concern that the new guidance "misinterprets" HLOGA, and will "chill ordinary interaction and association with Members of Congress and impose undue and unreasonable recordkeeping and reporting burdens on registrants and their employed lobbyists ... Members of Congress and other government officials frequently attend or speak at events that are sponsored or funded, at least in part, by entities that employ lobbyists, including policy forums, seminars, meetings, conferences, conventions and other events that have nothing to do with 'honoring or recognizing' the officials."

Under the guidelines, even a conference where a lawmaker made a speech could be interpreted as an event "honoring" that official. This could have ended up in not only exhaustive reporting, but could have also had an effect on those officials who wanted to participate in events.

In response to such concerns, the Secretary and the Clerk rewrote the guidelines as they pertain to LD-203, and now some events involving covered officials may not have to be reported on the form. Under the changes, an event does not "honor" or "recognize" a covered official when:

- A covered official acts as, and is listed as a speaker, but not an "honored" speaker
- The official is listed on event materials as "attendee" or "guest"
- The official is recognized as being in attendance
- The titled "The Honorable" is used in connection with the official's name at the event or in the event's materials
- The covered official is listed on the event materials or acts only as an "honorary co-host", but "honored co-host" would be considered to be honoring the official and would have to be reported

Lobbyists also do not have to disclose money raised for a charity that is not created or controlled by a lawmaker or that names the legislator as an "honorary co-host." Other changes include that buying a ticket or table at an event honoring a covered official would not be considered payment that has to be disclosed. However, it would need to be disclosed if the lobbyist is a sponsor or host of the event.

There has been some backlash in response to the new guidance, including accusations that the changes were made to create new loopholes for lobbyists' funding of events, particularly during political party nominating conventions. As the *Wall Street Journal* notes, "Nor will the new ethics rules clamp a lid on industry-paid merrymaking at Democratic and Republican nominating conventions this summer. The new guidance exempts companies from revealing their sponsorship of most parties at the conventions."

The deadline for filing LD-203 is July 30, and along with it, a filer must certify that he or she

understands and has complied with the Gift and Travel Rules.

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In This Issue

Consumer Product Safety Reform Clears Congress

Congress has approved a bill that will revamp the nation's consumer product safety net. The legislation reforms the Consumer Product Safety Commission (CPSC) to enable the agency to better enforce safety standards in a market dominated by cheap imports and requires new standards for dangerous substances like lead and phthalates.

After months of fits and starts, a conference committee of House and Senate leaders approved a package on July 28, bringing negotiations on the Consumer Product Safety Improvement Act (H.R. 4040) to a close. The final version of the bill passed the House on July 30 in a 424-1 vote. The bill passed the Senate the next day in an 89-3 vote.

The act will infuse CPSC with much-needed resources. A recent OMB Watch report found that resource shortfalls have left the agency hobbled and unable to police a growing marketplace flooded with imported goods like toys and all-terrain vehicles. The act will raise CPSC's budget to $136 million by FY 2014, nearly a 75 percent increase over current levels. However, the

increases must still be approved in the spending bills Congress takes up every fall.

Despite a significant increase in 2008 to $80 million, CPSC's budget is still lower than it was in the early 1980s. Budget shortfalls have translated into staffing cuts. CPSC's staff is 420, according to President Bush's most recent budget request — less than half of what it was in 1980. The act will require CPSC to increase its staff size to at least 500 by FY 2014.

One part of the bill bans certain phthalates, a class of chemicals found in a variety of plastic products, in children's toys. The provision bans three types of phthalates outright. Scientists have linked phthalates to reproductive and developmental abnormalities in fetuses and infants.

Three other phthalates would be banned temporarily pending further study. The phthalate provision in H.R. 4040 represents a dramatic shift in the federal government's approach toward regulating toxic substances. Usually, chemicals enter and stay on the market without regulation and are only pulled if scientists prove a definitive health risk. In this case, the banned substances will only be allowed back on the market if their safety is proven.

In a statement, OMB Watch Executive Director Gary Bass said, "The bill turns our usual system of chemical regulation on its head by requiring proof of safety, not proof of harm, an approach we strongly support."

The Act will also ban lead in children's products to trace amounts. Although consumers and lawmakers have known for years about lead's damaging effects on neurological development, CPSC does not limit the lead content of children's products, only paint and coatings.

The spate of recalls for lead-contaminated toys and children's jewelry in 2007 highlighted problems with both lead in paint and lead in other product components. The Consumer Product Safety Improvement Act will set a general ban on lead in children's products by requiring CPSC set a standard of 0.01 percent within three years. The act will also tighten the federal standard on lead paint to 0.009 percent from 0.06 percent.

Although the White House has said it disagrees with aspects of the bill, spokesperson Dana Perino indicated President Bush will sign the bill into law. "We still have a few concerns, but not enough that would keep us from signing the bill," Perino said at a July 31 press briefing. "So the President will sign [the bill] as soon as [Congress] can get it to us."

Changes Made by the Consumer Product Safety Improvement Act

	The Consumer Product Safety Improvement Act (H.R. 4040)	*Current laws and regulations*
Product Safety	**Phthalates** The act will permanently ban any children's products containing more than 0.1 percent of three specific types of phthalates: di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP).	Phthalates are not regulated by CPSC though some U.S. states have taken or are considering action. The European Union has banned phthalates in children's products.
	Lead The act will set a general ban on lead in children's products by requiring CPSC set a standard of 0.01 percent within three years. The act will also tighten the federal standard on lead paint to 0.009 percent. No general standard for lead exists. The current standard for lead paint is 0.06 percent.	No general standard for lead exists. The current standard for lead paint is 0.06 percent.
	All-Terrain Vehicles The act will require CPSC to adopt and enforce mandatory safety standards for four-wheel all-terrain vehicles.	Current safety standards are voluntary.
	Tracking Labels The act will require manufacturers, "to the extent practicable," to place tracking labels on children's products in order to help consumers identify the source of a product in the event of a recall or report of harm.	No tracking label requirement exists.
	Third-Party Testing The act will require third-party testing for imported children's products for compliance with U.S. safety standards.	Children's products must legally comply with safety standards, but certification is not required.
Enforcement	**Product Safety Database** The act will require CPSC create and maintain a "publicly accessible searchable database" containing "reports of harm relating to the use of consumer products" submitted by consumers, state and local health officials, health care providers, or others.	A database does not exist.
	Whistleblower Protections The act will extend to private sector employees protection against retaliation in the event an employee exposes violations of federal consumer product safety standards.	Sector-specific whistleblower protections do not apply to employees in most private consumer product firms.
	Civil Penalties The act will raise to $100,000 the civil penalty cap CPSC can fine a firm for a single violation.	The current civil penalty cap is $8,000.
	Criminal Penalties The act will allow CPSC to purse asset forfeiture in criminal cases and remove the requirement that violators knowingly violate federal consumer product safety standards.	Directors, officers, or other agents of a firm must knowingly violate safety standards to be subject to criminal prosecution.

CPSC Reform		
	CPSC Budget The act will authorize a budget of $118 million for FY 2010, $116 million for FY 2011, $124 million for FY 2012, $132 million for FY 2013, and $136 million for FY 2014. These figures will still need to be approved during the annual appropriations process.	CPSC's budget for FY 2008 is $80 million. Its budget in FY 2007 was $63 million. Its budget in FY 1976 was $142 million, when adjusted for inflation.
	CPSC Staffing The act will require CPSC to maintain a staff of at least 500 employees by FY 2014.	CPSC's staffing level for FY 2008 is 420. Its staffing level in FY 2007 was 393. Its staffing level in FY 1976 was 1,067.
	Number of Commissioners The act will restore to five the number of commissioners at CPSC.	CPSC has a commissionership of three.
	Commission Quorum The act will allow CPSC to operate with a two-member quorum for one year.	CPSC has been unable to conduct formal business, including mandating product recalls, since January 2007 because of a commissioner vacancy. (Congress passed a law allowing CPSC to temporarily operate, from August 2007 to February 2008, with a two-member quorum.)
	Expedited Rulemaking The act will allow CPSC to begin writing new regulations without publishing an Advanced Notice of Proposed Rulemaking, an extra comment period that takes place before an official regulatory proposal.	CPSC must publish an Advanced Notice of Proposed Rulemaking.
	Industry-Sponsored Travel The act will forbid CPSC commissioners from accepting gifts of travel from industries subject to CPSC regulation.	Former CPSC chair Hal Stratton and current acting chair Nancy Nord were discovered to have received $60,000 in gifts of travel, much of it from the consumer product industry.

Secret Risk Assessment Rule Aims to Halt Worker Safety Protections

The Bush administration is trying to rush through a Department of Labor (DOL) draft rule to require new worker safety standards to be based on a new risk assessment process that would potentially tie the hands of future administrations. The new rule was sent to the Office of Information and Regulatory Affairs (OIRA) for review in secret, violating the process OIRA has insisted agencies use for rulemaking.

The new rule would require the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) to alter their current risk assessment approaches and to take an additional step in the rulemaking process before a workplace safety

rule can be proposed. The current process is the outgrowth of the legal requirements Congress put in place decades ago to ensure these two agencies adequately safeguard worker health.

The new rule is the first attempt by the administration to put a new risk assessment process in place since a failed effort to change risk assessment in 2006. Then, OIRA administrator John Graham put forward a draft risk assessment bulletin that would have imposed a one-size-fits-all process on all regulatory agencies. The draft bulletin called for some of the same changes the new rule contains but was vigorously opposed by the scientific community and public interest groups, including OMB Watch. The Graham proposal was reviewed by a panel of the National Academy of Sciences (NAS). In the report issued by NAS in January 2007, the panel called the draft bulletin "fundamentally flawed" and urged the administration to withdraw it. The draft bulletin was withdrawn and replaced in September 2007 with a statement of risk assessment principles for agencies to follow.

The Bush administration's proposed rule would change the process in several ways. First, it would require OSHA and MSHA to collect data from each regulated industry sector and develop profiles of the industries and their job categories. Second, among the numerous ways the agencies could collect this information, they would now be required to issue an Advanced Notice of Proposed Rulemaking (ANPRM) as one method. The requirement to use an ANPRM can add years to the rulemaking process and in many instances would be completely unnecessary. These two changes have the potential to add years to the regulatory process just by the sheer quantity of information to be collected and analyzed.

Third, from these new profiles, which would have to be continually updated as the industries supply more information, the agency would have to calculate new assumptions about the numbers of years workers stay in their jobs in each industry. The draft rule states, "In the Department's view, customizing the number of hours, days, weeks and years attributed to a 'working life,' on an industry-specific basis, most closely hews to Congress's intent in directing the Secretary to set standards based upon the 'best available evidence' and upon consideration of the 'latest available scientific data.'" But the new calculation would focus on the *average number of years* a worker stays in that industry. The result would be a less protective standard for those who spend more than the average number of years in an industry.

Fourth, the rule would require the agencies to use a central estimate and disclose the endpoints of the risk estimates used when producing a protective standard. Again, this would provide a less protective standard, especially for sensitive populations such as older workers. NAS criticized the use of central estimates in OMB's draft risk assessment bulletin. In its report, NAS wrote, "Those numerical quantities are meaningful only in the context of some distribution that arises when variability and uncertainty are taken into consideration. A central estimate and a risk range might be misleading in situations when sensitive populations are of primary concern."

Fifth, the rule would require the agencies to quantify the level of uncertainty, if possible, a practice the NAS panel also criticized. According to the NAS report, there aren't good analytical tools to conduct uncertainty analyses, and the use of them may actually lead to lower

quality risk assessments. OSHA and MSHA would have to spend considerable time developing these analytical approaches in the absence of reliable methods and across a range of issues.

Analyzing and quoting from the proposed rule is quite an achievement because of how secret this rulemaking process has been. DOL did not disclose the proposed rule in any of the department's regulatory agendas or plans that agencies are required to develop and disclose to the public twice every year. It first appeared July 7 on OIRA's website as a rule OIRA was reviewing but was identified only by its title, *Requirements for DOL Agencies' Assessment of Occupational Health Risks*. It was developed not by the workplace safety and health experts within OSHA and MSHA, but by political appointees at the highest levels of DOL, the regulatory policy officer and his staff. Knowledge about the contents of the proposed rule is purely a result of agency whistleblowers and intrepid reporters and investigators.

In addition, White House Chief of Staff Josh Bolten issued a memo May 9 to all agencies, directing that any new rules the agencies wish to finalize during this administration be proposed by June 1 and finalized by November 1. If DOL really is trying to rush this through the rulemaking process, it violates the White House memo (although the memo does not have the force of law and can be waived by OIRA at its discretion).

When President Bush issued changes in January 2007 to the executive order that governs the regulatory process, OMB Watch expressed fears that the new responsibilities given to regulatory policy officers (RPOs) would result in a direct line of reporting and regulatory control between the RPOs and OIRA, sidelining the agencies' experts. This rule appears to be an example of the backdoor, behind-the-scenes manipulation of the rulemaking process we feared would result from the enhanced powers given to RPOs.

On July 30, Rep. George Miller☼ (D-CA), chair of the House Education and Labor Committee, introduced H.R. 6660, which would prohibit the Secretary of Labor from issuing this specific rule. The bill follows a letter sent July 10 by Miller and Sen. Ted Kennedy☼ (D-MA) that called on Secretary of Labor Elaine Chao to brief them on the content of the rule and the reasons why DOL did not follow the procedural requirements for disclosing the rule. The proposed rule is currently under review at OIRA. There is no word yet on when the Labor Department will propose the rule or whether the agency might try to directly issue a final rule.

Voter Registration Barriers Challenged in New Mexico, at Veterans Affairs

Throughout the country, new rules on nonpartisan voter registration efforts are making nonprofit voter mobilization drives more difficult — and groups are fighting these rules. After the Department of Veterans Affairs' (VA) May 5 directive banning voter registration drives at veterans' facilities, a multi-front advocacy effort developed to get the VA to change its policy. Voting rights advocates also have been fighting state restrictions, including a New Mexico voter registration law.

The VA continues to assert that voter registration activities on its properties would be too partisan and interfere with their medical mission. Several secretaries of state have been pressuring the VA to allow voter registration drives at its facilities. Connecticut Secretary of State Susan Bysiewicz and Connecticut Attorney General Richard Blumenthal were prevented from entering a West Haven facility to help register voters and distribute information on the state's new voting machines. Bysiewicz was able to register 12 veterans outside the facility. According to the *New Haven Register*, they registered a 92-year-old vet. "There was nobody here to do this last year," said Martin Onieal, a resident of the VA center since 2007.

Afterwards, Bysiewicz requested that elections officials have access to the facilities to distribute voter registration materials and to instruct residents on the use of new voting machines. The request was rejected. According to an AlterNet article, VA Secretary James B. Peake said his agency would not allow registration drives unless "these efforts be coordinated through the VA Voluntary Service (VAVS) office at each VA medical center." The July 15 letter said, "This policy is the result of careful deliberation and consideration for the needs and rights of our patients, concerns about disrupting facility operations, and the need to ensure VA is not involved in partisan political activities."

On July 11, Washington Secretary of State Sam Reed and Bysiewicz announced a national bipartisan effort among secretaries of state to get the VA directive overturned. In a letter to Peake, the state officials assert that "voter registration drives have historically been a critical outreach tool for veterans in facilities to ensure that they get the opportunity to register to vote. Many veterans simply are not able to get out on their own, rendering registration much more difficult."

A July 18 press release from Bysiewicz's office stated, "Our next step is a final demand to the VA, which we are sending by letter today: allow legally required non-partisan voter registration drives, including both in-patients and outpatients, staff and visitors; permit voter education and demonstration of the new machines; lift unreasonable and restrictive restraints on access. If these demands are unmet by August 1, we will take appropriate action to fight for these veterans rights — just as they fought for ours — including potential action in court."

By July 18, 20 secretaries of state had signed on to the effort, representing Ohio, Minnesota, Vermont, Montana, Connecticut, Idaho, Rhode Island, North Carolina, New Hampshire, West Virginia, Maine, Kansas, Kentucky, Oregon, Iowa, Pennsylvania, Massachusetts, Missouri, Washington State, and the District of Columbia.

Meanwhile, four voting rights organizations called for the VA to change its policy. On July 21, the American Association of People with Disabilities (AAPD), Common Cause, Demos, and the League of Women Voters wrote to Peake urging the approval of future state requests to allow voter registration on VA property. The groups also sent letters to secretaries of states nationwide in conjunction with their state-based chapters, asking that they request the VA to designate its offices in their states as voter registration agencies.

Legislatively, the Veteran Voting Support Act has been introduced in the House (H.R. 6625)

and in the Senate (S. 3308). On July 30, the House Administration Committee approved the bill by voice vote, and it has now been referred to the House Veterans' Affairs Committee.

According to Senate sponsor Dianne Feinstein (D-CA), the measure would allow nonpartisan groups and election officials to provide voter information and registration information to veterans and require an annual report to Congress. In addition, the VA would have to assist veterans who choose to receive and use absentee ballots.

Shortly before the House adjourned for the August recess, Reps. Chris Murphy (D-CT) and Patrick Murphy (D-PA) offered an amendment to the VA appropriations bill to prevent the VA from spending taxpayer dollars to enforce its directive and obstruct voter registration at VA facilities. The amendment passed and was included in the final version of the appropriations bill. However, it is uncertain if this appropriations bill will pass in 2008, let alone the rider restricting the VA policy.

On July 27, the National Association of Secretaries of State (NASS) passed a resolution urging Congress to designate the VA as a registration agency under the National Voter Registration Act and to ensure that election officials have access to facilities to provide assistance.

The VA is not the only entity with a restrictive policy for voter registration activities. The Brennan Center for Justice, along with pro bono law firms, filed a lawsuit in Albuquerque challenging a New Mexico law that makes it difficult for groups to conduct voter registration drives. The law is similar to a Florida law that is also being challenged.

Voting rights advocates want a judge to overturn New Mexico's law. It requires that before registering voters, every volunteer or employee has to first pre-register and submit an affidavit to the state and, in some counties, go through an in-person, hour-long training session. The training is conducted only during business hours and only a few times each month. The law also limits organizations to 50 registration forms at a time. Completed registration forms must be returned to county or state officials within 48 hours, and any "intentional" violation of these rules may be punishable with a jail sentence. Most alarming, no extenuating circumstance, such as a flood or an earthquake, will excuse a failure to submit a completed form within the allotted time period, bringing along civil penalties of up to $5,000.

The lawsuit was filed in state district court on behalf of four organizations, the American Association of People with Disabilities (AAPD), the Federation of American Women's Clubs Overseas Inc. (FAWCO), New Mexico Public Interest Research Group (NMPIRG), and the Southwest Organizing Project (SWOP), which all typically register low-income, minority, disabled, and young citizens. The complaint requests that the 2005 law be declared unconstitutional and that the New Mexico Secretary of State be barred from enforcing it. The plaintiffs charge that the law restricts their ability to register new voters and threatens to block thousands of eligible New Mexico citizens from registering and voting. The lawsuit states, "These unduly onerous laws, regulations, and policies have chilled and continue to chill core political speech and association, and have forced Plaintiffs to seriously curtail or halt their

voter-registration activities."

"The law aggressively discourages civic organizations from helping New Mexico citizens to exercise their basic right to vote, and threatens voter registration drives across the state," Robby Rodriguez of SWOP stated.

Nonpartisan voter registration drives are one of the most important tools to get more citizens involved in the electoral process. Registering to vote should be made easier, not harder, and the role of nonprofit nonpartisan voter registration activities must be protected, not distrusted.

Maryland State Police Surveillance of Advocacy Groups Exposed

On July 17, the American Civil Liberties Union (ACLU) of Maryland disclosed documents revealing that state police engaged in covert surveillance of local peace and anti-death penalty groups for over a year during the administration of former Maryland Governor Robert L. Ehrlich (R). In response, House Majority Leader Steny Hoyer (D-MD) said he might support a Justice Department investigation into why this surveillance occurred. Rep. Bennie Thompson☼ (D-MS), chair of the House Homeland Security Committee, wrote to Department of Homeland Security Secretary Michael Chertoff requesting a full account of the surveillance actions and further information regarding the funds used.

The ACLU of Maryland was concerned that the Maryland State Police were hiding information on the surveillance of local peace activists. On June 12, it filed a lawsuit against the state police for refusing to disclose records in response to a public information request. Plaintiffs include the American Friends Service Committee, Jonah House, Baltimore Pledge of Resistance, Baltimore Emergency Response Network, and several individuals.

A June ACLU press release states, "Documents disclosed during a prosecution for disorderly conduct and trespass against two individuals arrested at a protest at the National Security Agency (NSA) in October 2003 indicated that a 'Baltimore Intel Unit' had been monitoring protestors from these groups as they assembled and traveled to the NSA for a protest in July 2004. In order to discover the identity of this 'intel unit,' and why the unit was monitoring their peaceful protest activities, the groups filed requests under the federal Freedom of Information Act (FOIA) with several federal agencies, including the NSA, in August of 2006."

The press release describes the 43 pages of summaries and computer logs. Maryland State Police's Homeland Security and Intelligence Division sent agents to infiltrate the Baltimore Pledge of Resistance, a peace group, the Coalition to End the Death Penalty (CEDP), and the Committee to Save Vernon Evans. The surveillance continued even though there were no reports of illegal activity and consistently indicated that no violent protests were being planned. Reports of the surveillance were also sent to at least seven federal, state, and local law enforcement agencies. The press release went on to say, "Agents from the Division monitored private organizing meetings, public forums and events held in several churches, as well as anti-

death penalty rallies outside the state's SuperMax facility in Baltimore and in Lawyer's Mall in Annapolis."

The ACLU of Maryland will be filing additional requests under the Maryland Public Information Act. It called on activists across the state to find out if their organizations have been spied on. The ACLU will work with groups that are willing to provide the names of key individuals who could be listed in surveillance records to document the full extent of any surveillance and will ensure that the targets have an opportunity to review the files that relate to them and have those files purged.

The *Washington Post* reported, "Then-state police superintendent Tim Hutchins acknowledged in an interview yesterday that the surveillance took place on his watch, adding that it was done legally."

Reaction to news of the surveillance was swift and negative. Hoyer's statement said, "While it is the job of law enforcement to protect the public and keep the peace, it is difficult to understand how non-violent peace activists and opponents of the death penalty constituted a threat to public safety. We need to understand why the monitoring of these and other citizens took place — and whether any federal funds were used in support of this program." Thompson said, "The politically motivated surveillance of dissident domestic groups that have neither a link to terrorism nor promote violence is ... a deplorable use of taxpayer funds." In addition, Maryland Gov. Martin O'Malley (D) announced an investigation to be led by civil rights attorney Stephen H. Sachs, working with State Attorney General Douglas Gansler and state police chief Col. Terrence Sheridan. The 30-60 day review is aimed at developing new intelligence guidelines.

IRS Directive Broadens Scope of Prohibited Web Links on Issues

On July 28, the Internal Revenue Service (IRS) sent a memo to revenue agents that contradicts earlier guidance relating to 501(c)(3) organizations' use of web links for issue advocacy. The memo indicated that web links may be considered prohibited intervention in elections, depending on their context, the number of clicks between a site and a partisan message on the linked site, and whether an organization has a position on an issue and links to candidates' positions.

IRS guidance in Rev. Rul. 2007-41 and Rev. Rul. 2004-6 indicated that an organization's track record of ongoing advocacy on an issue is a factor that demonstrates genuine issue advocacy, as opposed to prohibited electoral intervention. However, the July directive appears to state the opposite, saying that when a 501(c)(3) organization takes a position on an issue and also posts information on candidate positions on the same issue, it is "at risk of having intervened in a political campaign. The risk arises *and the case should be pursued*, even if the two elements are in separate parts of the organization's Web site, or if one element is on the Web site and the other is not." (emphasis added) This seems to say that the more central an issue is

to a 501(c)(3) organization's mission, the less right it has to address it publicly during election season.

The directive follows up on an April letter from IRS Exempt Organizations Director Lois Lerner that announced continuation of the Political Activities Compliance Initiative for the 2008 election cycle. In that letter, the IRS was extremely vague about treatment of web links to sites of unrelated organizations, saying only that it "will pursue the case if the facts and circumstances indicate that the 501(c)(3) organization is promoting, encouraging, recommending, or otherwise urging viewers to use the link to get information about specific candidates and their positions on specific issues." However, there are many legitimate reasons a 501(c)(3) organization might use such links, including online nonpartisan voter education guides.

The July directive addresses "whether material on a linked Web site is attributable to the section 501(c)(3) organization," saying the context and directness of links are major factors. No specific number of clicks is specified and the "context" is not defined, since "neither of these characteristics appropriately reflects the facts and circumstances in all cases."

However, the directive says the IRS will limit its investigations to cases involving links to sites of unaffiliated organizations, because of the implications of the U.S. Supreme Court case *Taxation with Representation v. Regan*. The decision upheld limits on the amount of lobbying 501(c)(3) organizations may engage in because they can have an affiliated 501(c)(4) entity that has no lobbying limits. This, the IRS said, "can complicate the analysis in this area."

The directive is unlikely to address criticisms in a June report by the Treasury Inspector General for Tax Administration that said IRS employees differently interpret the criteria for evaluating cases of alleged political intervention. It further points out the need for the IRS to develop bright-line rules that clearly delineate what is and is not permissible.

Pesticide Problems Go Unnoticed by EPA

The Center for Public Integrity (CPI) has discovered that two groups of common pesticides, generally considered to be "safer" chemicals, are responsible for one quarter of reported human pesticide poisonings, based on the U.S. Environmental Protection Agency's (EPA) own data. CPI spent several years demanding the release of the data through repeated Freedom of Information Act (FOIA) requests. A trade association representing the interests of the consumer specialty products industry denounced the report.

Report Findings

The CPI report, *Perils of the New Pesticides*, analyzes the number of reported human health problems, including severe reactions and deaths, linked to two families of pesticides, pyrethrins and pyrethroids, over the past decade. Pyrethrins are a class of chemicals derived from chrysanthemum plants. Pyrethroids have similar properties but are created synthetically.

Pesticides made with these chemicals are found in thousands of common household products such as flea and tick poisons, ant and roach killers, delousing shampoos, lawn-care products, and carpet sprays.

The data reveal that reported incidents of fatal, major, and moderate exposures to the two classes of pesticides increased 300 percent since 1998. There were 1,030 incidents reported to EPA in 2007 alone, up significantly from the 261 reported in 1998. Pyrethrins and pyrethroids accounted for more incidents than any other class of pesticide over the last five years. The EPA's reporting system receives up to 6,000 reports of pesticide exposures annually.

The CPI report concludes that the increase in reported health problems may be a result of increased use and popularity of pyrethrins and pyrethroids following the ban on residential use of another popular group of chemicals, organophosphates, which are thought to be more toxic. However, the EPA data show at least 50 deaths attributed to these supposedly safer classes of pesticides since 1992.

Similar data provided by the American Association of Poison Control Centers were compared to the results. The association's data also show a large increase in reported health problems linked to pyrethroid and pyrethrin exposure over the last decade, with instances increasing 63 percent from 1998 to 2006. Additional data from the association show that the number of hospital visits resulting from pyrethrin and pyrethroid exposures is increasing and approaching the level caused by organophosphate exposures at their peak in the early 1990s, according to the CPI report.

As a result of the investigation, the director of the EPA's Office of Pesticide Programs said the agency this year would begin a broad study of the human health effects of these chemicals and examine further any trends. According to CPI, the EPA originally had not planned to review the data until 2010.

Medical studies have suggested that people with ragweed allergies and those with asthma may be especially sensitive to developing skin or respiratory disorders following exposure to pyrethrins and pyrethroids. Children and infants are also more susceptible than adults to health problems, including neurological disorders.

The Food and Drug Administration currently requires warning labels regarding the risks to people with allergies or asthma on anti-lice shampoos containing these chemicals. CPI also reports that researchers are urging more scientific studies of the effects of the use of these chemicals, more specific warning labels, and, in certain situations, allowing only trained professionals to apply them.

Data Access and Improvement

CPI produced its analysis using EPA's Pesticide Incident Data System, an aggregation of more than 90,000 pesticide exposure incidents from 1992 through 2007. The data system has been regarded by right-to-know advocates as one of the most important databases to which public

access was restricted. The database made the 1999 Top Ten Most Wanted Government Documents list produced by the Center for Democracy and Technology and OMB Watch. After repeated efforts to obtain information under FOIA, the agency finally released the database in early 2008.

Along with the report, CPI has launched a new interactive online database where the public can search for incidences of pesticide exposures, creating the only online public access to the long-sought EPA data. Searches can be conducted by product name or chemical name, and by city, state, and type of exposure.

Most of the information is reported by pesticide manufacturers, who are only required by law to report all instances that they become aware of — such as through a lawsuit. This means many poisonings may go unreported to EPA. The data also do not include incidents of medical problems caused by long-term exposure to the pesticides, which are much harder to diagnose. Only incidents that were classified in the EPA database as unknown or adverse were included in the analysis.

The Consumer Specialty Products Association (CSPA) responded to the CPI report claiming that the report distorts the truth. According to a CSPA press release, the EPA data system, which CPI relied on, includes all incidents without validation or investigation. Thus, cases resulting from misuse, abuse, and exposures resulting from attempts at self harm such as suicides are included. According to CSPA President Chris Cathcart, "The basic premise behind the report — that incident data in its raw form is signaling a serious health threat from these ingredients — is fundamentally flawed. There was no evaluation by expert clinical and medical toxicologists to sort out incidents that, under further scrutiny by EPA's team of expert toxicologists and medical professionals, would have been excluded from the raw data set to allow for a meaningful analysis."

The Center for Public Integrity reports that in response to its inquiries, the EPA has begun reviewing how incident data are collected and analyzed. The director of the EPA's Office of Pesticide Programs announced that an EPA working group will develop short- and long-term goals for improving the system. The EPA pesticide data has been a factor in previous agency decisions to ban, restrict, or negotiate voluntary cancellations of harmful products.

State Secrets Problems are No Secret to Congress

On July 31, the House Judiciary Committee heard testimony concerning the State Secrets Protection Act (H.R. 5607), sponsored by Rep. Jerrold Nadler☼ (D-NY), which would grant the judiciary greater authority to question executive branch secrecy. The act would establish a set of procedures and standards for assessing executive branch claims to the state secrets privilege.

Openness advocates have argued that abuse of the state secrets privilege has severely undermined government accountability in recent years. During his testimony, Steven Shapiro

of the American Civil Liberties Union (ACLU) stated, "Over the years we have seen the state secrets privilege mutate from a common-law evidentiary rule ... into an alternative form of immunity that is used more and more often to shield the government and its agents from accountability for systemic violations of the Constitution and core human rights principles."

Over the past seven years, the executive branch has gained what appears to be an upper hand on controlling information when civil actions have touched upon a claimed secret; the courts have rarely questioned claims of state secrets and have almost universally dismissed cases based on the claims. Meredith Fuchs of the National Security Archive commented upon this fact, stating, "The information that is claimed to be secret is controlled by a system in which there is a strong incentive to keep it from the public, especially if the government is overreaching or has engaged in some misconduct."

Since Sept. 11, 2001, courts have frequently assumed that only an agency has sufficient knowledge and expertise to understand the implications of secret information. Hence, the courts have been extremely deferential to the executive branch's stated need to keep information from being made public or even examined by a court. However, Shapiro argued that the courts are a "constitutional safety valve," a role that several laws have affirmed, including the Classified Information Procedures Act (CIPA), Freedom of Information Act (FOIA), and the Foreign Intelligence Surveillance Act (FISA).

The Nadler bill is based upon CIPA standards for the use of classified information in criminal cases. In civil cases, the court would review information that the government seeks to protect as well as evidence supporting the government's request for protection. The court would then make a decision assessing the likelihood that harm would result from evidence disclosure. Shapiro explained that H.R. 5607 "restores the state secrets privilege to its common law origin as an evidentiary privilege by prohibiting the dismissal of cases prior to discovery." Fuchs also supported the bill, arguing, "These procedures have worked well in the criminal CIPA context."

Similar legislation (S. 2533) was introduced in the Senate in January by Sen. Ted Kennedy (D-MA) and was referred to the Judiciary Committee; no action has yet been taken.

Attorney General Michael Mukasey has threatened that President Bush would veto S. 2533. In his March 2008 letter to the Senate committee, Mukasey elaborated on the administration's opposition to increased court authority by questioning Congress's own authority to alter the state secrets privilege. The administration argues that the privilege is protected by the Constitution and surrounding case law including *United States v. Nixon*. However, there is also case law that contradicts this argument, particularly the U.S. Supreme Court's decision in *New York Times v. U.S.* to protect the public release of the Pentagon Papers leaked by Daniel Ellsberg in light of government misconduct and administrative abuse of power.

The state secrets privilege was first recognized in 1953 by the Supreme Court in *United States v. Reynolds*. Ever since, the executive branch has used it to maneuver around traditional checks and balances. The executive branch has utilized this privilege increasingly since the events of Sept. 11. According to a September 2007 report by OpenTheGovernment.org, "the

administration used the privilege only 6 times between 1953 and 1976. Since 2001, it has been used a reported 39 times — an average of 6 times per year in 6.5 years that is more than double the average (2.46) in the previous 24 years."

Fuchs stated that the bill "provides substantial protection to the government's interest in maintaining secrecy" while also "protect[ing] against government overreaching." The legislation was introduced in March, and July 30 marked the first hearing on the bill. The bill has seven co-sponsors, six Democrats and one Republican.

Bills to Reign in Controlled Unclassified Information Fly through House

A bill to reduce and standardize Controlled Unclassified Information (CUI) designations moved quickly through the House in July, passing in both committee and on the House floor just a single week after it was introduced by Reps. Henry Waxman (D-CA) and Tom Davis (R-VA). This bill, along with a similar piece of legislation that focuses solely on the Department of Homeland Security (DHS), now goes to the Senate where it may have a tougher time given the limited amount of legislative time left in this congressional session.

The Waxman-Davis bill, the Reducing Information Control Designations Act (H.R. 6576), gives new authority to the National Archives and Records Administration (NARA). Under the bill, the Archivist of the United States must establish narrowly constructed standards for CUI designations that maximize public access to information as well as develop penalties for employees and contractors who repeatedly fail to comply. NARA is already the statutory designee for setting classification standards. The act also calls for random audits of unclassified information with control designations by the inspector general of each federal agency.

Among the provisions that encourage greater openness, the bill seeks to clarify how agencies handle these designations, which are often not mandated by Congress, under the Freedom of Information Act (FOIA). Openness advocates have expressed concern that records were being withheld improperly under FOIA due to uncertainty caused by the use of control designations on unclassified documents. In her June 11 testimony to the Committee on Homeland Security, Meredith Fuchs of the National Security Archive recommended that agencies be discouraged from using CUI labels as "*de facto* determinations of FOIA exemption." If passed, the bill would prevent agencies from using the CUI markings to determine how information is disclosed under FOIA.

The bill would require training for employees and contractors on the proper use of CUI categorization and designations and would establish penalties for employees and contractors who repeatedly fail to comply with NARA-issued CUI standards.

The Congressional Budget Office (CBO) estimates that the total cost of random audits, training, and regulatory implementation over the 2009-2013 period will be approximately $45

million. While the legislation could have an impact on agencies not funded through annual appropriations, the CBO did not estimate any significant net increase in spending by such agencies, stating that "enacting the bill would have no significant impact on directing spending or revenues."

This legislation builds on the May 2008 memorandum issued by President Bush on CUI to establish rules governing its designation and sharing. While the memo was a step toward streamlining the problem of multiple pseudo-classification markings, it only required a standardized system for "terrorism-related information" and makes no statement on limiting the use of these markings. Further, the president's order pertains solely to material used in the Information Sharing Environment (ISE) created by the Intelligence Reform and Terrorism Prevention Act in 2004. That act called for reducing disincentives for information, but overclassification is still prevalent.

Waxman's bill is similar to, but broader in scope than, the Improving Public Access to Documents Act (H.R. 6193). Introduced by Rep. Jane Harman☼ (D-CA) in June, H.R. 6193 seeks many similar changes but only for DHS, whereas H.R. 6576 will have an impact throughout the federal government. OpenTheGovernment.org has published a useful analysis of the differences between the two bills. Harman's bill passed the House at the same time as the Waxman bill and is also waiting for action in the Senate.

The two bills have now been referred to the Senate Committee on Homeland Security and Governmental Affairs. However, given that the Senate plans to reconvene in September for only three weeks, it is unlikely that it will be able to move these bills along with appropriations bills and other pressing matters that must be addressed before adjournment.

Overclassification Legislation

Both Waxman and Harman had also introduced related bills on overclassification, H.R. 6575 and H.R. 4806, respectively. However, in this case, it was Harman's bill, the Reducing Over-Classification Act, that the House passed, during the same July 30 voting session in which Waxman's CUI bill was passed. The legislation seeks to limit excessive classification at DHS with increased oversight by NARA, greater accountability for DHS employees who overuse classification stamps, and training of DHS employees.

Harman summarized the importance of this bill as it pertains to ensuring openness at DHS, stating, "Unfortunately, the amount of material that is classified is growing exponentially making it harder and harder for our first responders to do their jobs." If passed and implemented properly, the bill could establish DHS as an example to other agencies. Harman's overclassification bill has also been referred to the Senate Homeland Security and Governmental Affairs Committee and faces the same unlikelihood of passage given the Senate's tight September timeframe.

Contracting Reform Agenda Makes Gains

When President Bush signed the FY 2008-2009 war supplemental bill into law on June 30, he approved a pair of contracting reforms that had long been stalled in Congress. The enactment of these provisions has validated the legislative strategy of reform-minded legislators to pass federal contracting measures.

After the House passed a series of contracting reforms in April, the measures were held up in the legislative logjam in the Senate. Nevertheless, the bills' sponsors worked doggedly in the 2008 legislative year to attach these non-controversial contracting reform bills to other legislation that would likely get through the Senate and be signed into law by the president.

When OMB Watch reported on this strategy in May, one such contracting reform bill had already been signed into law, suggesting that the coattail strategy would yield results. In the last two months, two additional reforms have become law.

The two measures enacted with the war supplemental are part of a raft of bills offered by several members of Congress in the past two years aimed at bringing accountability and transparency to the federal contracting process. The first of these provisions, the Close the Contractor Loophole Act of 2007 (H.R. 5712), holds contractors working oversees to the same fraud reporting requirements as contractors performing work in the U.S. The second, the Government Contractor Accountability Act (H.R. 3928), requires private contractors that receive more than 80 percent of their revenue from federal contracting and at least $25 million in federal contracts to report the names and salaries of their five highest-paid executives.

These two reforms were attached to multiple bills between the time they were passed by the House on April 23 and when they were signed by the president on June 30. After House passage, both bills were attached to the FY 2009 Defense Authorization Act. However, when it became clear that expedient passage of the Defense reauthorization bill in the Senate was not guaranteed, House contracting reformers hedged their bets by also attaching the provisions to the war supplemental. After a tortuous path to passage, the supplemental was signed into law.

Still left in legislative limbo are measures that would bar contractors with federal tax debt from winning new federal contracts (H.R. 4881, Contracting and Tax Accountability Act of 2008) and that would establish a database of contractors found in violation of federal laws and regulations (H.R. 3033, Contractors and Federal Spending Accountability Act of 2008). However, House Oversight and Government Reform Committee Chairman Henry Waxman (D-CA) was successful in attaching his Clean Contracting Act as an amendment to the House's version of the National Defense Authorization Act for FY 2009. Waxman's amendment is a bundle of contracting reforms, which includes H.R. 3033, the contractor fraud database, as well as the two measures already enacted with the war supplemental.

Although the House approved the Defense reauthorization bill in May, the Senate will not consider the legislation until they return from August recess. It is still possible the contractor misconduct database (H.R. 3033) will be enacted into law through the Defense reauthorization

bill, although that is not yet guaranteed.

The Path to Contracting Reform					
Policy Proposal	Original Bill	First Attached To	Then Attached To	Finally Passed On	Chances of Approval in 2008
Creating contractor misconduct database	HR 3033 *(4/23/08)*	FY 2009 Defense Authorization bill *(5/22/08)*			Good
Closing fraud loophole in FAR	HR 5712 *(4/23/08)*	House version of war supplemental bill *(5/15/08)*	FY 2009 Defense Authorization bill *(5/22/08)*	FY 2008-2009 War Supplemental Spending Bill *(6/30/08)*	*Approved*
Requiring disclosure of names and salaries of top executives	HR 3928 *4/23/08)*	House version of war supplemental bill *(5/15/08)*	FY 2009 Defense Authorization bill *(5/22/08)*	FY 2008-2009 War Supplemental Spending Bill *(6/30/08)*	*Approved*
Prohibiting using offshore tax havens to avoid payroll taxes	HR 5602 *4/15/08)*	Taxpayer Assistance and Simplification Act *(4/15/08)*	HEART Act *(5/22/08)*	HEART Act *(5/22/08)*	*Approved*
Prohibiting tax deliquent contractors from obtaining new contracts	HR 4881 *(4/14/08)*				Unlikely

When Congress returns in the second week of September, it will have only three weeks remaining in its legislative year. Excepting the provisions already within a version of the Defense reauthorization bill, there is little chance that Congress will send other contracting reform legislation to the president during the remainder of 2008. Despite this, contracting reform agenda items are likely to float to the top of legislative heap in January 2009.

Additionally, investigative efforts by the 110th Congress are laying the groundwork for even more and perhaps broader reforms in the next Congress. The Webb-McCaskill Wartime Contracting Commission has seated seven of eight commissioners who will begin investigating war contracting abuses; Sen. Byron Dorgan's☼ (D-ND) Democratic Policy Committee has been holding regular hearings on contractor malfeasance in Iraq; and Waxman's committee has conducted extensive investigations of contractor waste, fraud, and abuse. These efforts continue to show major contracting problems exist and that additional reforms are necessary. At this point, Congress seems focused on increasing the transparency and accountability of the

federal contracting process as opposed to changing the process itself.

Congress Fails to Act on Tax Legislation as Clock Winds Down

Congress left town for the month-long August recess having failed four times to act on a popular package of tax cuts that are set to expire at the end of 2008. With only three weeks in session left in September before the door is expected to close on the 110th Congress, and with remaining differences between opposing sides, there is still significant work to be done before $123 billion in tax cuts can become law.

The hold-up in Congress on this legislation is once again the U.S. Senate. During June and July, the Senate voted four times to begin debate on the tax "extenders," a $123 billion tax cut proposal over the next ten years. The latest version of this proposal includes a one-year "patch" for the Alternative Minimum Tax (AMT) and $56 billion in other tax cuts that will benefit a wide variety of individuals and businesses, from motor sport race track operators to married couples, from teachers to mine operators, and from anyone who pays state and local sales taxes to children's toy arrow producers.

With minor exceptions, the underlying tax cuts within the package are widely supported by both Republicans and Democrats. To be sure, some of the tax cuts have likely lost their usefulness in a wider economic context, and Congress failed again to adequately review whether some aspects of the bundled "extenders" package should be discontinued. At this point in the congressional calendar, the opportunity for such a needed review has passed. Delay in enacting this bill is not due to its content, but rather Democrats' attempts to structure it as a fiscally responsible piece of legislation.

The House passed its version of the extenders package on May 21 by a vote of 263-160. House Ways and Means Committee Chairman Charles Rangel (D-NY) constructed a fiscally responsible bill by including $55 billion in revenue offsets that would increase taxes on hedge fund managers and modify tax rules on corporations. The Bush administration issued a veto threat opposing the revenue offsets, even as over 300 corporations wrote to the U.S. Senate leadership making it clear that the extenders package was such a high priority that they would rather have it paid for if that would enable its passage.

Senate Majority Leader Harry Reid (D-NV) attempted to put the House-passed bill before the Senate for consideration three times (on June 10, June 17, and July 29), but each time, a group of at least 40 Republicans blocked consideration of the bill.

As the August recess approached, seeing that the House bill could not reach the floor for debate, Senate Finance Committee Chairman Max Baucus (D-MT) introduced his draft of an "extenders" bill, including a "patch" for the AMT, which was absent from the House-passed bill. Reid attempted to bring that bill to the Senate floor on July 30, but he was blocked again. The reasons for blocking this bill became less about a debate over the inclusion of offsets or the AMT in the "extenders" bill and more about a political struggle between the two parties over

gas prices and energy policy heading into the fall elections. Though Congress has left town, the parties continue to maneuver in the media in order to blame the other side rather than pass legislation.

Even through Reid cannot get the tax extenders bill on the Senate floor, there are behind-the-scenes negotiations that may be making some progress on finding a compromise on the question of offsets in the "extenders" package. Baucus' package includes just over $54 billion in offsetting revenue increases for portions of the bill. The $63.5 billion AMT patch was not offset, leaving less than half (approximately 44 percent) of the bill paid for. In order to comply with Senate pay-as-you-go (PAYGO) rules, the entire cost of the bill would need to be offset, a near-impossible goal given Republican opposition to offsetting any tax cuts.

Yet Senate Finance Committee Ranking Member Charles Grassley (R-IA) appears to be willing to allow the $54 billion in offsets included in the draft bill, assuming Democrats exempt any provisions impacting individuals from PAYGO and use cuts in future years' discretionary spending to offset additional tax cuts. While Baucus has announced this proposal concerning discretionary spending is a non-starter for Democrats, Grassley's acceptance of the pay-fors already in the bill is a step in the right direction.

Even though less than half of the proposed bill is paid for, there are a number of very popular provisions within the "extenders" tax cut package, including a $250 deduction for teachers' expenses and tax-free distributions from IRAs to charities for those over seventy-and-a-half years old. Most notably, both the House and Senate have included an expansion of the Child Tax Credit (CTC) by lowering the income threshold that parents must meet to qualify for the refundable portion of the tax credit, from $12,050 to $8,500.

This change would benefit over 13 million children, according to data from the Tax Policy Center. The Center on Budget and Policy Priorities has also pointed out that many children who stand to benefit come from families with parents who work year round, include individuals with a disability, and/or contribute to a broad range of jobs in critical services that often pay low wages, such as caring for the elderly or teaching young children. This is a progressive change in the tax code long sought by a wide variety of low-income, religious, direct service, labor, child welfare, and poverty advocates.

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In This Issue

Bush Administration Pushing Last-Minute Rollbacks

The Bush administration is trying to finalize several new rules, covering a range of policy issues, before a new administration takes over and despite its own policy directive. The new rules would relax the standards and enforcement of longstanding federal laws, including the Endangered Species Act (ESA).

In a controversial move, Interior Secretary Dirk Kempthorne announced a proposed rule that would change the way government agencies comply with the Endangered Species Act. The proposal would allow officials to approve development projects that could impact endangered species without consulting federal wildlife and habitat scientists.

The Interior Department published the proposed rule in the *Federal Register* on Aug. 15. But the proposal missed by two and a half months a White House-imposed deadline for Bush-era regulations. A May memo from White House Chief of Staff Joshua Bolten states, "[R]egulations to be finalized in this Administration should be proposed no later than June 1, 2008." All final rules must be completed by Nov. 1 except in extraordinary circumstances,

according to the memo. Bolten claimed the deadlines were necessary to avoid the flurry of regulations agencies often hurry through in the final months of an administration.

However, all signs indicate that Interior intends to finalize the proposed ESA changes before President Bush leaves office and is doing so with the blessing of the White House. The Office of Information and Regulatory Affairs (OIRA), the White House office in charge of approving, changing, or rejecting new administration policy, spent only three days reviewing Interior's proposed rule.

The average review time for the 350 proposed rules OIRA has reviewed this year is 65 days. OIRA's average review time for the 12 Interior Department proposals submitted is 71 days.

Kempthorne also announced that Interior officials will accept public comment on the proposal for only 30 days. The standard comment period for proposed rules is 60 days. OMB Watch Executive Director Gary D. Bass said, "The limited 30-day comment period for this important issue suggests the rule is on a fast track for completion before the Bush administration leaves."

Noah Greenwald, science director at the Center for Biological Diversity, said, "Secretary Kempthorne seems determined to establish a legacy of environmental destruction and extinction."

Allowing agencies to bypass expert scientific review for development projects runs counter to long-standing practices required by the ESA. The act requires project managers to request from Interior "information whether any species which is listed or proposed to be listed may be present in the area" where construction will occur. Greenwald said, "[The proposed rule] would allow thousands of projects that harm endangered species to move forward without mitigation."

Another controversial rule that impacts the health of workers is also moving quickly through the regulatory pipeline despite the Bolten memo's requirements. The rule, proposed by the Department of Labor (DOL), would change the way the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) calculate estimates for on-the-job risks. (Read an article about the rule in the Aug. 5 *Watcher*.)

A draft of the rule was written quickly and without the consultation of occupational health experts inside OSHA and MSHA, Labor Department insiders say. DOL Secretary Elaine Chao's office forwarded the draft to OIRA for the required review period on July 7. OIRA has yet to send the proposed rule back to DOL for publication in the *Federal Register*.

Scientists and public health experts fear the rule change would downplay the severity of workplace risks, thereby weakening the case for regulation. In a letter sent Aug. 14, 80 doctors, scientists, and public health experts asked Chao to abandon the proposal. The letter said the rule "has serious flaws that would weaken current procedures and undermine occupational health rules" and would add delays to an already lengthy process for writing occupational

health rules.

Both proposed rules have drawn criticism from lawmakers. Addressing the ESA rule change, Rep. Nick Rahall (D-WV) told *The Washington Post*, "Eleventh-hour rulemakings rarely, if ever, lead to good government — this is not the type of legacy this Interior Department should be leaving for future generations." Rahall chairs the House Natural Resources Committee.

Rep. George Miller (D-CA) and Sen. Ted Kennedy (D-MA) were critical of both the negative effects the DOL risk assessment rule change would have and the way Chao's office has handled developing the rule. The two sent a letter to Chao July 10 asking to be briefed on the rule. Miller has introduced a bill that would forbid DOL from finalizing the rule.

A controversial rule that could reduce women's access to birth control also appeared to be in the works in the waning days of the Bush administration. A draft of the rule leaked from the Department of Health and Human Services (HHS) would have, for the first time, classified oral contraception as a form of abortion. The rule, as written in the draft, would have attached strings to federal funds given to health care providers who dispense birth control or perform abortions.

On Aug. 7, HHS Secretary Michael Leavitt claimed he had not seen the draft before it had been leaked to the public. On his blog, he wrote, "It contained words that lead some to conclude my intent is to deal with the subject of contraceptives, somehow defining them as abortion. Not true."

Nonetheless, reproductive rights advocates and lawmakers continue to criticize the rule. The rule has not been sent to OIRA for review, and Leavitt says, "The Department is still contemplating if it will issue a regulation or not."

According to an Aug. 16 *Washington Post* article, the Department of Justice (DOJ) proposed a rule July 31 that would "make it easier for state and local police to collect intelligence about Americans, share the sensitive data with federal agencies and retain it for at least 10 years." Under the rule, law enforcement agencies would be able to target groups and individuals but there would have to be a "reasonable suspicion" that the target is engaged in criminal activity before collecting information, according to a source in the article. It appears DOJ hopes to finalize the proposed rule before the end of the Bush administration, which would be yet another example of agencies violating the spirit and intent of the Bolten memo.

Increasingly, it appears the Bush administration is trying to solidify a range of policies before it leaves office — the Bolten memo notwithstanding — tying the hands of the next president and bypassing Congress.

One Year Later, Only Blame about Crandall Canyon Disaster

One year after the deaths at the Crandall Canyon mine in Utah, little has been accomplished at

the federal level to help prevent further mine collapse disasters. Although the House passed legislation addressing safety issues raised by this collapse and a series of other mine accidents in recent years, the Senate has not acted. Reports about the causes of the Utah mine collapse vary in assigning responsibility, which has led to different allegations about who bears the burden for the nine deaths at Crandall Canyon.

Aug. 6 marked the one-year anniversary of the mine collapse that entombed six coal miners. Only days later, during attempts to rescue or recover the miners, three more people died when another section of the mine collapsed. On Aug. 20, 2007, rescue efforts at the mine were called off indefinitely due to concern about the safety of rescue workers. Rep. George Miller (D-CA), chairman of the House Education and Labor Committee, which conducted its own investigation of the collapse, issued a press release on the anniversary saying:

> This anniversary reminds us of the significant risks miners still face while extracting the coal that meets our nation's energy needs. The several mine tragedies that have occurred recently have been the result of weak laws, outlaw mine operators, and government agencies asleep at the switch. This is unacceptable. We must work aggressively toward a future where all miners can return home safely after their shifts.

Miller introduced H.R. 2768, the S-MINER Act, on June 19, 2007, in the wake of a series of mine collapses in 2006 that killed 47 miners, the highest number of fatalities since 2001. The House passed the bill Jan. 16 and sent it to the Senate, where no action has occurred. The bill requires a series of safety improvements and requires the Secretary of Labor and other entities to provide greater protections for miners and to explore new ways of increasing safety.

Two new reports claim different actors are responsible for the mine failure. A July 24 report by the Mine Safety and Health Administration (MSHA) said the mine collapse was caused by a "flawed mine design" and that the mining plan "was destined to fail." The report also states that Genwal Resources, Inc. (GRI), the company employed by mine owner Murray Energy Co. to operate the mine, knew of but did not report a series of coal bursts to MSHA as required by federal regulations. The reporting failures "deprived MSHA of the information it needed to properly assess and approve GRI's mining plans."

As a result of its investigation, MSHA cited GRI with numerous serious violations and fined the company $1.6 million. MSHA also fined GRI's engineering consultant on the mine design, Agapito Associates Inc., $220,000 for its flawed analysis of the roof-control plan.

The second report, issued July 25, was performed at the order of Department of Labor Secretary Elaine Chao and was conducted independently of MSHA officials. Earnest C. Teaster, Jr. and Joseph W. Pavlovich, two former MSHA managers, conducted the independent review with the help of five MSHA employees. The team was charged with "evaluating and identifying deficiencies in MSHA's actions preceding the initial accident, evaluating and identifying deficiencies during the rescue attempt, and providing meaningful recommendations to better

protect the safety and health of miners and prevent such accidents in the future."

The independent report issued scores of findings about MSHA's failures in the plan approval process, inspection and rescue activities, and staffing and resource utilization. In short, the investigators found MSHA's deficiencies "to be evident of a systemic problem, both in District 9 [the regional office], and within MSHA as a whole." The report concludes that MSHA should not have approved the mining plan for Crandall Canyon and that, contrary to MSHA's assertion in its report, MSHA officials knew about the outbursts at the mine in the months before the collapse. In addition, MSHA bears some responsibility for the subsequent rescue failure because it chose not to bring two experts to the site who were more familiar with western, deep-mining conditions and should have been involved in the rescue operations.

Prior to the Education and Labor committee's release of the investigation of the collapse, completed in May, Miller sent a criminal referral to the U.S. Department of Justice (DOJ) asking it to investigate whether the mine's general manager may have hindered MSHA's oversight of the mine. According to an Aug. 1 *Salt Lake Tribune* article, DOJ is still considering the request.

The *Tribune* reported that the families of the dead and injured miners received an extensive briefing from MSHA on its findings but learned little that was new to them. An attorney representing the families was quoted in the article as saying, "This [MSHA] report confirms and underscores the allegations we made in our complaint... This clearly makes it known that these deaths and injuries were preventable."

Fisheries Rule Cuts Public Participation

A Commerce Department proposed rule governing fisheries management threatens to curb public participation in environmental reviews and give greater control to the fishing industry. The public comment period for the proposed rule ended on Aug. 12.

Of the almost 200,000 public comments received, opponents argued that the rule would result in less time for the public to comment on the environmental impacts of fishery management actions, fewer alternatives considered, fewer actions reviewed, greater control by managers with financial conflicts of interest, and an unwelcome precedent.

Proposed in May, the rule would define how managers of the nation's fisheries comply with the National Environmental Policy Act (NEPA), one of the country's bedrock environmental laws. NEPA requires federal agencies to examine the environmental effects of proposed actions and to inform the public of the environmental impacts considered during an agency's decision making process. An essential element in the NEPA process is the requirement to make available to the public environmental impact information, including the impacts of various alternative actions, and to give the public opportunity to participate in the decision making process.

The proposed rule is the result of congressional reauthorization of the primary law governing the management of fisheries, the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Congress instructed the Commerce Department, through its National Marine Fisheries Service (NMFS), to better align the environmental review procedures of the MSA with those of NEPA. Congress's intent was to streamline the environmental review process in the context of fishery management.

Instead, the Commerce Department proposed a new rule that would create additional procedures and new forms of documentation that, according to conservation advocates, would make the procedures more complex. The proposed rule would reduce public input and increase the number of actions that would receive no environmental review at all by expanding the scope of categorical exclusions — categories of actions that fishery managers would not need to review for environmental impacts.

In addition to the hundreds of thousands of public comments opposing the proposed rule, 80 members of Congress have also expressed their opposition, including a letter joined by 72 members of the House of Representatives. The letter states that the proposed rule fails to meet congressional intent made clear during the reauthorization of the MSA. Hundreds of scientists and environmental organizations have also signed on to oppose the rule.

Among the changes proposed by the rule is a reduction of the public comment period for environmental analyses, from 45 to 14 days, under certain circumstances. Some fishermen and others have expressed concern that two weeks is insufficient time to evaluate the sometimes hundreds of pages of complex information contained in new management actions and their environmental reviews, especially given that fishermen may often be at sea for longer than 14 days at a stretch.

The rule's opponents argue that too much power over environmental reviews would be placed in the hands of the fishing industry. The MSA, signed in 1976, established eight regional fishery management councils to recommend regulations to NMFS and to defend U.S. fisheries from foreign exploitation; it did not vest these councils with overseeing environmental and conservation issues. The councils are mostly composed of members of the fishing industry appointed in a heavily political process. The councils play the primary role in developing fishery management plans, which then must be approved or rejected by NMFS. More than 97 percent of the councils' recommended management actions are approved by NMFS.

The councils are exempt from the conflict-of-interest restrictions of the Federal Advisory Committee Act, and 60 percent of the appointed council members have a direct financial interest in the fisheries that they regulate, according to the reports *Conflicted Councils* and *Taking Stock* by the Pew Charitable Trusts. The same studies found that more than 80 percent of the appointed council members represent fishing interests, with few or no conservation groups represented. Moreover, the councils have been criticized frequently for mismanagement and failing to heed recommendations of their scientific advisory groups, leading to overfishing and bycatch problems. The new proposed rule draws heavily on

recommendations from the councils.

Additionally, the proposed rule would restrict public comment to issues raised in previous rounds of public input. Fishery management councils could bring new proposals midway through the public comment process, and public scrutiny of the newly raised issues would be prohibited. The rule also gives the councils authority to decide the scope of the environmental analyses of measures and which new measures would even qualify for environmental review.

Understandably, several of the fishery management councils have come out in support of the new procedures, claiming they will reduce the amount of time needed to enact management decisions and reduce redundant paperwork. However, conservation groups have pointed out that the existing environmental reviews under NEPA do not add time to the decision making process prescribed by the MSA. Other fishing groups have sided with the opponents of the proposed rule, pointing out that the new procedures would curtail public involvement by smaller fishing interests not represented among the politically appointed council memberships.

Conservation groups have also raised the prospect that the new procedures designed for the Department of Commerce would set a precedent for other federal agencies to design unique procedures for their own NEPA compliance, perhaps further reducing public participation and the scope of the alternatives considered during environmental reviews. The NEPA environmental review procedures are often regarded by federal agencies as burdensome, and the prospect of having to do fewer analyses may tempt agencies to craft new procedures.

Opponents of the rule also point to more than thirty years of case law and administrative experience with NEPA that have informed the existing procedures. The departure from this history embodied in the proposed procedures could increase the likelihood of legal actions should the rule be finalized and implemented in its current form.

Recent studies have shown that the world's oceans are in poor health, suffering from the combined problems of climate change, overfishing, habitat loss, and pollution. The most recent NMFS data show that 20 percent of managed fish stocks are overfished or subject to overfishing, but this figure only represents the small portion of stocks for which the agency has enough data to make a determination. According to a report by the Pew Environment Group, globally, one quarter of fish stocks are overexploited, depleted, or recovering from depletion because of excess fishing. In addition, half of the world's fish stocks are on the verge of being overfished. Fish stocks in U.S. waters have been declining for at least 30 years.

Actions that impact these stocks and their habitats have been dominated by the industries that exploit them. Greater public participation and more public information and analyses of environmental impacts — which NEPA is designed to require — could help improve the situation. As the critics have argued, the proposed fisheries rule moves in the opposite direction.

EPA Launches Online System for Reporting Violations

The U.S. Environmental Protection Agency (EPA) recently launched a pilot program to allow companies to electronically self-disclose violations of environmental laws. The new voluntary program, called eDisclosure, is designed to speed the processing times and reduce transaction costs for voluntary disclosures of violations under the Emergency Planning and Community Right-to-Know Act (EPCRA).

The program is part of EPA's Audit Policy, which provides reduced or waived penalties to companies that voluntarily disclose violations of environmental laws. The agency will not waive or reduce penalties for repeat violations or violations that resulted in serious actual harm.

Violators in EPA Region 6, comprising Arkansas, Louisiana, New Mexico, Oklahoma, and Texas, may also use the system to report violations of other environmental laws. Eventually, the agency plans to evaluate the program's performance, make revisions, and, if feasible, expand the program so regulated entities nationwide may self-report violations of all environmental laws under the Audit Policy.

The program will use the EPA's Central Data Exchange (CDX) as the point of entry for violators to submit data and complete electronic forms. EPA hopes that use of the electronic submission system will speed processing times and ensure submitted data are comprehensive. The agency also predicts the system will assure consistency in how disclosures are processed and reviewed.

According to the EPA, CDX provides users with the ability to submit data through one centralized point of access, fill out fewer forms and submit them electronically, receive agency confirmation when submissions are received, and submit data in a variety of formats.

While electronic reporting holds a great deal of promise, and the EPA's pilot is an encouraging step, it remains unclear how much effort is being placed behind it. EPA's numbers on participation have been somewhat inconsistent. According to an August agency release, since 1995, more than 3,500 companies have disclosed and resolved violations at nearly 10,000 facilities under the Audit Policy. However, almost a year earlier, an April 2007 memorandum claimed that under the Audit Policy, more than 4,000 entities had disclosed violations at more than 11,300 facilities through FY 2006. No performance measures for the pilot program have been disclosed. Reliable indicators will be essential to evaluating the success of EPA's effort.

EPA's 2006-2011 Strategic Plan, required under the Government Performance and Results Act, established a modest goal for the various compliance incentives programs, including the Audit Policy. The plan aims for a five percent increase in the number of participating facilities.

It remains unclear to what extent data collected by this pilot program will be made available to the public, if at all. EPA has expressed interest in speeding the process for companies to self-disclose violations, but the agency has not indicated if this will expedite the release of

violations data to the public. EPA also has not released any information regarding the budget for the pilot program or what financial support might be available to it in subsequent years.

Senate Report Documents Problems with State Secrets Privilege

An Aug. 1 report by the Senate Judiciary Committee articulates the need for new legislation to limit the state secrets privilege. The report documents that the current administration has asserted the privilege "more frequently and broadly than before" and that reforms, such as the State Secrets Protection Act (S. 2533), are necessary to restore the proper balance between the right to an open and accountable government and the protection of legitimate state secrets. The report's dissenters — nearly all the Republicans on the committee — disagree with the report, arguing that existing procedures are sufficient.

Since Sept. 11, 2001, courts have frequently assumed that only an agency has sufficient knowledge and expertise to understand the implications of secret information. Hence, the courts have been extremely deferential to the executive branch's stated need to keep information from being made public or even examined by a court in lawsuits involving state secrets.

As reported in the previous *Watcher*, the State Secrets Protection Act, introduced by Sen. Ted Kennedy (D-MA), would reform the state secrets privilege by instituting a procedure whereby judges would have the authority to review the government's claim of a legitimate state secret. In civil cases, the court would review information that the government seeks to protect as well as evidence supporting the government's request for protection. The court would then make a decision assessing the likelihood that harm would result from evidence disclosure.

The Senate report raised several concerns that illuminate the need for a more restricted and defined privilege. "Facing allegations of unlawful Government conduct ranging from domestic warrantless surveillance, to employment discrimination, to retaliation against whistleblowers, to torture and 'extraordinary rendition,' the Bush-Cheney administration has invoked the privilege in an effort to shut down civil suits against both Government officials and private parties."

Attorney General Michael Mukasey already threatened a likely Bush veto of S. 2533. In his March 31 letter to the Senate committee, Mukasey elaborated on the administration's opposition to increased court authority by questioning Congress's authority to alter the states secret privilege. He argued that the privilege derives from the Constitution, and therefore, Congress may not modify it through statutory law. Mukasey also argues the bill would shift powers to the courts in a manner that would unfairly and inappropriately unbalance the separation of powers between the branches. Mukasey concluded that "legislation raises serious constitutional questions concerning the ability of the Executive branch to protect national security information ... and would effect a significant departure from decades of well-settled case law..." Accordingly, the administration would "strongly oppose" the bill.

After receiving the Mukasey letter, Kennedy remarked that his bill was "about safeguarding the public interest, shared by all Americans, in having an executive branch that complies with the law and the Constitution and in preserving the integrity of our courts."

The dissenting section of the Senate report, written by eight Republican senators, argued that current procedures rooted in case law are sufficient to deal with the state secrets privilege and that "the bill is unnecessary because judges already have the necessary tools and procedures to adjudicate state secrets cases."

However, the report also states that the U.S. Supreme Court has repeatedly declined to intervene in matters of the state secrets privilege, which has resulted in a situation where lower courts have been inconsistent in their rulings. In her February testimony on the act, Patricia Wald, a former judge for the U.S. Court of Appeals, argued that such legislation would "contribute to the uniformity of the privilege's application throughout the federal judiciary and to both the reality and the perception of fairness for deserving litigants with valid civil claims"

Sen. Arlen Specter☼ (R-PA) was the lone Republican on the Judiciary Committee to support the report and express approval of S. 2533. Specter, the committee's ranking member, stated, "While national security must be protected, there must also be meaningful oversight by the courts and Congress to ensure the Executive branch does not misuse the privilege."

The Senate report noted that something larger was at stake than the failure to hear the claims of American citizens bringing cases against the government. "As use of the privilege has expanded and criticism has grown, public confidence has suffered. Mistrust of the privilege breeds cynicism and suspicion about the national security activities of the U.S. Government, and it causes Americans to lose respect for the notion of legitimate state secrets."

State Group Launches Government Transparency Wiki

On Aug. 11, the Buckeye Institute for Public Policy Solutions in Columbus, OH, announced the creation of its Center for Transparent and Accountable Government. With the mission of promoting open government initiatives at the federal and state levels, the center is leading the effort in Ohio to provide access to state and local government information and enable user participation in government through its wiki.

The Buckeye Institute, a statewide public policy, education, and research group, recently issued a white paper on Ohio transparency issues, declaring that "while there is a great deal of information available scattered throughout many web sites, Ohio does not meet reasonable, basic standards of transparency."

In response to Ohio's lagging behind on the transparency front, the center created a wiki-based website called OhioSunshine.org, which centralizes access to state and local records such as budget requests, bargaining agreements, and public records policies broken down by

municipality.

Mike Maurer, director of the Center for Transparent and Accountable Government, stated that "there are 11 million pairs of eyes to ensure good government in Ohio." According to Maurer, Buckeye's website is modeled on USASpending.gov, which was mandated by law to post federal contracts and grants after the passage of the Federal Funding Accountability and Transparency Act (FFATA) of 2006 (PL 109-282). USASpending.gov is similar to OMB Watch's FedSpending.org, which was licensed to the federal government to meet the law's requirements.

Government Web-based Transparency Programs in Other States

Other states such as Alaska and West Virginia have recently made strides toward centralized government disclosure of financial information on the Web. Beginning in February of this year, Alaska put its "checkbook" online, and West Virginia now posts the names and salaries of state employees.

In a November 2007 report titled *The State of State Disclosure*, Good Jobs First ranked Ohio in ninth place among American states in terms of public access to government information on contracts, subsidies, and lobbying. Among factors measured were the ease of website use, searchability, level of detail, depth, and "data currency," meaning how soon information was posted online after being generated. In its research, Connecticut ranked highest but still had room for improvement — the report only gave the state a letter grade of "B." While West Virginia's recent program to post state financial information on the Internet may be an improvement since the report was published, it ranked in the bottom two — higher only than Wyoming — a year ago.

Kansas was the first state to pass legislation requiring web access to state expenditure information based on the FFATA example. That 2007 legislation was followed by similar acts in Minnesota, Texas, Hawaii, Oklahoma, and Missouri. According to a July memorandum from Americans for Tax Reform, some 19 states had passed legislation or issued state executive orders creating public Internet disclosure of state financial information, while another 33 states, including Ohio, had stalled or ongoing efforts.

In Ohio, a bill (H.B. 420) similar to FFATA was introduced earlier in 2008. However, it only passed one house of the Ohio legislature and is currently stalled in the other. Regardless, the Buckeye Institute's efforts are a prime example of how local and state groups can utilize existing open records and disclosure laws to make public access to government records easier and ensure government accountability.

Such organizing has already begun in other states. In Virginia, a group called the Alexandria Taxpayers United issued a December 2006 memorandum to the city government to propose a local version of the FFATA legislation.

Federal Court Denies Injunction and Upholds Strict Voter Registration Fines in Florida

On Aug. 6, the U.S. District Court for the Southern District of Florida denied the League of Women Voters of Florida's (LWVF) request for a preliminary injunction to prevent a harsh voter registration law from taking affect. The law levies substantial fines on organizations that register voters and that do not promptly deliver the completed voter registration forms to the Florida Division of Elections. While the law does prescribe tougher penalties for willful misconduct, it does not grant exemptions for undue hardships or for inadvertent errors.

A 2005 Florida law holds third-party voter registration organizations liable if they miss the deadlines the state established for the return of completed voter registration forms. The law also exempted political parties from the law, which resulted in complaints of discriminatory practices.

According to the LWVF, the law will seriously impair nonprofit voter registration efforts and dampen voter turnout in elections. In response, LWVF, along with People Acting for Community Together; Florida AFL-CIO; American Federation of State, County and Municipal Employees, Council 79; SEIU Florida Healthcare Union; Marilyn Wills; and John and Jane Does 1-100, filed for injunctive relief. On Aug. 28, 2006, a Florida federal court blocked implementation of the law and ruled that the law was unconstitutional. The state filed an appeal.

While the appeal was working its way through the court system, the Florida legislature passed a revised voter registration law that was similar to the 2005 statute. The state modified the law slightly to address possible constitutional concerns. Notably, the new law did not exempt political parties, it reduced fines, and it distinguished between willful and inadvertent conduct. Under the original law, the fines were $250 for each application turned in more than 10 days late; $500 for each application collected prior to, but turned in after, the last day to register voters before an election; and $5,000 for each application that is not turned in to the Division of Elections. In addition to reducing these fines, the legislature mandated that the aggregate fine that may be assessed against an organization in a calendar year is $1,000.

The plaintiffs from the lawsuit under the original law filed another suit to stop the amended law. According to the Brennan Center for Justice, which provided the lead attorneys in the case, LWVF argued that the amended law "will produce a serious chilling effect on registration drives and dampen turnout in November. It will also disproportionately burden African-American and Hispanic voter applicants and applicants from Spanish-speaking households, who are twice as likely to register to vote through voter registration drives as white applicants or applicants from English-speaking households."

LWVF argued that the amended law is unconstitutionally vague and that the group was forced to stop its voter registration drives due to the vagueness of the law. The law will affect the people who rely on nonprofits' role in encouraging participation in the political process,

particularly low-income and disabled citizens.

Florida law defines a third-party registration organization as "any person, any entity, or any organization engaged in soliciting or collecting voter registration applications," except "those seeking to register or collect applications from their spouse, child or parent, and those registering or collecting applications as employees or agents of specifically named state agencies or a voter registration agency."

The district court rejected LWVF's arguments concerning vagueness. The court felt the amended law is not vague because it is clear who a third-party registration organization is, and it sufficiently states who is liable for fines. The court also rejected LWVF's argument that the amended law overly burdens the group's right to political speech and free association.

This ruling may seriously undermine voter registration efforts in Florida. According to the Brennan Center, who, along with the Advancement Project and Debevoise and Plimpton, filed suit on the plaintiff's behalf, groups that have traditionally lacked access to the political process, such as disabled citizens, minorities, and low-income citizens, are more likely than others to register to vote during a registration drive. The amended law may deter organizations from conducting voter registration drives due to the liability that they may incur.

Anti-Obama Group Seeks Exemption from Campaign Finance Rules

A new 527 group called The Real Truth About Obama, Inc. (RTAO) has filed a lawsuit in the U.S. District Court in Richmond, VA, against the Federal Election Commission (FEC) and the U.S. Department of Justice (DOJ). RTAO plans to run issue ads examining the Democratic presidential candidate's position on abortion and other policy issues. RTAO argues it is not a political action committee (PAC) because it will not advocate for Obama's defeat or election. The group seeks to prevent the enforcement of several FEC regulations regarding when a group must register as a PAC, as well as the enforcement of federal reporting requirements for political organizations, including 527 groups.

So-called 527 organizations are those organized to influence elections, but to avoid regulation by the FEC, they must steer clear of directly advocating for the election or defeat of a federal candidate. 527 groups across the ideological spectrum are often forced to walk a fine line, however, as the FEC and the courts will sometimes find that ads or other materials go beyond pure issue advocacy. Should an organization cross this line, the FEC will often attempt to treat the group like a PAC, which is subject to spending limits and other rules.

According to a press release from the James Madison Center for Free Speech, "RTAO was formed to tell the American people the real truth about Senator Obama's☼ public policy positions. Its first project is about Obama's radical pro-abortion views and voting record. However, RTAO fears that it will be deemed a federal PAC, if it does the project, because of the FEC's enforcement actions arising out of the 2004 election where various issue-advocacy 527s,

such as the Swift Boat Veterans for Truth, were fined for failure to register as a federal PAC, even though they only engaged in issue advocacy."

The group's lead attorney, James Bopp, Jr., won the 2007 *Wisconsin Right to Life* (WRTL) case against the FEC. In the WRTL decision, the U.S. Supreme Court ruled that the federal electioneering communications ban is unconstitutional when applied to genuine issue ads. RTAO argues that, due to the central holding of the WRTL decision, 527s should not have to disclose their activities, including independent expenditures and election-related communications.

RTAO's abortion information project includes a website, www.TheRealTruthAboutObama.com, and a radio ad called "Change."

The lawsuit challenges the FEC's definition of express advocacy: any communication that "can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)." In WRTL, the Court stated that an ad can be considered an electioneering communication when it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," therefore protecting messages put out by political groups that engage in issue advocacy.

However, according to RTAO, the regulation put in place after the WRTL decision is unconstitutionally vague and overbroad. RTAO is challenging this new regulation, which the group charges could restrict messages if they contain "indicia of express advocacy," such as references to political parties, and could exclude some "express advocacy."

"[T]he FEC continues to enforce its vague and overbroad rule defining 'express advocacy,' even where the communication does not contain such explicit words," said RTAO. "If an ad is deemed to contain express advocacy, it becomes an 'independent expenditure,' which is forbidden to corporations, such as RTAO, must be reported to the FEC, must contain a disclaimer, and can trigger PAC status." The group's "Change" ad does not have any words of express advocacy, such as "vote for" or "defeat," but RTAO is arguing that under FEC definitions, the ad could be considered an independent expenditure, rather than the issue advocacy the group claims the piece represents.

RTAO's website is not operational due to the FEC's enforcement policies that prevent RTAO from raising money for the project. The FEC has adopted rules indicating that groups that become involved in federal elections could be viewed as regulated "political committees." The lawsuit challenges this "contribution" solicitation provision the FEC adopted in 2004, which says that groups can be regulated if they solicit money based on an appeal to support or oppose a candidate. RTAO also disputes the FEC's enforcement policy for imposing PAC status, including the determination of a group's major purpose.

The FEC continues to determine PAC status on a case-by-case basis, based on a wide range of factors. After the enforcement actions against 527 groups active during the 2004 presidential campaign, the group feels it will be subject to an FEC and DOJ investigation. In the

preliminary injunction request, the RTAO details reasons why it is not a PAC. "[I]ts Articles establish that its major purpose is issue advocacy, not the regulable campaign activities that could make its major purpose the nomination or election of candidates."

RTAO's lawsuit also named DOJ, citing a letter from a DOJ official to Democracy 21 President Fred Wertheimer that said DOJ would "vigorously pursue instances where individuals knowingly and intentionally violate clear commands" of the Federal Election Campaign Act. According to the lawsuit, "RTAO's chill is heightened by the DOJ's recent declaration."

A Sept. 10 hearing date has been set, and the case has been assigned to U.S. District Judge James Spencer, who has previously issued rulings striking down campaign finance regulations on constitutional grounds. A motion filed by FEC lawyers suggests that the plaintiff engaged in "forum shopping" by filing the case in a court that has been sympathetic to its argument in the past.

In addition, on Aug. 14, the Campaign Legal Center and Democracy 21 filed an amicus brief with the District Court opposing RTAO's request for a preliminary injunction. The amicus argues that the FEC regulations are constitutional and that the FEC "correctly applied the "major purpose" test to determine whether certain 527 organizations were "political committees."

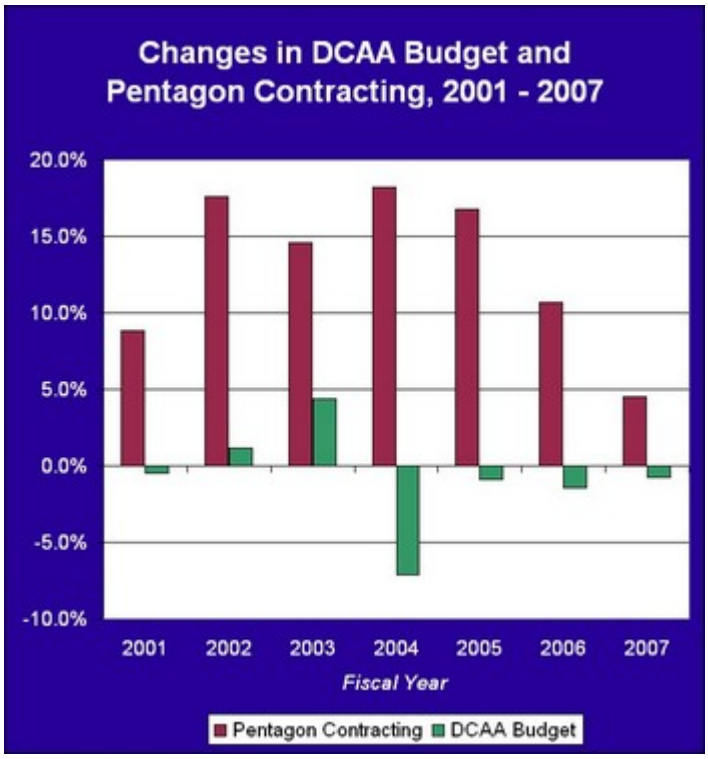
In a press release, Bopp said, "The U.S. Supreme Court has recently reaffirmed the constitutional protection for issue advocacy. The FEC, however, refuses to change its regulations and enforcement policy to conform with that mandate. Instead, the FEC plans to use its complicated PAC enforcement policy, developed in 2004, to punish groups for engaging in issue advocacy. This is unconstitutional, and we hope the federal courts will put an end to it."

Defense Contract Oversight Faces Multiple Challenges

Over the last seven years, the Defense Department has doubled the amount of money spent on private contractors, yet it has remained disturbingly lax on contractor oversight. Recent evidence has emerged showing that the Pentagon spends too little on contract oversight and interferes with current auditors to restrict the length and scope of investigations.

The Government Accountability Office (GAO) recently released a report affirming whistleblower complaints of improprieties at the Defense Contract Audit Agency (DCAA), and a subsequent investigation by the media revealed that DCAA managers are primarily concerned with adhering to performance metrics rather than conducting competent contract oversight. The agency is further hampered by declining employment and a budget that has failed to keep pace with the amount of dollars spent on Defense contracting. The Defense Contract Audit Agency is the primary office in the Pentagon dedicated to auditing contracts and providing financial advisory services.

At the end of July, GAO issued a report entitled *DCAA Audits: Allegations That Certain Audits at Three Locations Did Not Meet Professional Standards Were Substantiated*. GAO investigated 13 cases in 14 audits and found that "the limited number of hours approved for their audits directly affected the sufficiency of audit testing." Moreover, the report was ultimately critical of DCAA management, which it found had interfered with investigations and changed opinions to support contractors even in the face of contradictory evidence. GAO writes:



[i]n many cases [DCAA management] changed audit opinions to indicate contractor controls or compliance with CAS [cost accounting standards] was adequate when workpaper evidence indicated that significant deficiencies existed.... [I]n some cases, DCAA auditors did not perform sufficient work to support draft audit conclusions and their supervisors did not instruct or allow them to perform additional work before issuing final reports that concluded contractor controls or compliance with CAS were adequate.

GAO noted in the report that "DCAA did not agree with the 'totality' of GAO's findings, but it did acknowledge shortcomings with some audits and agreed to take corrective action." However, a media report published by *Government Executive* following up on the GAO investigation showed an oversight agency plagued by more pervasive problems. Nearly a dozen former DCAA employees told GovExec.com a story of agency management so obsessed with meeting certain performance goals that contract oversight was relegated to the periphery; the agency was "broken." The story cited one former employee who believed that "defense contractors big and small are getting away with murder because they know we at DCAA are slaves to the metrics."

Mismanagement of auditing resources at DCAA compound another problem at the agency — an erosion of available resources. In Fiscal Year 2000, the Department of Defense spent over $160 billion (inflation-adjusted for 2007 dollars) on private contractors. By 2007, that number had nearly doubled as DOD paid contractors $312 billion that fiscal year. And yet, as the Pentagon became more and more reliant on contracting to carry out its mission, employment at the DCAA fell from the equivalent of 4,005 full-time employees (FTEs) in 2000 to 3,867 in 2007.

This decline in human resources and increasing contract volume has increased the workload of

DCAA employees substantially. In 2000, an FTE oversaw $40 million in contract obligations on average. However, in 2007, that same FTE was expected to oversee about $79 million in payments to private contractors. A similar trend in DCAA financial resources has also persisted from 2000 to 2007. Although DCAA's real (inflation-adjusted) budget has increased in that time period, the volume of defense contracting has far outpaced those increases. One dollar of DCAA's budget could be devoted to overseeing $417 of defense contracting in 2000, but by 2007, that dollar would have to be used to audit $785 of contract obligations. Even a DCAA management not dedicated to a flawed performance measurement system would have a hard time of effectively guarding taxpayer dollars given the rapidly increasing contracting oversight load seen in the past seven years.

Outside of DCAA, the Pentagon also has yet to demonstrate a commitment to contractor oversight commensurate with the scale of contracting which it has employed since 2000. The problem is especially acute for Iraq War contracting. A pair of instances in which the military removed contract oversight personnel from their duties indicates active hostility to Iraq War contractor accountability. In 2004, Chief of the Army's Field Support Command Division Charles M. Smith was removed from his post after he refused to approve some $1 billion in unsubstantiated charges from then-Halliburton subsidiary Kellogg Brown & Root (KBR). The Army subsequently replaced Smith with private contractor RCI (now SERCO) to review KBR's pricing proposals for future procurement. A year later, the Army Corps of Engineers demoted Procurement Executive and Principal Assistant Responsible for Contracting Bunnatine Greenhouse when she "voiced great concern over the legality of the selection of KBR, the total lack of competition and the excessive duration of the [Restore Iraqi Oil] contract."

Both demotions effectively ended the careers of these oversight professionals, warning other DOD employees that blocking contractor excesses is not in the best interest of their careers. Smith and Greenhouse recently testified about their demotions before the Senate Democratic Policy Committee, which has been holding a series of oversight hearings on misconduct, waste, and fraud in Iraq War contracting. Their testimony comes in the midst of a flurry of hearings in the past two years revealing an agency riddled with procurement and oversight problems.

Smith and Greenhouse are just two examples in a larger system that has lacked oversight and accountability for years. While the DPC hearings have begun to bring to light specific problems, and a newly-formed bipartisan war contracting commission (known as the Webb-McCaskill commission) is beginning to start its own investigations, these efforts have had little impact so far on reforming the system. Unfortunately, until these efforts bear more fruit, the experiences of Smith, Greenhouse, and the auditors at the DCAA are likely to continue for the foreseeable future.

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In This Issue

Commentary: Bush's Last-Minute Rush to Dismantle Public Protections

by Gary D. Bass, OMB Watch Executive Director

Those who keep an eye on the federal government know the Bush administration is not friendly toward regulation — particularly health, safety, environmental, civil rights, and consumer protections. When they have been forced to regulate, Bush officials have advanced policies that mostly let the market control the game, while the idea of strong government intervention has been left to gather dust. However, even outside the recent regulatory takeover of Fannie Mae and Freddie Mac, events show the administration is starting to kick things into high gear on regulations, trying to lock the next administration into a Bush legacy.

In May, White House Chief of Staff Joshua Bolten issued a memo that set deadlines for agency regulations during the remaining months of the Bush administration. Bolten said he wanted to stop last-minute regulatory activity — commonly known as midnight regulations. To avoid this, except in "extraordinary circumstances," Bolten said agencies should propose regulations

that they want to finalize no later than June 1 and that all final rules should be published by Nov. 1.

Now that the June 1 deadline has come and gone, it appears there are a lot of "extraordinary circumstances" to be found. Recently, the Department of Health and Human Services (HHS) proposed a rule that could have far-reaching impacts on women and family planning decisions. The rule allows health care professionals at institutions that receive government money to opt out of providing abortion and sterilization if such services create a problem of conscience for the provider. HHS would require the institutions to certify they are complying with federal laws that allow health care workers to withhold services on the basis of religious or moral grounds. Violations could lead to loss of funding.

After first leaking a proposed rule that would have defined many contraceptives as abortion, HHS published a rule that leaves ambiguous the scope of services that might be curtailed.

The proposed rule was published on Aug. 26, long after the Bolten June 1 deadline, and the Bush administration is gaming the system to get the rule finalized. The Office of Management and Budget (OMB) reviewed the rule before it was released, as it does with all major rules. But OMB reviewed the HHS rule with unusual stealth: the review was done in hours, the same day HHS published the rule, ensuring that it would not appear on OMB's website until after the fact. Additionally, the comment period on the proposal is only 30 days, which is short for major rules in general, but very short for highly complex and controversial rules such as this one.

Maybe the HHS rule was posted after the fact on the OMB website because OMB learned from another "extraordinary circumstance" proposed by the Department of Labor (DOL). The public first learned about the Labor Department proposal when *The Washington Post* found it on the OMB website. The rule would change the way the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) calculate estimates for on-the-job risks; a draft was written quickly, in secret, and without the consultation of occupational health experts inside OSHA and MSHA, Labor Department insiders say. Labor Secretary Elaine Chao's office forwarded the draft to OMB for the required review period on July 7, well after the Bolten June 1 deadline.

After the *Post* disclosed this secret rulemaking, scientists and public health experts expressed concern the rule change would downplay the severity of workplace risks. In an August letter, 80 doctors, scientists, and public health experts asked Chao to abandon the proposal. The letter said the rule "has serious flaws that would weaken current procedures and undermine occupational health rules" and would add delays to an already lengthy process for writing occupational health rules. The DOL proposal is striking for an administration that has issued only two significant workplace health and safety standards in its two terms.

OMB cleared the rule on Aug. 25, and Chao officially unveiled it on Friday, Aug. 29. Call it an early Labor Day present from those in the Bush administration hostile to workplace

protections. Like the HHS rule on abortion, DOL will take public comment for only one month.

Another DOL proposed rule, this one from MSHA, violates the Bolten memo and appears to be heading swiftly toward finalization. On Sept. 8, MSHA proposed to require mandatory substance abuse testing for miners. The requirement would apply to miners who perform "safety-sensitive job duties" and their supervisors. (MSHA defines safety-sensitive job duties as, "Any type of work activity where a momentary lapse of critical concentration could result in an accident, injury, or death.") Mine operators could test for drug and alcohol use both as a condition of employment and at any time during employment.

Why would MSHA focus on drug testing when recent mine disasters have shown that miners face unconscionably hazardous working conditions including lack of adequate communications systems and rescue equipment? As Ken Ward reports in the *Charleston Gazette*, "Coal industry officials have long sought an MSHA rule to require drug testing of miners." Like with the other rules, MSHA will only take public comment for 30 days, indicating Bush officials — like former coal industry executive and current MSHA chief Richard Stickler — are trying to bestow a generous parting gift to the coal industry before a new administration takes over.

In another "extraordinary circumstance," on Aug. 15, the Department of Interior proposed a change in the way government agencies comply with the Endangered Species Act. The proposal would allow officials to approve development projects that could impact endangered species without consulting federal wildlife and habitat scientists.

Interior's proposal missed the Bolten memo's deadline by two-and-a-half months. OMB spent only three days reviewing the proposed rule, whereas the average review time this year for Interior rules is 64 days. Like all the others, the comment period will only be 30 days.

The hits just keep on coming. On July 31, the Department of Justice proposed a rule — again, after the June 1 deadline — that may result in additional domestic spying by allowing state and local law enforcement agencies to gather and include terrorism-related information in their federally funded criminal intelligence data systems, and to share such information with federal officials. The data would be held in the information systems for ten years instead of the current five years. Civil liberties experts noted that the rule, the first revision of police intelligence gathering since 1993, would result in local and state law enforcement conducting intelligence gathering for the federal government. In short, the proposal makes it easier for state and local police to spy on Americans. Like the others, this proposed rule only allows one month to comment.

While the Bush administration fiddles, public protections burn. We have serious problems today. Eating food, taking medications, and drinking water, for example, are increasingly like playing Russian roulette; you are never certain if you're the one who will get seriously ill. Congress needs to stop this last flurry of "extraordinary circumstances" from the Bush administration. But the next president has a bigger challenge: he has to fix a broken system.

Among the many things that need to be done, here are four:

- First, restore credibility to the federal regulatory process. Putting politics above science and common sense must stop. Government regulations are supposed to protect us all, not just political patrons. It is time for our government to identify gaps in safeguards and take actions to protect us.
- Second, such actions need to be done with care, but also with alacrity. Academic experts have called the current system "ossified," filled with too many analyses and opportunities to slow or stop regulations. The next president should work to remove those barriers and act quickly when new threats emerge, instead of waiting while the tolls of pollution, disease, and economic hardship mount.
- Third, the system needs to be more transparent, thereby allowing for better public understanding and participation. National policy should reflect the views of citizens, not just well connected lobbyists and special interests.
- Fourth, once a regulation is final, enforce it. The federal agencies in charge of inspecting our toys, food, and workplaces and monitoring the cleanliness of our air and water are facing historic resource and staffing shortfalls. We need new techniques and more feet on the ground to ensure we receive the protection we deserve.

Increasingly, it appears the Bush administration is trying to solidify a range of policies before it leaves office — the Bolten memo notwithstanding. Proposals like the ones outlined above will tie the hands of the next president and bypass Congress and the public's will. The next president will have to deal with this legacy of midnight regulations while fixing the regulatory process to get the special interests out, make it more transparent and responsive to public needs, and once again restore public trust in government.

Rule Description	Proposal Date	Length of Comment Period	Days under OMB review
Department of Health and Human Services rule which could reduce women's access to federally funded reproductive health services. • Find out more from Reg•Watch, OMB Watch's regulatory policy blog • Proposed rule text	Aug. 26	30 days	Less than 1 day

Department of Labor rule which would change the way occupational health agencies calculate estimates for on-the-job risks. • Find out more from Reg•Watch • Proposed rule text	Aug. 29	31 days	49 days
Mine Safety and Health Administration rule which would require drug testing for miners. • Find out more from Reg•Watch • Proposed rule text	Sept. 8	30 days	84 days
Department of Interior rule which would change the way government agencies comply with the Endangered Species Act. • Find out more from Reg•Watch • Proposed rule text	Aug. 15	31 days	3 days
Department of Justice rule which would allow local law enforcement to engage in domestic spying without good cause. • Find out more from OMB Watch • Proposed rule text	July 31	33 days	70 days

Notes:

*In May, the White House instructed federal agencies to propose by June 1 any rule they wished to finalize by the end of the Bush administration.

**The typical comment period for a proposed rule lasts 60 days or two months.

***As of Aug. 31, OMB has spent an average of 65 days reviewing agency drafts.

FDA Fighting Mounting Evidence on BPA

The U.S. Food and Drug Administration (FDA) continues to claim there is insufficient evidence about the health effects of a chemical widely used in consumer products to justify regulating the substance. Evidence is mounting from a variety of other sources, however, that bisphenol-A (BPA) may affect human development and mental health. FDA continues to advise consumers that there is no reason to "discontinue using products that contain BPA."

BPA is a common chemical found in certain hard plastics and the linings of food cans. The most common plastic products that contain BPA are shatterproof water bottles, baby bottles,

and food cans with plastic linings used to reduce the amount of metal leaching into food.

The latest evidence to conclude that BPA is harmful was reported in a Sept. 4 *Washington Post* article describing a Yale School of Medicine study that links the chemical to brain functions and mood disorders. The study was published Sept. 3 in the *Proceedings of the National Academy of Sciences*. According to the abstract of the article, "This study is the first to demonstrate an adverse effect of BPA on the brain in a nonhuman primate model and further amplifies concerns about the widespread use of BPA in medical equipment, and in food preparation and storage."

The scientists who conducted the study used monkeys as subjects to better approximate the likely response in humans exposed to BPA. The scientists exposed the primates to levels the U.S. Environmental Protection Agency (EPA) considers a safe daily limit. Other studies used rodents as subjects "which may not be representative of the effects of human BPA exposure," according to the scientists. The authors conclude that because exposure to the chemical causes the loss of connections between brain cells, there may be memory loss, brain impairment, and depression at the exposure level the EPA has established as safe. EPA has the responsibility for setting safe chemical exposure limits, while FDA can limit or ban the use of BPA in food-related items.

On Sept. 3, another study was released indicating potential harm from BPA. The National Toxicology Program (NTP), part of the Department of Health and Human Services, released its final report on the health effects of BPA. According to the report, "The NTP has *some concern* for effects on the brain, behavior, and prostate gland in fetuses, infants, and children at current human exposures to bisphenol A." A spokesperson for NTP said the study indicates that concern about exposure cannot be dismissed.

These latest studies come on the heels of earlier analyses of BPA that led to warnings and product withdrawals. The Canadian government reviewed more than 150 studies on BPA exposure and announced in April that it would move to ban the use of BPA in baby bottles. At the time, the Health Canada minister concluded that it was "pretty clear" that the highest risk was to infants and young children, according to an April 19 *Washington Post* article. As a result of the announcement, Wal-Mart Canada pulled BPA products from the shelves and a manufacturer of plastic water bottles containing BPA, Nalgene, switched to producing non-BPA plastic bottles. Other retailers and manufacturers in Canada and the U.S. also began withdrawing products and changing their manufacturing processes.

FDA, meanwhile, continues to claim the science regarding BPA is too uncertain to warrant regulation of the chemical in food products. An Aug. 14 *Draft Assessment of Bisphenol A for Use in Food Contact Applications* being circulated for FDA's scientific peer review program concludes that there is no adverse effect from BPA. The draft assessment continues to rely heavily on two industry-funded studies that formed the basis of FDA's earlier assessment of BPA. FDA is holding a public hearing on the issue Sept. 16.

According to FDA's website, the agency is not recommending consumers change their habits

regarding BPA-based products:

> At this time, FDA is not recommending that anyone discontinue using products that contain BPA while we continue our risk assessment process. However, concerned consumers should know that several alternatives to polycarbonate baby bottles exist, including glass baby bottles.

The Center for Science in the Public Interest's (CSPI) *Integrity in Science Watch* newsletter from Aug. 18 notes that eleven states and Canada are all considering tougher stances on BPA in light of accumulating evidence. California, for example, is considering banning the use of BPA in any products designed for use by children three years old or younger. It also reports the chemical industry has launched a campaign to counter California's proposal, insisting the scientific evidence is too uncertain and has not established a connection between exposure to the chemical and adverse health effects. The industry group is also challenging the conclusions drawn by the Health Canada scientific review.

In addition to the state activity, Congress is investigating the FDA's approach to BPA, reviewing the science, and considering several proposed bills to limit or ban the use of BPA in some products. It is unlikely that legislation will be passed in the short September session Congress is planning before the recess for the November elections. Meanwhile, consumers are advised by public health experts like CSPI and Consumers Union to avoid using most plastic containers marked with the recycling number 7, the most likely plastics to contain BPA.

EPA Withholds Pesticide Information While Bees Die

A conservation organization has sued the U.S. Environmental Protection Agency (EPA) for failing to release information about a pesticide linked to dramatic declines in honeybee populations. The pesticide was approved on the condition that the manufacturer study the effects of the chemical on the bee species. The EPA has received the studies but refuses to release them to the public, even though a Freedom of Information Act (FOIA) request was filed.

The Natural Resources Defense Council (NRDC), which made the FOIA request, sued EPA on Aug. 18 for withholding the information. The pesticide, known as clothianidin and sold under the brand name Poncho, is in a class of chemicals linked to collapses of thousands of bee colonies.

Honeybees have been declining for several years in the United States, including a die-off of 36 percent between September 2007 and March 2008. The problem is referred to as Colony Collapse Disorder (CCD), and it is characterized by the disappearance of all adult worker bees in a hive while the queen and immature bees and honey remain. The result is the destruction of the entire hive. Exact causes are unknown. Recent evidence suggests certain pesticides may be contributing to the rapid decline in bee populations.

The collapse of managed bee colonies could be disastrous for U.S. agriculture. The U.S. Department of Agriculture estimates that the production of one-third of the nation's food is dependent on pollination by honeybees. Pollination is responsible for $15 billion in added crop value, particularly for specialty crops such as almonds and other nuts, berries, fruits, and vegetables.

Clothianidin is a neonicotinoid, a chemical that attacks the nervous system of insects, leading to paralysis and death, among other effects. The use of clothianidin is currently suspended in France and Germany because of links between use of the chemical and collapses of honeybee colonies.

Since 1999, France has suspended use of similar pesticides in the same class of chemicals. For instance, another neonicotinoid, IMD, has been the subject of numerous controversies in Europe because of its connection to CCD. French research has found that exposure to even tiny amounts of IMD can disorient bees, which could explain the failure of the insects to return to colonies after flying off on foraging trips. Bayer CropScience, the manufacturer, has repeatedly suggested that other non-manmade causes are behind CCD. Sales of IMD were €556 million in 2007 (about U.S. $784 million), making it the company's top seller among pesticides.

An EPA fact sheet from 2003 states clothianidin is potentially toxic to honeybees, as well as other pollinators, through residues in nectar and pollen. Bayer maintains that clothianidin does not pose long-term risks to bees.

NRDC scientists sought the clothianidin studies for several reasons. First, they want to discover what information the studies contain about the neurotoxin's effects on bees. Secondly, there are concerns surrounding the quality of the study and the standards by which it was designed. NRDC hopes to learn what EPA required of the company and whether the company's response meets those requirements. Finally, they want to learn what else the agency considered and examine how EPA evaluated the information when it decided to leave the pesticide on the market.

Little research has been conducted examining the effects of sublethal dose exposures on bees. It is possible the industry studies contain new information in this area. Existing research, as well as much anecdotal evidence, has convinced French and German agricultural authorities to suspend use of clothianidin until evidence of its safety to bees is established. Despite having the same facts before them, the EPA has not taken similar precautions.

Instead, the EPA has repeatedly used "emergency exemption provisions" under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to approve use of clothianidin in five states. The agency has also used the emergency provisions to approve use of IMD 163 times in 26 states. These emergency exemptions are intended to allow unregistered use of pesticides for a limited time if EPA determines that an emergency condition exists. The Sierra Club is urging EPA to suspend use of neonicotinoids until sublethal doses are shown to be safe for bees.

EPA's director of pesticide programs expressed "great disappointment" in NRDC's action and

defended the agency's activities regarding CCD. In an Aug. 21 letter, Debra Edwards described CCD as a "matter of serious concern" and noted voluntary measures the agency is undertaking to deal with the matter. Edwards also claimed that EPA needs more time to fully respond to the FOIA request. If bees are likely to be exposed, EPA requires pesticide manufacturers to conduct bee toxicity tests before a new pesticide may be registered and marketed.

This is not the first time that NRDC has had to seek legal intervention to extract pesticide information from EPA. NRDC claims that EPA's pesticide program has repeatedly refused to disclose information in response to FOIA requests until months or even years after the deadline. Several times, federal judges have rebuked the Office of Pesticide Programs in cases NRDC was forced to litigate regarding the EPA's lack of transparency. The group reports that over the last seven years, NRDC has filed several FOIA requests per year for EPA pesticide information, and the agency has not responded on time to any of the requests.

Government's Secrecy Grade: Unsatisfactory

OpenTheGovernment.org's 2008 Secrecy Report Card, released Sept. 9, explored numerous indicators of government secrecy and found that continued expansion of secrecy across the federal government occurred in 2007. The report is the group's fifth such annual publication; all five reports have discovered continual poor performance by the federal government in permitting public access to government information.

The 2008 report also noted that while secrecy worsened in the executive branch, the 110th Congress pushed forward with new legislation to increase government openness and accountability. In particular, Congress passed and the president signed into law amendments to the Freedom of Information Act (FOIA) intended to strengthen the law.

The report found that in 2007, the government received nearly 22 million requests for records under FOIA, which was almost a two percent increase from the number of requests received the previous year. These increases seem to be mostly due to the fact that the Social Security Administration and the Veterans Administration classify individuals' requests for information as FOIA requests.

The report also found that the 25 departments and agencies responsible for the bulk of FOIA requests continued to carry significant backlogs of these requests. According to Patrice McDermott, Director of OpenTheGovernment.org, "These trends indicate that citizens will have to wait even longer to know what their government is doing."

In 2007, there was a slight increase in the number of original classification decisions, after two consecutive years of declines. At the same time, there was an almost 13 percent increase in the number of derivative classifications. Derivative classifications replicate originally classified information in different ways and formats. The growing number of derivative classifications reflects the continuing increase in original classification and, according to ISOO (Information

Security Oversight Office), the use of classified e-mail, webpages, blogs, wikis, and so on.

In addition to the time that secrecy costs the public in waiting longer and longer for FOIA requests, classification costs taxpayers money. The report estimated the government spent almost $200 to maintain secrets for every dollar the government spent declassifying documents, a five percent increase over the 2006 ratio. Even though the government spent the same amount of money on declassification as it did in 2006, the number of pages declassified declined. Also troubling was that the annual decline in original classification decisions being assigned automatic 10-year declassification status has continued: 64 percent of such decisions were slated for automatic declassification in 2005, but only 61 percent were so designated in 2006, and just 57 percent in 2007.

The report also tracks data on the following indicators to help present a complete picture of the state of access to federal government information:

- Use of state secrets privilege
- Issuance of National Security Letters
- Assertions of executive privilege
- Foreign Intelligence Surveillance Court Orders
- Secrecy orders for patents
- Use of presidential signing statements
- Whistleblower awards for saved money
- Competition of federal contracts
- Closed Federal Advisory Committee meetings

"The current administration continues to refuse to be held accountable to the public," said McDermott. "In recent years, polls have shown that a growing number of Americans believe the federal government is secretive — terrible news for our democracy. Until we restore openness and accountability to the federal government, it will be impossible to win back the public's trust."

OpenTheGovernment.org is a coalition of over 70 consumer and good government groups, librarians, environmentalists, labor leaders, journalists, and others working together to reduce governmental secrecy and promote openness. The coalition focuses on making the federal government a more open place in order to make the public safer, strengthen public trust in government, and support democratic principles. OMB Watch is a member of the coalition.

Congress Returns with Little Time, Huge Workload

Congress returned to Washington the week of Sept. 8 to a jam-packed schedule and just three weeks left to complete work for the year before the target adjournment date of Sept. 26. Below is a brief summary of some of the major pieces of legislation covering fiscal policy issues that will likely be addressed:

Appropriations: A new fiscal year will begin on Oct. 1, and without approved appropriations legislation, the federal government will lack the funds necessary to continue its day-to-day operations. With only one of the 12 bills passed by the House (Military Construction-Veterans Affairs) and none passed by the Senate, it is virtually guaranteed that a continuing resolution (CR) will be enacted in the next three weeks. Although one or two individual appropriations bills may pass (particularly the Defense bill), a CR will be necessary to keep the rest of the government operating past the start of the new fiscal year. The CR will most likely provide funds at current-year levels for several months into 2009. When inflation and population growth are taken into account, a level-funded CR represents a cut in funding for many vital programs.

AMT Patch: Because the Alternative Minimum Tax (AMT) was enacted without a provision for inflation indexing, every year it threatens to affect millions of middle-income taxpayers — a scenario unimagined by the architects of the tax. Rather than permanently fix the tax — at a 10-year cost of $710 billion - $1.3 trillion — Congress opts to apply one-year "patches" that prevent the AMT from affecting millions of middle-income families. In 2008, the AMT patch will cost $63.5 billion and will not be offset with other revenue raisers or cuts in mandatory spending, adding that cost to the already growing federal deficit. If Congress fails to enact AMT legislation, over 22 million families will be hit with thousands of dollars of increased tax liabilities.

Tax Extenders: The "extenders" is a collection of miscellaneous tax cuts that expire every one to three years. Like the AMT patch, without congressional action, many of these tax cuts will expire in 2008. The current package contains a number of tax cuts for businesses (like a research and development credit) and some tax cuts for households (like a deduction for state sales tax in states that do not have a state income tax). Passage of this year's extenders package will cost approximately $55 billion over 10 years (JCT scores: House bill, Senate bill).

The House version (H.R. 6049) passed in May by a vote of 263-160 and is fully offset. Completion of the extenders package has been blocked by the Senate, which is steadfast in its resistance to offset the cost of these tax cuts. The Senate Finance Committee approved a $123 billion bill (S. 3125) that contains a deficit-financed AMT patch and a fully offset extenders package. Four times Senate Majority Leader Harry Reid (D-NV) has tried to bring this bill up for a vote in the Senate, and four times a group of 40 Senate Republicans has rebuffed him.

Energy: Leading up to the August recess (and even throughout it), congressional Republicans were adamant that Democratic leadership bring to the floors of the House and Senate a bill that would allow energy companies to drill for oil and gas on the Outer Continental Shelf (OCS). House Speaker Nancy Pelosi (D-CA) appears ready to relent as she may offer an energy package containing the OCS drilling provision along with a repeal of some oil and gas industry tax cuts.

Defense Authorization: The $613 billion FY 2009 Defense Authorization bill not only authorizes spending for national defense but contains a host of other measures affecting military policy. In the version passed by the House (H.R. 5658) in May (384-23) is a set of

provisions designed to improve contractor oversight. House Oversight and Government Reform Committee Chair Henry Waxman (D-CA) was successful in attaching his Clean Contracting Act as an amendment to the bill. The measure is a bundle of contracting reforms including provisions that would:

- Establish a database of contractors found in violation of federal laws and regulations (this provision was also passed in the House by voice vote as a stand-alone bill in April: H.R. 3033).
- Close a fraud reporting requirement loophole (also passed by the House by voice vote as a stand-alone bill: H.R. 5712)
- Establish a database of the names and salaries of top executives of private contracting firms that receive more than 80 percent of their revenue from contracts (passed by the House by voice vote as a stand-alone bill: H.R. 3928)

Passage of the DoD bill in the Senate has been stymied by a Republican filibuster, as Senate Minority Leader Mitch McConnell (R-KY) has instructed his colleagues to insist that a vote on the OCS drilling bill be brought to the floor before any other bill. Enactment of the bill is also in doubt because President Bush has threatened to veto the House version over numerous provisions. Some of these provisions include a prohibition on public-private competitions for government contracts, a requirement to videotape detainee interrogations, a rejection of an executive order regarding earmarks, Iraq war policy, missile defense, and many others.

Other Priorities: Hurricane Gustav spared the Gulf Coast cataclysmic damage but did not leave the region unscathed. Although a damage estimate has yet to be tallied, and the extent the damage is unknown, hurricane victims seeking relief may find more than a few sympathetic ears in Congress. And as hurricanes continue to form in the Atlantic and threaten the Southeast, Congress may be compelled to appropriate funds for hurricane recovery before they adjourn for the year. In fact, this may become a high enough priority that a lame-duck session of Congress would be called after the elections in November.

In addition to hurricane relief, the prospects for a second economic stimulus package are improving as indications of a souring economy continue. Although gross domestic product (GDP) figures remain somewhat above levels typically seen during recessions, a rapidly increasing unemployment rate (currently at 6.1 percent) is within recession territory. Further, insurance claims are also at levels seen in recessions. While tax rebates keep the economy afloat, there are millions of households struggling to keep their heads above water. In an effort to boost the economy and provide aid to families that need it most, groups such as the Coalition on Human Needs (CHN) and the Emergency Campaign for America's Priorities (ECAP) have been asking legislators to enact a number of stimulus measures including:

- Unemployment Insurance extension and reforms
- Increased spending on Food Stamps and Emergency Food
- Assistance for home heating and cooling bills (LIHEAP)

Given the overloaded list of priorities and the glacial pace at which Congress has moved in

2008, completion of all of these items is unlikely. Whether congressional leaders will decide to bring members back after the elections to try to complete some of the unfinished work or simply wait until the start of a new Congress in 2009 is still undetermined.

Rising Unemployment Adds to Struggling Economy

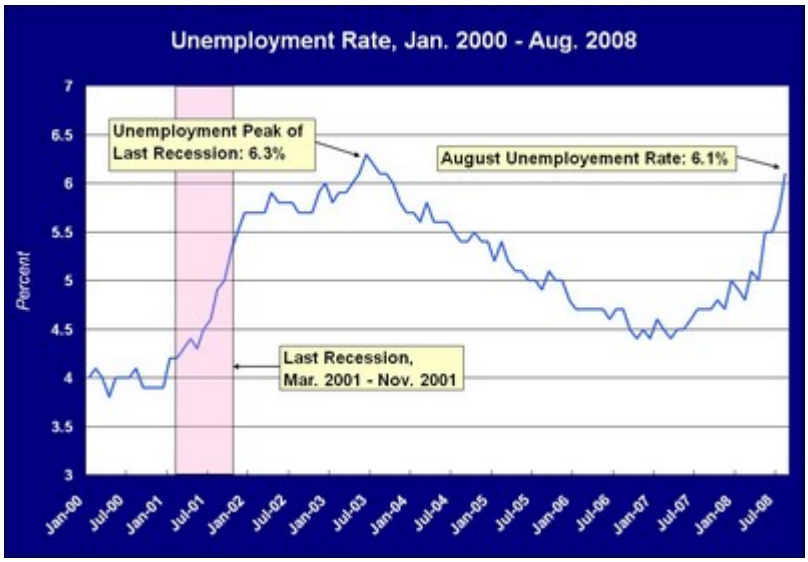
When the Labor Department released its monthly unemployment and jobs data on Sept. 5, it reported that the unemployment rate for the month of August was 6.1 percent. The 0.4 percentage point increase over the prior month has pushed the unemployment rate to a five-year high and is the latest indication that the economy continues to deteriorate.

Recessions are officially designated by the Business Cycle Dating Committee (BCDC) at the private, nonprofit, nonpartisan National Bureau of Economic Research (NBER). NBER defines a recession as:

> ...a significant decline in economic activity spread across the economy, lasting more than a few months, normally visible in real GDP, real income, employment, industrial production, and wholesale-retail sales. A recession begins just after the economy reaches a peak of activity and ends as the economy reaches its trough.

The news media typically cite the definition of a recession as "two consecutive quarters of negative GDP [gross domestic product] growth." However, NBER's definition is broader. While NBER "views real GDP as the single best measure of aggregate economic activity," it also considers personal income, employment, industrial production, and wholesale and manufacturing sales.

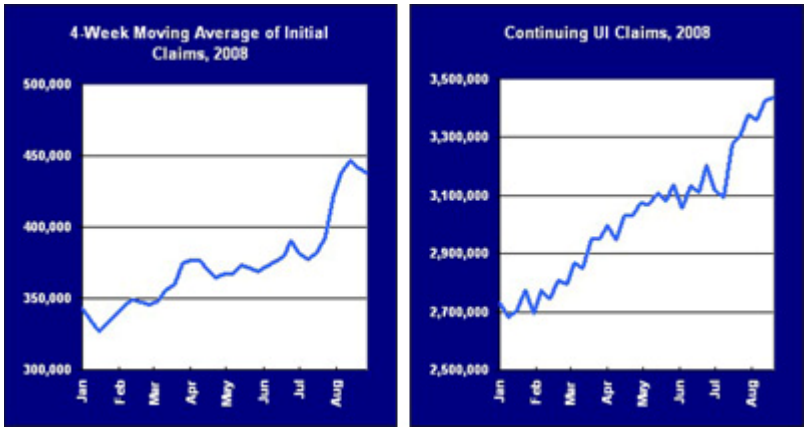
At 6.1 percent, the unemployment rate is well within recession territory and shows little indication that the 9.4 million unemployed people will return to the payrolls in the short term. Since August of 2007, the number of unemployed people has increased by 2.2 million, and the unemployment rate has ticked up 1.4 percentage points. As the graph below shows, during the last recession (March 2001 through November 2001), the unemployment rate increased 1.2 percentage points from 4.3 to 5.5 percent, but the economy continued to shed jobs during the recovery as the unemployment rate peaked at 6.3 percent 19 months later.



(click to enlarge)

The Labor Department measures unemployment by several methods; however, the most commonly reported measure, the one cited above, is known as the "U3" measure and counts only those people actively seeking employment. This ignores those too discouraged by their prospects to look for employment. Another, broader measure, "U6," includes "marginally attached workers...plus total employed part time for economic reasons." By this measure, as Paul Krugman notes, the employment outlook is "worse than it was in the aftermath of the 2001 recession."

Paralleling the increase in unemployment is the number of people applying for unemployment insurance (UI) benefits. Since the beginning of this year, the four-week moving average of first-time UI claims has increased from about 343,000 to 438,000, a 28 percent increase. Similarly, the number of people who have claimed UI benefits for consecutive weeks has increased 27 percent, from 2.7 million in January to 3.4 million at the end of August. *The Wall Street Journal's* blog *Real Time Economics* has noted that economists view these UI claims as "arguably in recession territory" and that "there is no question this looks very bad indeed."



(click to enlarge)

The increase in the number of people looking for work can largely be attributed to the number of job cuts by employers. Since the beginning of the year, the economy has shed over 600,000 jobs, and each month has seen job losses. However, this number is buoyed somewhat by the growth in government jobs, which increased by 153,000 while private employers slashed their payrolls by 758,000. The last time the economy saw eight consecutive months of job losses was in May 2002, at the end of a15-month period of payroll cuts precipitated by the 2001 recession.

Congress attempted to stem the tide of this economic downturn earlier this year when it approved tax rebate checks for the majority of Americans. While these checks did stimulate consumer spending and are likely the cause of a significant bump in economic growth in the second quarter, they did little to slow the deterioration of the economy.

This summer, Congress acted again, this time to help those already hit by job losses and the poor employment atmosphere. In light of rising unemployment, Congress voted to extend UI benefits in July, allowing people who exhaust the 26 weeks of state unemployment benefits to qualify for another 13 weeks of federal assistance. This policy has been enacted in the past, particularly when the ranks of the long-term unemployed swell, as is happening in 2008.

Yet even those people who have maintained employment are not immune to the declining economy. Although real average weekly earnings have stagnated since December 2001, a precipitous drop in worker paychecks that began in September 2007 has yet to abate. Worker pay is now just above what it was in September 2005, and excepting that month, one has go back to almost ten years to September 1998 to find earnings levels as low as they were in July of 2008.

(click to enlarge)

Until the Bureau of Economic Analysis reports consecutive quarters of negative GDP growth (economic contraction), headlines proclaiming a recession will remain relegated to economic

blogs. Yet for millions of families who have lost a primary source of income or have seen a significant drop in pay, regardless of the headlines, they are currently living a recession.

Critics Ask DOJ to Drop Proposed Expansion of Domestic Surveillance Powers

Recently, several organizations submitted public comments critical of a Department of Justice (DOJ) proposed rule to expand the power of state and local law enforcement agencies to investigate potential criminal activities and report the information to federal agencies. Many noted the proposal is unnecessary for public safety and a threat to free speech and association. DOJ claims the changes are necessary because the existing regulation on criminal investigation does not specifically mention terrorism or "material support thereof."

The DOJ's existing regulation allows authorities that receive funds under the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act) to "collect and maintain criminal intelligence information concerning an individual *only* if there is suspicion that the individual is involved with criminal conduct or activity." (emphasis added) DOJ wants to expand this. On July 31, the agency proposed amendments to the existing regulation that would broaden the scope of activities authorities could monitor to include organizations as well as individuals, along with non-criminal activities that are deemed "suspicious." The proposal would also double the period authorities could keep information without updating or validating it, from five years to ten years, and change the accepted standard of disseminating collected intelligence to agencies having "a need to know and a right to know" to a wider audience of actors, possibly including creditors, employers, and landlords. According to the *Washington Post*, the proposed rule is "part of a flurry of domestic intelligence changes issued and planned by the Bush administration in its waning months. They include a recent executive order that guides the reorganization of federal spy agencies and a pending Justice Department overhaul of FBI procedures for gathering intelligence and investigating terrorism cases within U.S. borders."

The comment period was limited to 30 days, which is unusual for such a controversial rule. In its comments, OMB Watch highlighted the short comment period and called for the rule to be withdrawn due to concerns about violations of the First Amendment rights of free speech and assembly. The comments noted that the proposed changes would expand information collection to include organizations, and as a result, "Americans may become reluctant to participate in organizations if they feel it will make them targets of government investigations.... Abuse and politicization of investigative powers are not just a potential danger. The problem already exists, and has been exposed in the press." The comments also said the proposed rule is at odds with the Safe Streets Act's requirement that regulations ensure that information collection systems "are not utilized in violation of the privacy and constitutional rights of individuals."

Other critics believe the additional powers will burden police officers with excessive and needless data and hinder the needed focus on legitimate threats. Comments filed by the

Defending Dissent Foundation said doubling the information storage period from five to ten years "will undoubtedly increase the volume of obsolete, incorrect and useless information sitting in intelligence databases." OpenTheGovernment.org's comments suggest that proposing to add activities such as taking notes or pictures, drawing diagrams, and voicing extremist views as acceptable reasons to suspect criminal activity "risks adding useless information to the database and making it more difficult to identify legitimate threats."

According to DOJ, some of the proposed changes would facilitate the dissemination of sensitive data at regional intelligence fusion centers and for Joint Terrorism Task Forces. These changes are a cause for concern, according to the American Civil Liberties Union's (ACLU) comments. The ACLU's research details legal problems with fusion center intelligence activities. In addition, a 2007 Congressional Research Service report revealed that guidelines issued in 2006 by the DOJ and the Department of Homeland Security sanction the collection of data "beyond criminal intelligence" in violation of the current DOJ rule. According to the ACLU reports, fusion center officials feared that the inclusion of data obtained under such broad conditions could lead to a reduction in powers granted to future intelligence gathering operations.

Members of Congress have also expressed concern. A Sept. 5 letter from House Judiciary Committee Chair John Conyers (D-MI) and Reps. Bobby Scott (D-VA) and Jerrold Nadler (D-NY) stated that "we question the need to consolidate the FBI guidelines during the waning days of the Administration." They asked the agency to answer a series of questions in writing prior to a Sept. 16 oversight hearing on the FBI's domestic operations.

The proposed rule is being rushed through despite a White House memo issued in May that says all regulations "to be finalized in this Administration should be proposed no later than June 1, 2008." The rush may be because the same White House memo also says that final rules must be published by Nov. 1.

Police and Protest Groups Clash at Political Conventions

Scores of protesters converged on the Democratic National Convention (DNC) in Denver, CO, and the Republican National Convention (RNC) in St. Paul, MN. Both were designated "national special security events," and the Secret Service was responsible for planning and implementing a security plan for each city. Protesters were visible at both conventions, although far fewer at the DNC, and hundreds of arrests made headlines at the RNC.

In Denver, police made few arrests. City officials had predicted thousands of protesters, but only a few hundred showed up. The location of the protest zone, far from the convention site at the Pepsi Center, was blamed for the low turnout. According to *Roll Call* (subscription required), "Protesters pointed out that only the back of the media tent faced the demonstration area, and reporters couldn't access the area without exiting convention security and walking about 15 minutes around the block." The American Civil Liberties Union (ACLU) of Colorado and a dozen protest groups filed a lawsuit against the city arguing that the demonstration area

was too far away from the convention, but a federal judge ruled that the plans were constitutional.

The scene was different in St. Paul, where there were reports of widespread civil liberties abuses during large-scale arrests, police raids on private homes, and the detention of several journalists. The Associated Press reported that there were over 800 arrests "during a week of sometimes peaceful, sometimes violent dissent. Anti-war protesters rallied Thursday [Sept. 4] at the state Capitol and then planned to march to Xcel Energy Center, where Sen. John McCain☼ was due to accept the GOP presidential nomination. But their permit had expired, and police — in riot gear and using horses, snow plows and dump trucks — blocked their way. For hours, police let the protesters amble from one blocked intersection to another. But then the arrests began in earnest. At least 19 journalists, including two reporters from the Associated Press, were among those held by police." Journalists complained they were covering the protest activities, not participating in them, when being arrested.

One of the more publicized journalist arrests was Democracy Now! host Amy Goodman. According to the Free Press, "Local advocates and independent journalists will deliver more than 50,000 petitions to St. Paul City Hall calling on Mayor Chris Coleman and local law enforcement officials to drop all charges against journalists arrested while covering protests." Nancy Doyle Brown of Twin Cities Media Alliance said, "The targeting and harassment of journalists that we've seen during the RNC sends the message that the Twin Cities don't value the essential role that journalists play in a democracy."

The *Minneapolis Star Tribune* reported that informants were planted in protest groups before the convention began, reminiscent of accounts from the 2004 RNC. At least six buildings across St. Paul and Minneapolis were raided to stop an "anarchist" plan to disrupt the RNC. "From Friday night through Saturday afternoon, officers surrounded houses, broke down doors, handcuffed scores of people and confiscated suspected tools of civil disobedience," the paper reported. The ACLU of Minnesota filed a lawsuit in federal court asking for the release of literature confiscated during the raids on private homes.

Eight people were charged with conspiring to cause a riot as part of a terrorist act and arrested in raids of homes conducted by the Ramsey County Sheriff's Department. The Minnesota Chapter of the National Lawyers Guild (NLG) is representing several of the suspects and is seeking judicial review of the preventative detentions ordered by Sheriff Bob Fletcher. An NLG press release stated, "Despite the incendiary and alarmist language used by Sheriff Fletcher, there is no evidence that the common household items and tools seized in the pre-emptive house raids were intended to be used to cause death or civil unrest. No judge or prosecutor has reviewed the allegations made by Sheriff Fletcher." Bruce Nestor, president of the Minnesota chapter of the NLG, referred to the accusations as "an effort to equate publicly stated plans to blockade traffic and disrupt the RNC as being the same as acts of terrorism."

In a press release, ACLU Executive Director Anthony D. Romero stated, "Attempts by law enforcement to squelch lawful political speech and stifle the press have no place in our democracy and are unacceptable." The ACLU has called for an investigation into the arrests of

hundreds of peaceful protestors, the surveillance on several activist groups and private homes, and the targeting and harassment of journalists.

Not all forms of advocacy were so publicly dejected. Many nonprofit representatives were present at the conventions and used them as an opportunity to bring their issues to the table. For example, the advocacy group Every Child Matters had a live blog from the RNC.

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In This Issue

Free Market Ends as Washington and Wall Street Merge

Following a string of guarantees, buy-outs, and bailouts for various financial firms, Congress is now rushing to authorize the Treasury Secretary to spend $700 billion to bail out the rest of Wall Street. Since its role in the sale of investment bank Bear Stearns to rival J.P. Morgan in March, the federal government has intervened three times in the nation's financial markets by using taxpayer dollars to prop up the value of various private banking and mortgage entities. While taxpayers ought to be concerned about the sums of money involved in these transactions, a more fundamental problem exists: the bottom-line cost is anybody's guess.

The current crisis in the financial markets is rooted in the basic problem of bad debt. Since the housing bubble burst, millions of homeowners have been unable to pay off their mortgages, ultimately surrendering to foreclosure. Unfortunately, the repercussions of these foreclosures extend beyond just the individual homeowners who default. The mortgages for these homes

were bundled, sliced and diced, and sold by and to Wall Street investors in the form of mortgage-backed securities (MBS). Investment banks, using borrowed money, bought up trillions of dollars of these securities in a bid to enlarge their profit margins. But, as the housing market collapsed, the values of these MBSs became unknowable as good debt — mortgages whose holders maintain payments — was mixed in with the bad. And because these banks cannot properly estimate the value of the outstanding bad debt or identify which MBSs contain those bad debts, banks have significantly reduced their lending to each other to minimize their risk. Recognizing the potential depression-magnitude effects that this failure to lend might have on the economy, the Federal Reserve Bank and the Treasury Department have initiated several extraordinary measures over the past six months.

On March 16, investment bank J.P. Morgan agreed to purchase competitor investment bank Bear Stearns. But the sale was at a substantial discount and was premised on the condition that the Federal Reserve lend J.P. Morgan $29 billion, with $30 billion in MBSs used as collateral. If J.P. Morgan defaults on the loan, the Federal Reserve will be left holding a pile of MBSs worth substantially less than the $29 billion it loaned the investment bank. And because the Fed transfers its profits to the Treasury, a $29 billion loss will result in $29 billion less revenue for the federal government — to be made up by taxpayer-financed debt. An estimate for potential costs to taxpayers remains unknown, however, as the value of Bear Stearns's MBSs are unknown. Yet, a few months later, the Bush administration requested, and Congress granted, the authority for the government to own even more risky assets.

When the president signed into law the Housing and Economic Recovery Act of 2008 (H.R. 3221), he gave the Treasury Department the authority to takeover Fannie Mae and Freddie Mac — the two government-sponsored entities (GSEs) that own or guarantee some $5 trillion in mortgage debt. The measure also gave Treasury the authority to purchase "any amount of obligations and other securities" issued by these GSEs. When the Bush administration proposed these provisions, the Congressional Budget Office (CBO) estimated that the cost to the federal government would be about $25 billion. CBO's explanation for its estimate, however, turned out be based on little more than speculation.

Although CBO asserted that "there is a significant chance — probably better than 50 percent — that the proposed new authority for the Secretary would not be used before it expired at the end of December 2009," the Treasury Department took Fannie and Freddie into conservatorship (essentially taking over ownership and operations) in September. Explaining the necessity for such a move, Jim Lockhart, director of the new independent regulator of the GSEs, the Federal Housing Finance Agency (FHFA), stated, "Our economy and our markets will not recover until the bulk of this housing correction is behind us. Fannie Mae and Freddie Mac are critical to turning the corner on housing." As part of the takeover, the Treasury Department extended a $200 billion line of credit to the GSEs to ensure their continued operation. It also implemented a plan in which the GSEs would expand their ownership of MBSs up to $850 billion, with the goal of ultimately reducing the inventories of these securities to $250 billion. Like CBO's initial estimate, the ultimate cost to taxpayers remains in a murky realm of speculation.

About a week after taking over Fannie Mae and Freddie Mac, the federal government intervened in financial markets once again when it took an 80 percent stake in AIG (American International Group). Like the GSEs and recently bankrupted investment bank Lehman Brothers, AIG had trouble meeting its debtor obligations. Believing that "a disorderly failure of AIG could add to already significant levels of financial market fragility and lead to substantially higher borrowing costs, reduced household wealth, and materially weaker economic performance," the Federal Reserve Board loaned the massive insurance firm $85 billion. The loan is to be repaid as AIG sells off its assets, and Fed staffers believe that the loan will be paid in full. It is not certain, however, that the current value of AIG's assets will be maintained over the two-year life of the loan.

Following the Fed's purchase of AIG, the Bush administration began maneuvering to intervene in the market yet again. Treasury Secretary Henry Paulson asked Congress to provide even more authority to the executive branch to take on more bad debt. Released this past weekend (Sept. 20), the Paulson request calls for a $700 billion blank check from Congress. The initial text of legislation would have given the Treasury Secretary virtually unchecked authority to purchase $700 billion more in toxic MBSs. And like the other instances in which the federal government took securities onto its books, the ultimate cost to taxpayers remains totally unknowable. What is clear, however, is that the administration projects a $700 billion increase in the national debt, as the draft legislation included a provision to increase the debt ceiling from $10.6 trillion to $11.3 trillion.

The administration is seeking quick approval of its plan from Congress during this last week before a scheduled adjournment to head out on the campaign trail on Sept. 26. But both Democrats and Republicans appear hesitant to write the blank check without significantly more transparency, oversight, and accountability mechanisms in place. Sen. Chris Dodd (D-CT) has begun drafting changes to the Treasury proposal he hopes will bring increased transparency and oversight, as well as direct assistance for homeowners with mortgages in danger of default.

The upshot of these market interventions, for better or ill, is that the federal government has added to its balance sheet potentially hundreds of billions, perhaps even trillions, of dollars in bad debt. And while economists and policymakers may argue the importance of bailing out Wall Street, they can carry out only the most rudimentary of cost-benefit analyses, because they are working in such an information void. It is precisely this dearth of information that is cause for concern: A crisis in the nation's long-term finances is looming, and now the federal government may or may not be piling on more than a trillion dollars in future obligations. The knots of federal budgeting have just gotten tighter, although by how much is difficult to determine.

Commentary: On Bailouts, Congress Should Move with Great Care

The pace at which Congress is considering the largest intervention into financial markets in the

history of the United States, if not the world, is shocking. Over the weekend, the Bush administration proposed legislation that would grant it the authority to buy up toxic financial assets in an amount equal to five percent of gross domestic product (GDP). The magnitude of the funds requisitioned is matched only by the administration's requested level of unchecked power and opacity in how it would execute this historic market intervention. Congress has responded with uncharacteristic haste, setting the stage for passage of monumentally flawed legislation that purports to fix a yet-undiagnosed problem in roughly one week.

We do not pretend to know whether a bailout is needed or, if one *is* needed, what size and scope it should be. But most assuredly, rushed actions will result in quick fixes without resolving underlying problems. If economists and financial experts are correct in their assessment of the economy, Congress would be well advised to take a collective breath, slow down, and begin the process of study and deliberation that legislation of this historic magnitude deserves. If the economic crisis is as severe as Treasury Secretary Henry Paulson now indicates, Congress can wait an extra week before adjourning or return during the final weeks of the election season to address this issue. That Democratic leaders Harry Reid (D-NV) and Nancy Pelosi (D-CA) have neglected to mitigate the hysteria induced by an impending adjournment date that could easily be postponed is baffling and frustrating. After all, addressing national priorities is precisely why they were elected.

Paulson's initial request to Congress would have hid the actions of the Treasury from the sight of not only the public, but also from Congress and the courts. Sec 2(b)(2) of Paulson's legislative text would give his department authority to enter into contracts "without regard to any other provision of law regarding public contracts." Sec. 8 would make "[d]ecisions by the Secretary pursuant to the authority of this Act … non-reviewable and committed to agency discretion, and may not be reviewed by any court of law or any administrative agency." Paulson has agreed to modify these provisions, but it is a clear indicator that the administration has its sights set on virtually unchecked authority — much like what happened after the 9/11 terrorist attacks.

Congress would be wise to ensure that significant oversight and accountability structures are in place. If Paulson or his successor can make unilateral decisions about contracts, for example, it will likely raise conflicts of interest. The firms most able to help the government dispose of toxic assets are likely the firms that are seeking the government bailout. Congress must be wary of ceding authority to a unilateral actor with no assurances of safeguarding the public from conflicts of interest.

Paulson's proposal would do what advocates and watchdogs of all ideological stripes abhor: it would socialize the risks (and bad decisions) of capitalism while privatizing the rewards. The Bush administration's toxic asset buyout program would purchase from financial firms and individuals assets that are now worth significantly less than the original purchase price. The plan calls for the government to relieve the financial industry of hundreds of billions (potentially trillions) of dollars of bad debt without receiving anything in return from these firms. Nothing. No one knows what the size or value of these debts will be. Progressives complain the taxpayers get no equity in the companies that created the bad debt; conservatives

complain about government interference in the free market. This issue is at the crux of a major philosophical debate about the role of capitalism as this country moves into the 21st century.

Without attaching strings to a bailout, Washington would place an additional $2,000 of debt on the shoulders of each man, woman, and child in the country while encouraging the foolish and greedy decisions of Wall Street. It was the poor decisions of investment bankers that put the nation's entire economy at risk; it would be nothing less than immoral to enable and reward their reckless behavior as millions of Americans find themselves unemployed, losing their homes, and struggling to pay for food and electricity.

With nary a witness heard nor public forum entertained, the chair of the Senate Banking Committee, Christopher Dodd (D-CT), working with his counterpart in the lower chamber, chair of the House Financial Services Committee Barney Frank (D-MA), had started circulating the outline of the legislation his committee is likely to offer. However, Republican ranking member on the Senate Banking Committee, Richard Shelby (R-AL), sensing the imprudent manner under which Congress is responding to the administration, believes "Congress must immediately undertake a comprehensive, public examination of the problem and alternative solutions rather than swiftly pass the current plan with minimal changes or discussion." Dodd's contribution is substantively promising, and Shelby's warning is well warranted and should be heeded. While things are shifting quickly, if a bailout is to occur, the legislation must adhere to the principles outlined in a letter co-authored by ACORN and the Campaign for America's Future, to which OMB Watch has signed on.

These guidelines include the set of principles that should be followed whenever Congress intervenes in the market:

- Ensure proper oversight will be conducted over the intervening agency
- Protect the taxpayer by ensuring that the federal government not only assumes the risks of a bailout, but also shares in the benefits
- Maintain a sensible regulatory framework under which assisted firms and individuals conduct business
- Hold individuals accountable for their irresponsible behavior

In addition to these guidelines, consideration should be given to aiding individual citizens who continue to struggle to stay in their homes. Above all, Congress must conduct its deliberations transparently and be wary of potential conflicts of interest of those that seek to influence the legislative outcome.

It was only four days ago that Paulson asked Congress to pass legislation that would allow his department to use $700 billion to purchase mountains of bad debt. That's five percent of the nation's total economic annual output, or to put it another way, that's even more than what has been spent on the war in Iraq. With so much riding on the decisions and actions that our leaders are about to make at this pivotal moment in our history, every American deserves more than five days of Congress's time. Perhaps now, more than any other time, elected officials, particularly Congress, need to do more than prop up our expectations with short-term

solutions. Instead, they should develop a clear understanding of all the components that led to this crisis. Only then will proposed reforms have lasting impact and ensure this type of problem is not allowed to happen again. Let's hope our leaders make the prudent decision to slow the process down and devise a wise policy solution that benefits our entire society.

Senate Clears Contracting Reforms after Resolving Earmark Dispute

The Senate passed important contracting reforms Sept. 17 when it approved the FY 2009 Defense Authorization Act (S. 3001) by an 88-8 vote. Among other measures, the legislation included a provision to create a national contractor misconduct database.

The Senate had been debating the legislation behind the scenes for months, and majority Democrats had attempted to pass the authorization bill multiple times since the House passed its version in late May. The upper chamber was unable to garner 60 votes to limit debate on the bill throughout the summer because of a variety of objections from the Republican minority, including a desire to first address energy issues and transparency of earmarks.

After Senate Republicans dropped their filibuster of the bill over unrelated energy policy concerns in early September, progress was then held up because of another round in the fight over earmark policy. The Defense Authorization bill contains over $5 billion in earmarks that are listed in the committee report for the bill rather than within the text of the legislation. In addition, the text of the bill instructs that earmarks included in the report language should be considered part of the bill — in direct opposition to an executive order issued by President Bush in January.

Sen. Jim DeMint (R-SC) — one of the Senate's head earmark hawks — attempted to offer an amendment to effectively remove the earmarks in the committee report. This amendment would have deleted the section in the bill instructing that the report language on earmarks be followed. Sen. John Warner (R-VA) attempted to strike a compromise between DeMint and Armed Services Committee Chairman Carl Levin (D-MI) by proposing that an eventual conference committee bill list the earmarks in the legislative text. Neither DeMint's amendment nor Warner's compromise were considered by the full Senate. Although these and many other amendments were not considered, a good number of those proposals could be added to the bill in a conference with the House.

One area where transparency and accountability advocates are hoping for further improvement is in the scope and access of a proposed contractor misconduct database. The database would be a compilation of information regarding integrity and performance of entities awarded federal contracts and grants, including details about contractors that have defrauded the government, violated laws and regulations, had poor work performance, or had their contracts terminated for default. Much of the information required in the database is already publicly available from other government sources.

As originally proposed in separate legislation by Rep. Carolyn Maloney (D-NY) and Sen. Claire McCaskill (D-MO), the database was designed to apply to all large government contractors and be accessible both to government employees and the public. In the final version of the Senate authorization bill, however, the database only applies to Department of Defense contractors and is accessible only to government employees, not the public. These restrictions on the database would greatly limit both its value and its effectiveness.

The Project on Government Oversight organized more than 30 national organizations in May to urge Congress to structure the database as originally conceived — covering all types of contractors and being open to the public. Although the effort to keep the database transparent has yet to be successful, the passage of language requiring the database is still a significant accomplishment and, if used correctly, should be a powerful tool for preventing risky contractors from receiving federal contracts.

Congress is currently working furiously to reconcile the House and Senate versions of the authorization bill in the hopes of sending a final bill to President Bush by the target adjournment date of Sept. 26. Conference committee negotiations will have to take into consideration a staggering number of objections to the legislation from the president, including disagreements over the misconduct database and two smaller restrictions on using private contractors for security functions in combat zones and allowing contract employees to participate in detainee interrogations.

Key Tax Policy Items Remain Unresolved

Congress is scheduled to adjourn for the election season on Sept. 26, but a set of what many consider must-pass tax cut bills have yet to be sent to the president's desk. As differences between the House and Senate remain over offsets, and as a massive Wall Street bailout bill has grabbed the spotlight, final congressional approval of these measures before adjournment remains less than certain.

The House has already passed a variety of tax cut bills, all of which are fully offset, and is awaiting Senate action. Earlier in 2008, the House passed a fully paid-for Alternative Minimum Tax (AMT) "patch" (H.R. 6275), a fully paid-for set of alternative energy tax cuts (H.R. 6899), and a fully paid-for set of miscellaneous expiring tax cuts (H.R. 6049). On Sept. 23, the Senate will be considering three different tax cut proposals. The Senate will use H.R. 6049 as a vehicle to move its tax provisions, striking the language of the House's bill and replacing it with the Senate's version. This is because all revenue legislation technically must originate in the House.

The first proposal would provide tax incentives for renewable energy production, including solar and wind power. The $17 billion in tax cuts would be fully offset by ending tax cuts for fossil fuel production. The second proposal would provide AMT tax relief to some 22 million families, extend almost $60 billion in expiring non-energy tax cuts, and provide disaster relief for hurricane and flood victims. This proposal is fully offset, but chances of passage in the

Senate are considered slim, as the Senate has little appetite for approving legislation that is offset. A third amendment would be similar to the second amendment, but it would be only partially offset and is more likely to pass.

Tax Package to be Considered by Senate, Week of Sept. 22, 2008		
Provision	**Cost**	**Offset**
Proposal 1		
Energy tax provisions	17.0	17.0
Proposal 3		
AMT relief	64.2	0
Tax extenders and disaster relief	67.5	25.2
Tax extenders	*59.3*	
Disaster relief	*8.2*	
Net Cost of Package		***123.5***

If the Senate approves any of the measures above — it's likely that the first and third proposals will pass — the House will take up the amended bill before Sept. 26. Getting the non-energy, non-offset extenders language approved in the House will prove difficult, however, as House Democrats strongly favor offsetting the tax cuts. Plainly stating their position on approving tax cuts that add to the deficit, Rep. Earl Pomeroy (D-ND) said, "We're not going to accept this." But, if House Democratic leadership breaks up the Senate bill into three individual bills, there is a possibility that an unpaid-for AMT patch may be approved, as Congress would prefer to keep millions of families from paying higher taxes through the AMT.

With details still awaiting finalization and only one week left for Congress to finish its work, there is little time remaining for debate on these tax cuts. If Congress leaves town without enacting these provisions, particularly a "patch" for the AMT, the chances of a lame-duck session after the elections will increase dramatically.

Veterans Administration Again Reverses Itself to Allow Some Voter Registration Drives

Over the past several months, support has been growing to allow voter registration efforts at Department of Veterans Affairs (VA) facilities. In a reverse of policy, the VA will no longer ban voter registration drives for veterans living at federally operated nursing homes, shelters for the homeless, and rehabilitation centers across the country. A week after this change, the House passed the Veterans Voter Support Act to legislatively protect such activity and to ensure that the VA allow voter registration drives by nonpartisan groups. However, the VA told a Senate committee that it opposes the legislation in its current form.

On Sept. 8, the VA announced a change in its voter registration regulations. "The Department will welcome state and local election officials and non-partisan groups to its hospitals and

outpatient clinics to assist VA officials in registering voters at VA facilities. Such assistance, however, must be coordinated by those facilities in order to avoid disruptions to patient care." The VA did not, however, decide to designate VA facilities as voter registration agencies under Section 7 of the National Voter Registration Act (NVRA). Also known as the Motor Voter Act, Section 7 requires states to offer voter registration opportunities at all offices that provide public assistance. Given that the early September decision marked the third time in five months that the VA had revised its voter registration policy, many in Congress were skeptical and moved ahead with legislative action.

The new VA policy only covers in-patients and only requires that voter registration information be posted on the wall, rather than specifically allowing someone to directly ask veterans if they want to register to vote. The ability of third parties to assist in voter registration is left to the discretion of local VA officials with no precise criteria for approving or denying a request.

In the House, hearings were held on H.R. 6625, the Veterans Voter Support Act, sponsored by House Administration Committee Chair Robert Brady (D-PA). Subsequently, the House passed the legislation by voice vote on Sept. 17.

The bill would allow states to designate VA facilities as voter registration agencies and require those facilities to provide information about absentee ballots and to make sure that such ballots are available upon request. It also would allow nonpartisan organizations and election officials to enter VA property and provide veterans with information on registering.

On the House Floor, Rep. Chris Murphy (D-CT) made remarks in support of the measure, stating, "While the VA has acted wisely in withdrawing their directive, they still retain the ability to reinstate it at some future date. The VA's recent policy shifts on voting registration have been sudden and unpredictable, and there is precious little assurance that they will not undergo another change of heart."

The companion bill in the Senate, S. 3308, has yet to move out of the Senate Rules and Administration Committee. The committee held a hearing on the bill on Sept. 15. Witnesses included Paul Hutter from the VA Office of General Counsel; Paul Sullivan, Executive Director of Veterans for Common Sense; and Lisa Danetz, Senior Counsel at Demos.

Hutter stated clear opposition to the bill in his opening statement, specifically because the legislation allows a state to designate the VA as a voter registration agency under the NVRA. "This would establish a competing use for VA facility space beyond the needs of the veterans who rely on that facility for its primary mission."

Hutter continued, "Voter registration activities, particularly those that invite in the broader community, would be highly disruptive to the services offered, which are often of a very sensitive and personal nature. The additional traffic brought to the Vet Centers may also adversely impact the treatment of individual veterans and may discourage others from seeking services." Hutter was concerned that the proposed legislation could be read as requiring the VA to allow any nonpartisan group that wanted access, without giving the VA any discretion over

the number or type of nonpartisan organizations that would be able to provide such services. "VA facilities are not the equivalent of public sidewalks or the courthouse steps," he noted, "and reasonable and viewpoint neutral restrictions on speech are lawful."

According to Hutter's testimony, the VA had only recruited 173 volunteers to register voters at its 1,400 facilities and has only registered 414 inpatients and outpatients, out of more than 5 million veterans who receive care at VA facilities.

Voting rights advocates said news that the VA has not substantially changed its policy further confirms that Congress should move forward with legislation. For example, members of the nonprofit organization Veterans for Peace were denied access to register voters at the Fort Miley medical center in San Francisco. According to an AlterNet article, "VA officials said Veterans for Peace members had to be screened and approved as volunteers, which included being tested for tuberculosis. That response by the VA prompted litigants who have sued the VA over the registration drives to return to court seeking an order to force the VA to allow those efforts."

Nonpartisan nonprofit organizations are skilled at increasing the number of Americans registered to vote, and veterans may benefit from such efforts. Despite the fact that the 2008 election is only weeks away, voting rights groups will likely continue to call for a federal law that will allow veterans to have access to voter registration opportunities at VA facilities. Ensuring that veterans can participate in the democratic process through access to voter registration should be standard policy.

Voter Purging Allegations Arise as November Election Nears

As the November elections near, more allegations of voter purging are cropping up. Michigan, a closely watched swing state in the presidential election, has been a hotbed of voter purging issues in recent weeks. Florida, another swing state, also finds itself in the midst of voter purging issues. Nonprofit organizations, individual citizens, and political parties have recently filed lawsuits alleging that voters are being unlawfully removed from the eligible voter pools.

The United States Student Association Foundation, the American Civil Liberties Union Fund of Michigan, and the American Civil Liberties Union of Michigan filed suit on Sept. 17 against the Michigan Secretary of State, the Michigan Director of Elections, and the City Clerk for the City of Ypsilanti to prevent the state from implementing two voter removal programs.

According to an ACLU press release, one of the voter removal programs "immediately cancels the voter registrations of Michigan voters who obtain driver's licenses in other states instead of issuing the appropriate confirmation of registration notices," and it fails to follow voter removal procedures mandated by the National Voter Registration Act.

The other voter removal program "requires local clerks to nullify the registrations of newly-registered voters whenever their original voter identification cards are returned by the post

office as undeliverable."

There are also allegations in Michigan that Republican leaders may try to take advantage of a recent spate of foreclosures to challenge voters at polling places. According to the *Michigan Messenger*, James Carabelli, chairman of the Republican Party in Macomb County, MI, is "planning to use a list of foreclosed homes to block people from voting in the upcoming election as part of the state GOP's effort to challenge some voters on Election Day."

The *Michigan Messenger* alleges that Carabelli told them, "We will have a list of foreclosed homes and will make sure people aren't voting from those addresses." Carabelli and Michigan Republican officials have denied the claims.

In Florida, the "No-Match, No-Vote" law is causing voting rights advocates to fear that thousands of voters will be disenfranchised. Under Florida's "No-Match, No-Vote" law, individuals who have registered to vote and who display valid ID at the polls may still have their votes invalidated. On Sept. 8, Florida's Secretary of State decided to enforce the controversial law.

The "No-Match, No-Vote" law requires that a person's driver's license number or Social Security number be verified before they are registered to vote. According to an article on AlterNet, "State officials admitted in a recent challenge to the law, *Florida NAACP v. Browning*, that typographical errors by election workers are responsible for most of the failures." The same article states that the law "previously blocked more than 16,000 eligible Florida citizens from registering to vote, through no fault of their own, and could disenfranchise tens of thousands more voters in November."

According to voting rights advocates, many voters will not realize that there is a problem with their voter registration until they show up to vote and are forced to cast provisional ballots. Florida voters must show photo ID at the polls to cast the provisional ballot. After casting the ballot, they must send a photocopy of their driver's license or Social Security card to election officials within 48 hours of the election or their votes will not count.

Organization's Election-Related Activities Raise Questions

The American Issues Project (AIP) has aired an ad in several swing states questioning Democratic presidential nominee Barack Obama's ties to a controversial professor. The group claims a single $2.9 million donation for the ad does not violate federal campaign finance laws, but many legal experts have questioned this logic and AIP's claimed status as an issue advocacy organization.

The AIP ad, aired in Michigan, Ohio, Pennsylvania, and Virginia, links Obama to University of Illinois at Chicago professor William Ayers, co-founder of the Weather Underground Organization, which bombed government buildings in the 1970s. The ad is the only activity thus far by the previously unknown AIP. The ad is funded by a single donor, Harold Simmons,

the Texas billionaire who funded the "Swift Boat" ads against 2004 Democratic presidential nominee John Kerry.

AIP is tax-exempt under Section 501(c)(4) of the Internal Revenue Code (IRC). According to National Public Radio, it was incorporated as Citizens for the Republic (CFTR) (also as a 501(c)(4) organization) in May 2007. CFTR changed its name to Avenger Inc. earlier in 2008. The group again changed its name, this time to the current American Issues Project, when different leadership took over. AIP assumed CFTR's 501(c)(4) tax-exempt status at that time.

Legal experts question whether the ads violate federal campaign finance law. As a 501(c)(4) organization, AIP cannot make influencing elections its "primary" purpose. Since it does not appear that AIP has engaged in any activities other than the Obama ad, it seems the group may be operating outside proper activities for a 501(c)(4) organization and be acting more like a 527 organization (where influencing elections can be the major or primary purpose of a group's activities). Ed Martin, president of AIP, told the *Wall Street Journal* that the group plans to engage in issue advocacy, such as lobbying or other non-electoral activities, in the future and that "part of our plan is that the issue advocacy will better fit around the time when the new Congress is coming in."

Many experts argue that the AIP ad is aimed at influencing a federal election and, as a result, Federal Election Commission (FEC) rules that apply to 527 organizations should also apply to AIP. Those rules limit contributions to $5,000 annually per contributor. If the 527 rules are enforced against AIP, Simmons' $2.9 million contribution would appear to violate that limit.

Former FEC attorney Larry Noble told the *Huffington Post* that "there's a question about how it's funded." However, there is an exception to this rule for "qualified nonprofit corporations" (QNCs). The U.S. Supreme Court decision in *FEC v. Massachusetts Citizens for Life Inc.* (MCFL) held that organizations that expressly promote "political ideas" and do not take corporate money are exempt from campaign finance contribution limits. The FEC adopted an exemption to its rules to comply with the Supreme Court decision.

AIP claims that it is a QNC and is thus exempt from the $5,000 contribution limit. However, the *MCFL* decision also notes that if the "major purpose" of an organization is to influence federal elections, it should be considered a political committee subject to FEC rules.

In a letter to the U.S. Department of Justice, AIP compared itself to NARAL Pro-Choice America, a 501(c)(4) organization and QNC that engages in political activities. "NARAL reported spending more than $3 million on political activities related to federal elections in 2006, more than any other of its program areas, but presumably not a majority of its expenditures," the letter said. Although the IRS has not ruled specifically on percentages, a general rule of thumb is that 501(c)(4) organizations should use at least 60 percent of their funding on issue advocacy, with the remaining 40 percent on other activities, including advocating for or against a candidate.

Allison Hayward, an Assistant Professor of Law at George Mason University, argued in a

Weekly Standard article that the issue is not as clear as many believe. "AIP is a new name for an older tax-exempt group. Do the activities of its former incarnation count when assessing its present purpose? You might argue that new name equals new group. Or you might argue that the name change is immaterial." Hayward goes on to say that "[t]he FEC has attempted several times to write a 'major purpose' rule, but has never produced language that would satisfy a majority on the commission."

Any FEC investigation of AIP is not likely to be completed before the November election.

EPA Failing on Children's Environmental Health Issues

The Government Accountability Office (GAO) told a Senate oversight committee Sept. 16 that the U.S. Environmental Protection Agency (EPA) has ignored recommendations from an advisory committee established to assist the agency in creating policies to protect children's health. For example, in developing three recent air quality standards on particulate matter, ozone, and lead, EPA either rejected the committee's recommendations or treated them as one of many public comments, according to GAO.

The Senate Committee on Environment and Public Works held the oversight hearing because of the concern that EPA has rolled back or not acted on standards for dangerous chemicals, such as perchlorate, mercury, and lead, all at the expense of children's health, according to the opening statement of Sen. Barbara Boxer (D-CA), chair of the committee. Boxer and Sen. Hillary Clinton (D-NY) asked GAO to review EPA's efforts. GAO's John Stephenson testified on the interim findings of a longer-term study the office is conducting and expects to complete in 2009.

In April 1997, President Clinton issued Executive Order 13045, *Protection of Children from Environmental Health Risks and Safety Risks*, directing federal agencies to make a concerted effort to address children's health issues because of children's increased susceptibility to toxic chemicals and air pollutants. The order established an interagency task force co-chaired by the heads of EPA and the U.S. Department of Health and Human Services (HHS). In addition, EPA created an Office of Children's Health Protection (OCHP) and the Children's Health Protection Advisory Committee.

According GAO's testimony, the advisory committee was "to provide advice, information, and recommendations to assist the agency in the development of regulations, guidance, and policies relevant to children's health." Committee members include public health officials from government, nonprofits, academia, industry, and health care organizations. OCHP and other EPA officials have met with the advisory committee regularly, as have outside groups. Nevertheless, GAO concluded that in more than 30 meetings of the advisory committee in the first ten years, "EPA has rarely sought out the committee's advice and recommendations to assist it in developing regulations, guidance, and policies that address children's health."

EPA requested advice from the committee on regulations only three times, on guidance three

times, and only once on developing a policy. Fourteen other times, EPA asked for advice on other issues such as developing plans and evaluating pilot programs. Yet over the period GAO reviewed, the committee sent to over 600 recommendations for action EPA should take on a wide variety of issues, ranging from mercury regulation and farm worker protections to pesticides and air pollution. GAO concluded, "EPA has largely disregarded the advisory committee's recommendations."

The task force created by the executive order was intended to provide federal leadership and interagency coordination of children's health issues. Nine cabinet officials and several White House policy directors were part of the task force that met regularly between October 1997 and October 2001. Although senior staff of the task force continued to meet until the task force expired in 2005, the last meeting of high-ranking members was in October 2001.

GAO concluded that EPA and HHS no longer have the mandate or infrastructure to coordinate federal activities regarding children's health since the task force expired. One consequence of this retreat from a coordinated federal response is that

> "the task force could have helped the federal government respond to the health and safety concerns that prompted the 2007 recall of 45 million toys and children's products, 30 million of them from China. Furthermore, since the provision of the executive order expired in 2005, the task force no longer reports the results of its efforts to the President. Those reports collected and detailed the interagency research, data, and other information necessary to enhance the country's ability to understand, analyze and respond to environmental health risks to children."

Other witnesses at the hearing testified about the rapidly increasing rates of chronic disease in children and various efforts and studies underway to document the scientific connections between exposure and disease. One notable research effort being assembled is the National Children's Study, an epidemiological study that will track more than 100,000 children from the womb to age 21. The study "will examine the effects of environmental influences on the health and development" of children, according to the study's website, with the goals of identifying preventable environmental causes of disease and developing preventative actions to improve children's health and health care. The first preliminary results are expected in 2011. Congress appropriated $200 million between 2000 and 2008 to set up the study, according to Dr. Leo Trasande of Mount Sinai Medical Center, one of the hearing witnesses. Trasande urged Congress to include funds in its FY 2009 appropriations so the study will not be abandoned.

Lobbyists, Allies in Congress Work to Derail Greenhouse Gas Limits

With the support of special interest lobbyists, congressional Republicans are pushing legislation to hinder the federal government's ability to address climate change. Proposed legislation would halt early efforts by the U.S. Environmental Protection Agency (EPA) to place

new limits on greenhouse gas emissions.

H.R. 6666 would prevent the EPA from issuing new rules to curb greenhouse gas emissions. Specifically, the bill would amend the Clean Air Act to read, "The term 'air pollutant' shall not include carbon dioxide." Rep. Marsha Blackburn (R-TN) introduced the bill July 30.

Blackburn introduced the bill in response to an EPA notice announcing plans to regulate greenhouse gas emissions under the Clean Air Act. The so-called Advanced Notice of Proposed Rulemaking (ANPRM) is not a binding policy proposal. Instead, it solicits public comment on a variety of options for regulating emissions. Environmentalists criticized the ANPRM for not going far enough, while special interest lobbyists complained of potentially large compliance costs.

EPA issued the ANPRM after the U.S. Supreme Court found that greenhouse gas emissions could be considered an air pollutant under the act. As a result of the decision in *Massachusetts vs. EPA*, EPA decided to begin a rulemaking to curb emissions. Previously, EPA held that greenhouse gases were not a pollutant, thereby preventing the agency from using air quality rules to cut emissions.

Massachusetts vs. EPA is considered a landmark case and was hailed by environmentalists and others concerned about the effects of greenhouse gases on climate stability. H.R. 6666 would effectively render moot the high court's decision.

Blackburn and the bill's 22 Republican co-sponsors are receiving high-powered support from the U.S. Chamber of Commerce. The Chamber, a national organization representing business interests, is lobbying Congress in support of H.R. 6666.

On Sept. 9, Chamber Vice President R. Bruce Josten wrote to lawmakers announcing the beginning of an intensive lobbying campaign: "Over the next month, the Chamber will educate members of Congress and the public about the different options EPA is weighing and the impact those options would have on businesses."

Part of the Chamber's education efforts includes a new report on the number of businesses and other entities that may be subject to regulation under EPA's tentative plans. In the report, the Chamber portends that bakeries, pet supply stores, and places of worship, among others, will fall under EPA's regulatory purview if new rules are finalized.

However, compared to EPA's own estimates, the Chamber report grossly overstates the potential impact. For example, the Chamber estimates one million "commercial" sources — offices, food service businesses, and schools, among others — would be subject to EPA's proposal. However, EPA estimates only 88,000 sources would have to institute new pollution control measures.

Frank O'Donnell, president of the nonprofit advocacy group Clean Air Watch, told BNA news service (subscription), "I don't think any rational person believes the EPA would even consider

placing limits on churches or donut shops." On his blog, O'Donnell said the Chamber is using "ugly scare tactics" in its lobbying campaign.

In the ANPRM, EPA acknowledges that new regulations may need to be tailored to avoid imposing burdens on small businesses. Although the Clean Air Act sets emission thresholds, EPA used the notice to propose several legal options for potentially exempting small sources.

While the Chamber calls the costs of greenhouse gas regulation "devastating," American businesses are already taking steps to limit emissions in advance of federal requirements. In a new report by the Carbon Disclosure Project, 32 percent of companies surveyed have instituted emissions reduction programs. "Given their historically heavy carbon footprints and extended global supply chains, manufacturing companies are often on the leading edge of carbon emissions management, tracking and reporting," the report says. The Project surveys S&P 500 companies about their emissions habits.

Other sources of greenhouse gas emissions are clamoring for greenhouse gas regulation at the federal level. A spokesman for a New Jersey power plant, which will be subject to a new regional emissions reduction compact for northeast states, told *The Wall Street Journal*, "We need to remove the imbalance as quickly as we can...We need to transition quickly to a national program."

The Chamber's efforts are the latest in a series of campaigns that corporate and anti-government lobbyists have waged to prevent EPA from taking meaningful action to address the growing threat of climate change.

In late 2007, EPA had been prepared to issue an official rulemaking proposal which would have placed new limits on greenhouse gas emissions from both vehicles and stationary sources. However, the proposal was scuttled at the behest of ExxonMobil and the American Petroleum Institute, according to congressional investigators. The oil industry lobbyists funneled their concerns through officials at the White House Office of Management and Budget and the Office of Vice President Dick Cheney.

The Heritage Foundation, an anti-regulatory think tank, also opposed EPA's initial plan. In March, *The Los Angeles Times* reported, "Edwin Meese III and fellow attorneys at the Heritage Foundation, a Washington-based think tank, spent months sending detailed legal analyses and memos to 'everyone we could think of' at the White House and in Congress, said Michael Franc, the foundation's vice president of government relations."

Despite the Chamber's support for H.R. 6666, the legislation is unlikely to move in a Congress facing a constrained calendar and pressing economic issues. The 110th Congress is expected to adjourn for the year by the end of September so members can focus on the November elections.

FBI to Increase Secret Powers in the Near Future

The Department of Justice (DOJ) plans to finalize secret changes to a secret rule that sets guidelines for the Federal Bureau of Investigation's (FBI) work. The changes will reportedly lower intelligence-gathering standards and could pose a significant threat to individual rights. Several senators have voiced strong concerns about the changes.

Previously, the FBI had three different sets of guidelines for allowable activities depending on the type of investigation being conducted. First were guidelines on General Crimes, which were last revised in May 2002 without any public review. The other two sets of guidelines for National Security Investigations and Foreign Intelligence Collection were produced in 2003, but only heavily redacted versions were released publicly.

The guidelines met with strong criticism that the powers granted would have a negative impact on civil liberties and investigatory effectiveness. The 2002 revision allowed for data-mining of commercial databases for personal information and attendance at public meetings of domestic groups with no prior suspicion and little internal control.

According to a Sept. 12 DOJ briefing for department officials, the FBI contacted DOJ leadership over a year ago and requested that the three guidelines be combined. The request was made in part because the FBI found that some of the restrictions interfered with its ability to investigate, and in part because the agency "didn't see the public policy rationale for the differences and what could be done under one set of guidelines versus the other."

Following the briefing, the American Civil Liberties Union (ACLU) reiterated concerns that the revised guidelines would give "unparalleled leeway to investigate Americans without proper suspicion, and that will inevitably result in constitutional violations." The revised guidelines would reportedly allow FBI agents to collect information on Americans through physical surveillance, soliciting informants, and interviewing friends of people they are investigating, all without the approval of a supervisor or reasonable suspicion. Additionally, racial profiling would be permitted.

Sen. Patrick Leahy (D-VT), chair of the Senate Judiciary Committee, has complained that DOJ has refused to provide copies of the new guidelines to the committee despite an August request from him and Sen. Arlen Specter (R-PA), ranking minority member on the committee. Leahy and Specter held a Sept. 17 hearing on the guidelines despite not receiving the documents. Attorney General Michael Mukasey has stated that the new standards are scheduled to take effect Oct. 1.

Additionally, Sens. Dick Durbin (D-IL), Russ Feingold (D-WI), Edward Kennedy (D-MA), and Sheldon Whitehouse (D-RI) challenged the guideline changes after being briefed on the rule in August. The senators expressed concerns about the broad authority to investigate American citizens with little or no basis of suspicion and the fact that new powers include authority to racially profile individuals.

However, in testimony before the Senate Judiciary Committee, FBI Director Robert Mueller argued that the existing guidelines are inadequate to meet the contemporary threat of terrorists operating within sophisticated networks. Mueller further claimed, "We know that if we safeguard our civil liberties but leave our country vulnerable to terrorism and crime, we have lost."

The FBI has a poor track record when it comes to exercising increased powers in a responsible manner. Last May, the FBI was forced to withdraw an unconstitutional National Security Letter (NSL) and in March admitted to improperly accessing telephone records, credit reports, and Internet usage of American citizens. Further, in a report to Congress, it underreported the number of NSLs it had issued by 4,600.

EPA's Assessments of Chemical Dangers -- Too Slow

A government investigation of the U.S. Environmental Protection Agency's (EPA) process for assessing dangerous chemicals concludes the agency is so slow and lacking in credibility that the system is in "serious risk of becoming obsolete."

The Government Accountability Office (GAO) completed a new extensive review of EPA's Integrated Risk Information System (IRIS), a publicly searchable database for studies and information on the human health effects of chemical substances. The GAO investigation concluded that recent EPA changes to the IRIS assessment process had made a bad situation worse.

This database is a significant tool to protect public health and the environment. Health risk assessments made using IRIS data directly influence the development of public health policies. The EPA's IRIS program is supposed to assess more than 540 chemicals now in the IRIS database, but from 2006 to 2007, it finalized evaluations of only four chemicals. At that rate, it will take almost three centuries to complete the assessments, assuming no new chemicals will require evaluation between now and then. The agency is also supposed to reevaluate old decisions to incorporate new scientific data.

EPA has a significant backlog of chemical assessments and a growing number of outdated assessments. The GAO reports that assessments of certain, especially dangerous chemicals, such as dioxin and trichloroethylene (TCE), the most frequently reported contaminant in groundwater, have been in progress for over 17 years and over 10 years, respectively. Unlike many other EPA programs that have statutory requirements, the IRIS program has no required deadlines.

In April, EPA released its new assessment process. The new process was not made available for public comment. This lack of transparency and public feedback occurred despite Office of Management and Budget (OMB) assurances that EPA would circulate a draft to the public before moving forward with the final process. Changes included one apparently demanded by OMB, which allows other agencies, including OMB, to comment on IRIS assessments. The

comments from OMB and other federal agencies about the scientific assessments will not be made public nor be noted in any peer review process. Additionally, EPA changed the definition of the scientific assessment process to include policy considerations, where previously, science and policy were distinct.

GAO's Sept. 18 testimony before the House Committee on Energy and Commerce Subcommittee on Oversight and Investigations indicated that EPA's new procedures have failed to improve the program. Several factors contributed to the failure, including the fact that OMB and several other federal agencies now have an even larger role in evaluating the EPA's work, slowing down the process.

Under EPA's current IRIS procedures, OMB, as well as several other federal agencies, may intercede in the scientific assessment process multiple times. The comments and changes to the IRIS assessments made by these interceding agencies are not revealed to the public. In the GAO's analysis, this lack of transparency violates the principles of sound scientific analysis. Moreover, these federal agencies are often affected by IRIS assessments, which poses an apparent conflict of interest.

Another IRIS problem identified by GAO is that EPA management decisions to postpone completion of assessments to wait for more scientific analyses compound existing delays. Several of EPA's assessments are essentially stuck in a loop where the evaluation process stretches out over several years, during which time the scientific research used in the initial assessment becomes outdated, and the agency starts a new evaluation to incorporate more recent information. This cycle, combined with the new, longer evaluation process, is largely responsible for the significant delays in finalizing risk assessments, according to GAO. Without risk assessments, policymakers at the federal and state levels — and even in other countries — are not able to make informed risk management decisions.

For instance, in 2005 in the aftermath of Hurricane Katrina, the Federal Emergency Management Agency (FEMA) provided trailers to those without housing, which caused health problems because of high levels of formaldehyde. FEMA officials cited the lack of a standard for formaldehyde exposure in mobile homes as one of the problems that delayed action. Apparently, EPA had initiated an assessment of formaldehyde in 1997 to update the data in IRIS, but the process had not been completed by 2005 when FEMA took action. Instead, EPA chose to rely on an industry-funded assessment of formaldehyde, which projected the risk from the chemical to be 2,400 times lower than that determined in studies by the National Cancer Institute and the National Institute of Occupational Safety and Health, according to the GAO analysis.

At the hearing, EPA officials defended the program. Dr. George Gray, EPA's assistant administrator for research and development, cited increased staff levels and funding for the IRIS program. He also stated that there would be no way to conduct "scientific shenanigans" with the IRIS process because of existing independent peer reviews. Marcus Peacock, EPA's deputy administrator, also proclaimed that EPA "[does not] tolerate political interference with

science."

Senate and House Take Legislative Swings at Secrecy

The Senate introduced new legislation that would make it more difficult for the executive branch to establish secret policies. This effort followed the House's passage of legislation to reduce overuse of classification by security agencies.

On Sept. 16, Sens. Russ Feingold (D-WI) and Dianne Feinstein (D-CA) introduced the Office of Legal Counsel (OLC) Reporting Act of 2008 (S. 3501), a bill that would require the Attorney General to notify Congress when the Department of Justice (DOJ) determines that executive branch actions are not covered by particular statutes, such as criminal laws.

Legal opinions issued by the OLC are incredibly important to the executive branch because they create policies that effectively become new laws and can amend existing laws that bind the entire branch. Often, OLC opinions have been withheld from Congress, causing a breakdown in the system of checks and balances vital to maintaining an accountable political system.

A prominent example of this is the March 2003 DOJ memorandum authored by John Yoo, which became public in April 2008. The OLC memo took the position that the executive branch was not bound by criminal statutes prohibiting torture when interrogating detainees. Feingold argued that this practice creates an environment where "the executive branch is no longer operating according to the rules that are on the books, and there is truly a separate ... regime of secret law." The public has a clear interest in knowing when the executive branch claims to be above the laws established by their elected officials in Congress.

The Senate bill is supported by former members of both the Clinton and Bush administrations. Dawn Johnsen, a head of the OLC during the Clinton administration, and Bradford Berenson, former counsel to President Bush, wrote a joint letter in support of the bill. They said, "We believe [the bill] strikes a sensible and constitutionally sound accommodation between the executive branch's need to have candid legal advice, to protect national security information, and to avoid being overburdened by overly intrusive reporting requirements and the legislative branch's need to know the manner in which its laws are interpreted."

The House also took action against excessive secrecy in the executive branch with the Sept. 9 passage of the Over-Classification Reduction Act (H.R. 6575). The legislation would require the Archivist of the United States to establish regulations for the prevention of over-classification. The bill mandates that agency Inspectors General conduct periodic audits of classification activity to ensure agencies comply with those standards. A system of incentives and penalties that would reward compliance and discipline abuse of classification authority would also be established.

Over-classification is a well documented problem within government. According to the 2008 Secrecy Report Card issued by OpenTheGovernment.org, $195 is spent on classification for

every $1 spent on declassification. Since 2001, the government has been shrouded in a darkening veil of secrecy that has resulted in increasing numbers of classification decisions and requests for information, all creating massive costs to the taxpayer.

While transparency advocates agree that over-classification is a problem, there is some doubt that government-wide solutions are realistic. Steve Aftergood of the Federation of American Scientists asserted, "Over-classification at the CIA is not the same as over-classification at the Pentagon or the State Department. Not only do these agencies have different institutional cultures, their classification policies revolve around different sets of security concerns, and they are implemented through distinct sets of procedures." For instance, the Information Security and Oversight Office's 2003 implementation directive concerning classification duration, training, and marking was not successful at reversing the ever growing problem of over-classification.

S. 3501 has been referred to the Senate Judiciary Committee, and H.R. 6575 awaits action in the Senate. Between Congress's attention to the urgent economic crisis and the dwindling session calendar, neither bill appears likely to be enacted this year.

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In This Issue

Commentary: Bailout Package Signed into Law; Economic Stimulus Still Needed

With the enactment of a $700 billion Wall Street bailout, or "financial rescue" package, prospects for success in stabilizing the nation's financial markets remain uncertain. Certain, however, is that deteriorating economic conditions that continue to put Americans on the unemployment rolls will remain unaffected by the implementation of the Troubled Asset Relief Program (TARP). And despite over $100 billion in tax cuts included in the package, Congress failed to leverage even modest economic stimulus from the resulting jump in the federal budget deficit. If and when Congress returns to work for a lame-duck session after the elections, it should consider what steps to take next to improve the economy and aid those who have fallen victim to it.

The Emergency Economic Stabilization Act of 2008 (H.R. 1424) was signed into law on Oct. 3, hours after the House overwhelmingly approved the bill by a 263-171 vote. The act grants the

Treasury Secretary $700 billion to purchase troubled mortgage-related financial assets, but it also extends dozens of miscellaneous energy, individual, and business tax cuts and a one-year "patch" for the Alternative Minimum Tax. No one can predict the ultimate cost of rescuing Wall Street from itself, nor is there consensus among economists that the bailout will even cure what ails the financial system. Yet, for all the five hundred pages of the new law, the plan was not engineered to abate the march of the economy toward recession.

On the day that President Bush signed the bill into law, the Labor Department reported that the economy lost 159,000 jobs in September, adding to a nine-month streak of payroll contraction resulting in a 6.1 percent unemployment rate, the highest since 2003. However, TARP was not intended to aid an economy that may already be in recession; it was designed to prevent a catastrophic collapse of the financial markets that would deepen and prolong the looming recession. Not a single cent of the $700 billion program is to be directed toward stimulating the economy or helping families cope with rising unemployment.

Congress did not adequately address the needs of millions of Americans before it adjourned Oct. 3, while the implementation of the tax cuts in the act will actually diminish the possibility for future economic stimulus and assistance. The attendant deficit (and national debt) hike caused by the more than $107 billion in unpaid-for tax cuts will ultimately increase political pressure on Congress to curb spending. And because of a $600 billion, bipartisan commitment to continue growing defense and national security spending, programs for supporting families, infrastructure investment and repair, education, and health care will be moved to the front of the line for the chopping block. Some of the tax cuts included in the package will help low- and middle-income families, like the expansion of the child tax credit, but without fiscally responsible offsets to these and other revenue losers, record-setting deficits will ultimately undermine their goals.

This is not to say, however, that all deficit spending is not worth the price of borrowing. When the economy begins a down cycle, millions of workers lose their jobs while even more are forced to take part-time work that falls short of meeting demands like rent, groceries, gas, and utilities. Extending unemployment insurance, expanding the Food Stamp and other nutrition programs, boosting home energy assistance, and increasing Medicaid spending not only provide assistance to those who need it most but also carry an added economic benefit: These targeted spending programs boost the economy by stimulating aggregate demand. The kinds of tax cuts passed by Congress, like extending a dollar-per-gallon credit for biodiesel makers, decreasing excise taxes on rum, or cutting $100 million in taxes for "certain motorsports racing track facilities," do little to aid those affected by the economic downturn while inducing deficit increases that make investments in families more politically difficult to enact.

TARP, continued tax cuts that aren't focused, and unwise spending are a prescription for future failure. The next administration will face a Congress that expects more tax cuts and more favors for districts back home. But the cycle of further untargeted tax cuts simply cannot continue. Focused federal spending, such as rebuilding infrastructure instead of going to war, can help provide the stimulus to help middle-income America and kick start the economy. The problem is not deficit spending; the problem is unwise deficit spending — and continued

untargeted tax cuts are part of the problem.

TARP may or may not prevent the cataclysmic breakdown of the nation's financial markets as it was designed to do. However competent and successful the execution of the bailout (details in the law on implementation of TARP are sparse), the rescue legislation still does not deal with the wild ride of building up national and international debt and continuing to leverage it through so many derivatives that even Wall Street professionals no longer understand. The latest hot-button topic is the estimated $60 trillion in credit-default swaps built on about $6 trillion in bonds. (Credit-default swaps are a type of unregulated insurance that has become a market of runaway speculation.)

Perhaps more importantly, addressing Wall Street, no matter how important for stabilizing credit flow, will not improve the lot for the millions of unemployed workers and those on the edge. By widening the budget deficit with the passage of billions of dollars of unnecessary tax cuts, Congress has worked against itself to pass another economic stimulus package. Regardless of a heightened barrier to passage, Congress should begin crafting a set of timely, targeted, and temporary spending measures to cushion the blows of the economy against families and mitigate the duration and depth of the coming recession.

Congress Enacts Flurry of Legislation at Year's End

Congress tentatively adjourned for the year on Oct. 3 after passing a flurry of legislation to address the financial meltdown, extend expiring tax cuts, provide disaster relief funding, and fund the federal government through March 6, 2009.

On the final day of the fiscal year (Sept. 30), President Bush signed the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, a massive spending bill ensuring continued funding for the federal government through the spring of 2009.

The president's signature follows last-minute congressional action to finish the FY 2009 appropriations process. On Sept. 24, the House put together a $600.6 billion package of three appropriations bills (Defense, Homeland Security, and Military Construction-VA), along with a continuing resolution (CR) that will cover all the other sections of the government until March 6, 2009. The House passed the package by a vote of 370-58. The Senate passed the House proposal on Sept. 27 by a vote of 78-12.

The year-end appropriations package was assembled and passed in less than a week, with little transparency or time to review specific provisions, earmarks, and funding levels. The bill level-funds most government programs outside of the three individual security bills that were included and a few select programs and priorities in need of more immediate funding. These include the Low Income Home Energy Assistance Program (LIHEAP), which received a $5.1 billion increase. This is more than double the $2.5 billion appropriated for LIHEAP in FY 2008 and finally brings the program up to its authorized funding level. There is also $22.9 billion in emergency funding for disaster relief from recent hurricanes on the Gulf Coast and flooding in

the Midwest, and $7.5 billion to support a $25 billion loan to the U.S. auto industry.

After finishing with appropriations legislation for the year, Congress turned immediately to attempts to pass a rescue package for the troubled financial sector. On Sept. 29, the House shockingly voted down — by a 205-228 margin — a modified version of the widely criticized administration bailout plan. This was an unexpected setback for leaders of both parties in the House, who were confident the rescue proposal would pass.

The Senate stepped in two days later and passed (74-25) a large legislative package that included the rescue legislation originally rejected by the House, a Senate-approved bill containing over $100 billion in tax cuts, and a temporary increase in the Federal Deposit Insurance Corporation's (FDIC) deposit limit (from $100,000 to $250,000). This increase will last through the end of 2009, and premium increases will be funded by the government. The additional proposals were added to the House legislation to help entice more House Republicans to vote for the rescue bill. This strategy was successful, as the House passed the Senate's proposal on Oct. 3 by a vote of 263-171.

The tax language in the Senate bill was the same as a tax package (H.R. 6049) passed earlier this year by the Senate that contains a patch to the Alternative Minimum Tax (AMT) and an extension of dozens of expiring tax cuts. These tax cuts would provide incentives for renewable energy production, including solar and wind power, extend the deduction for state and local taxes, qualified tuition expenses, and teaching supplies. The $17 billion in energy production tax cuts would be fully offset by ending tax cuts for oil and gas production. The legislation would also lower the income threshold to qualify for the child tax credit from $12,050 to $8,500 for the 2008 tax year, which would benefit 13 million children.

The passage of this bill ends a bitter stand-off between the House and Senate over how to pay for the cost of these tax cuts. Adherence to pay-as-you-go (PAYGO) rules by moderate House Democrats had thrown into doubt whether any of the tax cuts would be enacted this year. In the end, the Senate proposal was approved after being attached to higher-priority legislation House members felt they could not oppose.

While the cost of the tax provisions of this bill is straightforward, the total cost of the rescue/tax cuts legislation is difficult to determine. According to the Congressional Budget Office (CBO), the ten-year cost of the tax cuts would total $107.1 billion. The CBO, however, indicates that it is "impossible at this point to provide a meaningful estimate of the ultimate impact on the federal budget from enacting this [rescue] legislation," but would be "substantially smaller than $700 billion." Nor can CBO estimate the cost of increasing FDIC limits on insured deposits.

Budgetary Impact of Senate Financial Rescue Bill, HR 1424, Approved Oct. 1, 2008 *(billions of dollars)*	
Provision	**Cost**
Division A	
FDIC limit increase	"difficult to predict"
$700 Wall Street Bailout	"not currently possible to quantify," more than 0, but "substantially smaller than $700 billion"
Division B	
Renewable energy tax cuts	16.9
Offsets	-17.0
Division C	
AMT patch	64.1
Extension of miscellaneous tax cuts	59.3
Disaster relief	8.8
Offsets	-25.2
Total package cost	At least $107.1 billion, possibly more than $800 billion
Source: Letter to Honorable Christopher J. Dodd, Congressional Budget Office; Joint Committee on Taxation: Estimated Budget Effects of the Tax Provisions Contained in an Amendment in the Nature of a Substitute to H.R. 1424	

The recent legislative blitz in Congress has resulted in major tax and spending decisions in a very short amount of time. In less than a two-week period, Congress approved legislation that could potentially cost taxpayers approximately $1.85 trillion. While some of that spending has received significant review and oversight, much of it has not.

Foreign Foods Evade FDA's Watch

The ability of the U.S. Food and Drug Administration (FDA) to monitor and police imported foods is once again under scrutiny. A public health crisis originally thought to be limited to China crept into the U.S. when FDA announced recalls of products tainted by melamine, a dangerous chemical.

The FDA has announced recalls for beverage products imported from China and contaminated with melamine. On Sept. 26, FDA announced the recall of Mr. Brown instant coffee and milk tea products. On Oct. 6, FDA recalled Blue Cat Flavor Drink. California has recalled Chinese-made candies as well. No illnesses have been reported, according to FDA.

FDA announced Oct. 3 a new standard for melamine. Rather than banning the nonfood item completely, FDA released an interim assessment that determines melamine to be safe in food at levels of 2.5 parts per million or lower.

The current melamine contamination controversy began in September when contaminated infant formula was linked to thousands of illnesses and at least four infant deaths in China. The Chinese dairies producing the contaminated formula cut their milk with melamine to create the appearance of increased nutrient content. Unlike water, melamine can fool devices that test milk for purity. However, melamine is toxic and more commonly used in industrial manufacturing to produce glue and concrete, among other items.

FDA's new interim assessment also says that no amount of melamine in baby formula is safe. According to FDA, the agency is "currently unable to establish any level of melamine and melamine-related compounds in infant formula that does not raise public health concerns." FDA adds, "There is too much uncertainty to set a level in infant formula…" In September, FDA advised consumers not to purchase infant formula manufactured in China from Internet sites or other sources.

The recalls have reignited concern over FDA's ability to adequately police the rising tide of imported food reaching American consumers. From 2002 to 2007, food imports increased 84 percent, according to the Government Accountability Office (GAO).

GAO released a report Sept. 26 analyzing FDA's practices for ensuring the safety of the nation's fresh produce supply. The report comes on the heels of this summer's *Salmonella Saintpaul* outbreak, which sickened 1,442 people in 43 states, Washington D.C., and Canada. After a three-month investigation focusing mainly on tomatoes, FDA traced the contamination to serrano and jalapeño peppers imported from Mexico.

GAO found that FDA is unable to examine the vast majority of fresh produce imports. FDA samples less than one quarter of one percent of imported produce shipments, according to GAO. "[W]hile FDA has allocated additional resources to import oversight, it has not been able to inspect a larger percentage of imported fresh produce items," the report says.

FDA conducts fewer than 20,000 inspections of all imported foods, GAO found. Batches of imported foods, which FDA calls "entry lines," numbered 9.6 million in 2007. Based on those figures, FDA inspects less than 0.21 percent of all import entry lines.

Controversy has surrounded FDA for the past few years. In addition to numerous imported food recalls, the agency's drug safety program has been under scrutiny. FDA's approval of Vioxx, which killed thousands of people suffering heart disease, piqued public awareness of the flaws in FDA's drug approval process. Later controversies over pharmaceuticals, such as the diabetes drug Avandia, fanned the flames.

FDA officials decided to begin a public relations campaign to improve the agency's image. However, even that was not immune from controversy. A *Washington Post* investigation,

published Oct. 2, found the agency sidestepped contracting requirements when it awarded a $300,000 contract to a public relations firm.

FDA awarded the business to Alaska Newspapers Inc., which does not have to compete for federal contracts because the company is considered an Alaska Native corporation. The government exempts Alaska Native corporations from competition requirements in order to promote native-owned business.

However, the *Post* investigation shows that FDA's intent all along was to subcontract the public relations work to Qorvis Communications, a major Washington-based consulting firm. Internal e-mails uncovered by the *Post* show FDA knowingly circumvented contracting rules in order to award the contract to Qorvis without opening up the work to competition. Although the FDA suspended the contract, Congress has started an investigation.

Bill Improving Inspectors General Independence Passes Congress

Congress recently passed legislation that reforms the functions of federal agencies' inspectors general to increase their independence and insulate them from political interference. The passage comes after more than a year of negotiations in Congress and between the legislative and executive branches. President Bush is expected sign the bill.

The Inspector General Act of 1978 created independent units, called inspectors general (IGs), within most federal agencies to conduct audits and investigations of agency activities to ensure that agencies are as effective, efficient, and accountable as possible. The law requires the IGs to report to their respective agency heads, who are to transmit the reports to the appropriate congressional oversight committees. Amendments to the act over the years have expanded the number of inspectors general, placing them in 65 federal agencies and departments.

The Inspector General Reform Act of 2008, H.R. 928, passed the Senate Sept. 24; it passed the House Sept. 27 by a 414-0 vote. Passage of the legislation is in response to controversies about the roles and operations of IGs and claims of political interference in their activities. IGs have become at times a political football, having been injected into controversies about the effectiveness of the response to Hurricane Katrina, the firings of several U.S Attorneys, and political interference in the work of scientists at the Department of the Interior and at the National Aeronautics and Space Administration (NASA).

The bill was introduced in the House by Rep. Jim Cooper☼ (D-TN) in February 2007 and approved by the House Committee on Oversight and Government Reform in September of that year. A companion bill was introduced in the Senate by Sen. Claire McCaskill☼ (D-MO) in June 2007.

In October 2007, President Bush issued a statement of administration policy threatening to veto the bill over provisions that would have infringed upon the president's ability to supervise

and remove IGs. The president also objected to provisions that would have required IGs to submit budget requests directly to Congress, bypassing the normal budget process, which requires presidential review and approval. Bush also objected to codifying an independent council of IGs, even though such a council exists by executive order. Several provisions addressing the president's objections were removed and altered in the final bill to gain White House support.

Among the changes included in H.R. 928 are:

- A requirement that the president or agency heads inform both houses of Congress of the reasons for removing or transferring IGs at least 30 days prior to the removal or transfer. Under current law, the president is required to communicate the reasons to Congress but is not required to do so prior to an IG's removal or transfer.
- Salary increases for IGs to pay them as senior level executive employees, but with a prohibition on receiving bonuses or cash awards
- The creation within the executive branch of a Council of the Inspectors General on Integrity and Efficiency to "(A) address integrity, economy, and effectiveness issues that transcend individual Government agencies; and (B) increase the professionalism and effectiveness of personnel by developing policies, standards, and approaches to aid in the establishment of a well-trained and highly skilled workforce in the offices of the Inspectors General."
- Provisions to allow IGs to obtain their own legal counsel. The bill allows IGs to seek counsel from other IG offices, have their own counsel reporting directly to them, or obtain counsel from the Council of the Inspectors General
- The establishment of separate budget lines in the requests of the IGs, agency heads, and the president for the operations, training, and support of the IGs so that Congress can clearly track the resources a president intends to provide IGs
- A provision requiring agencies to have a direct link on their homepages to the office of their IG so that IG reports and materials are easily accessible and so that the public can directly report instances of waste, fraud, and abuse

The bill was sent to President Bush Oct. 3, and he is expected to sign the legislation.

EPA Doesn't Want to Know about Factory Farm Waste

In a Sept. 24 congressional hearing, the U.S. Environmental Protection Agency (EPA) defended its proposal to exempt factory farms from reporting on airborne and chemical emissions from animal waste, even though the agency has no reliable information on public health impacts of the pollution. Without the reports, communities would not know when potentially dangerous animal waste releases occur. Emergency responders would also have less information when responding to citizens' reports of noxious odors.

In December 2007, EPA proposed a rule that would exempt factory farms known as concentrated animal feeding operations (CAFOs) from reporting on emissions of hazardous

chemicals from animal waste. The number of CAFOs more than tripled from 1982 to 2002, according to a Government Accountability Office (GAO) report, from 3,600 to almost 12,000. These operations generate enormous amounts of waste in a relatively small area; in some cases, a single farm can produce more than one-and-a-half times the sanitary waste produced by the 1.5 million residents of Philadelphia, according to the report.

The GAO report identified several problems with EPA's approach to CAFO animal waste emissions, most notably the lack of reliable information on the facilities. Currently, no federal agency collects data on the number, size, and location of CAFOs. The GAO report had to extrapolate other U.S. Department of Agriculture data to identify the growth trend. EPA also has very little information about the pollution emitted from CAFOs and the resultant public and environmental health implications. Despite the dearth of information, EPA proposed exempting CAFOs from reporting animal waste emissions.

EPA began a study of CAFO air pollution in 2007 with the intention of using the results to help develop protocols for determining compliance with applicable federal laws. However, this voluntary study is designed and funded by the agribusiness industry, and GAO researchers and other scientists have identified numerous flaws in the study that would threaten the accuracy and reliability of the data it produced. Without good data, it is unlikely that EPA could develop appropriate air emission protocols for CAFOs. With the two-year industry study only half completed, EPA decided to proceed with its exemption proposal without the resulting data — information that could be flawed and unusable, in any event.

EPA's main justification for the proposed rule is that it is unlikely that federal emergency responders would respond to a report of a release of hazardous chemicals if they knew it was originating from a farm. The nature of such releases provides little opportunity for responders to do anything about the emissions, thus discouraging any response if there are no remedial or protective actions they can take.

Despite EPA's assertions, many emergency responders still oppose the proposed rule. In public comments submitted in March, a national association of state, local, and federal emergency responders labeled the proposed exemption "offensive" because it denies valuable information needed when responders deal with emergency calls from the public. The association also questions the legality of the proposed rule on several grounds.

During a hearing of the House Committee on Energy and Commerce's Subcommittee on Environment and Hazardous Materials, several members of Congress criticized the logic of EPA's decision, referring to it as "a backwards way of looking at [emergency responses to CAFO emissions]" and "Alice in Wonderland thinking."

In testimony to the House panel, Susan Bodine, the assistant administrator for EPA's Office of Solid Waste and Emergency Response, defended the agency's action. EPA has no record of initiating an emergency response to reports of animal emissions from CAFOs. This lack of previous emergency response convinced EPA to seek to exempt CAFOs from reporting the releases. However, the EPA does not receive reports of emissions from animal waste that are

submitted to state and local authorities or to other federal agencies, so EPA would not have complete information on the extent of emergency responses to this type of pollution. Bodine acknowledged the agency had received comments from emergency responders both for and against the proposed exemption.

EPA is still reviewing feedback submitted during the public comment period that ended March 27 and will draft a response to the comments. The final rule has not yet been submitted to the Office of Management and Budget (OMB).

The proposed rule affects reporting requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA). These laws require polluters to report when releases of hazardous chemicals pass a certain amount over a 24-hour period. Proper authorities — local, state, or federal, depending on the situation — decide whether emergency responders should take action.

The manure from large feed lots has been shown to pose serious threats to environmental and public health. Of 68 scientific studies reviewed by GAO, 27 found a direct or indirect link between emissions from manure to specific health or environmental impacts. Thirty-four studies focused on measuring the amount of air and water pollution from animal feeding operations. Only seven of the 68 studies found no linkage between pollution from animal wastes and human or environmental health. Threats from improperly handled manure include water pollution from excess nutrients resulting in fish kills, contaminated drinking water, and emissions of hydrogen sulfide, ammonia, and particulate matter.

EPA Reopens Libraries

After two years, numerous protests by the public, a formal grievance from a government employee union, a critical governmental report, and congressional intervention, the U.S. Environmental Protection Agency (EPA) has reopened agency libraries it closed as a purported cost-saving measure. The libraries generally are smaller and open fewer hours than before, are now controlled by a political appointee, and may have lost materials in the interim, but they are open to the public.

Beginning in 2004, the agency dismantled a significant portion of its library network in response to anticipated budget cuts. Ultimately, six libraries were closed, and four others had their hours reduced. Parts of the collections from the closed libraries were scattered across the network or converted into digital formats, though many records were simply thrown away. Outcry among public interest groups, public employees, librarians, scientists, and others prompted Congress to halt the closings and force EPA to reconsider its network plan.

In December 2007, Congress ordered the libraries reopened and appropriated $1 million for that purpose. The reopened libraries are in Chicago, Dallas, Kansas City, and the EPA Headquarters Repository and the Chemical Library in Washington, DC. The libraries, staffed

by professional librarians, will provide services to the public and EPA staff via phone and e-mail, and they will be open for a minimum of 24 hours over four days per week on a walk-in basis or by appointment.

In addition to the library reopenings, EPA pledged in a Memorandum of Agreement (MOA) with the American Federation of Government Employees (AFGE) to digitize more library holdings to improve online access. The agency's initial digitization report noted that the process is on hold, with almost half of the estimated publications yet to be digitized. EPA claims to be evaluating the digitization process in order to reconcile "some difference of opinion on some of the technical aspects of the project."

As part of EPA's effort to resolve the difference of opinion on digitization, the agency plans to convene a panel of National Library Network stakeholders for their input on the process. The stakeholders will include advisors from the Federal Library and Information Center Committee (FLICC) of the Library of Congress, professional library associations, the scientific community, academia, and the public. No time frame for this process or for restarting the digitization process was mentioned in the agency's report. The MOA negotiated with the employees' union requires EPA to report on the digitization process every three months but sets no specific performance benchmarks.

The EPA status report noted enhancements made to the database that will eventually hold the digitized publications, located in the National Environmental Publications Internet Site (NEPIS). However, these improvements were completed in May, before the union and the agency had signed the MOA.

In a July 21 letter to members of Congress, AFGE called on members to address specific questions about the EPA's plan. The union expressed concern about the amount of resources dedicated to the libraries, including the amount of physical space and shelving; the absence of public involvement regarding the libraries; and an accounting of the funds appropriated for the reopening of the libraries. Additional concerns about the libraries remain, including their control by a political appointee in the EPA's Office of Environmental Information.

Department of Justice Finalizes Enhancements of FBI Powers

Attorney General Michael Mukasey recently finalized changes to Federal Bureau of Investigation (FBI) rules that increase the agency's ability to gather information on citizens without having prior suspicion of wrongdoing. The new rules cover the FBI's powers over criminal, national security, and foreign intelligence surveillance and have been criticized by civil liberties advocates and privacy groups.

The FBI withheld drafts of the new rules, which will go into effect Dec.1, from congressional inquiry. As reported in the previous *Watcher*, several senators, including Sen. Patrick Leahy☼ (D-VT), said that the Department of Justice (DOJ) refused to provide copies of the draft guidelines to the Senate Judiciary Committee, and the agency continued such evasive behavior

at a hearing on Sept. 17. The stated reason for the new rules was to consolidate several older rules that the FBI argued were outmoded for a post-9/11 environment.

Mukasey and FBI Director Robert Mueller released a joint public announcement Oct. 3 describing the new guidelines. They stated, "Previously, several existing sets of guidelines applied to the FBI's activities, with one set applying to ordinary criminal law enforcement activities; one set applying to national security efforts; another applying to foreign intelligence collection; and additional sets applying to other activities." Mukasey noted that some text of the new rule will remain unavailable to the public, but he took the position that transparency of the FBI's guidelines had improved. "The vast majority of the new rules will be available to the public, in contrast to the classification of substantial portions of the previous guidelines."

Leahy responded in a statement that "the attorney general is once again giving the FBI broad new powers to conduct surveillance and use other intrusive investigative techniques on Americans without requiring any indication of wrongdoing or any approval even from FBI supervisors."

In his Sept. 29 memorandum to agency heads, Mukasey wrote that the new rules would replace six existing guidelines, including one governing how the FBI monitors civil demonstrations, which has been in place since 1976.

The new rules govern the FBI activities in the following areas:

- General authorities to conduct investigations inside the U.S.
- The scope and methods allowed for investigations and intelligence gathering
- Providing assistance to other agencies, including other intelligence agencies, state, local and tribal offices, as well as foreign agencies
- Analyzing intelligence to identify and understand trends, causes, and potential indicators of criminal activity and other threats
- Retaining and sharing of information

The most controversial aspect of the new guidelines is the redefinition of the FBI activity called "assessment" as a method of investigation. Assessments allow agents to proactively initiate investigations without a court order and without factual evidence that a crime has been committed or planned. The guidelines explain that assessment investigations can include collecting information from online services, both nonprofit and commercial, such as social networking websites. However, assessments may also involve "observation or surveillance not requiring a court order" and use of "human sources" or informants.

The guidelines also permit otherwise illegal activity by agents and resources as part of intelligence gathering so long as the activity is approved by the Attorney General or Special Agent in Charge. The guidelines note that some illegal activities cannot be authorized, including the use of violence when not defending oneself, as well as unlawful investigative techniques such as illegal electronic surveillance. It is notable that the guidelines describe the

activity as "illegal electronic surveillance" and not "warrantless electronic surveillance."

Finally, as Mukasey noted in his statement, there are aspects of the new rules that are not made public. One section authorizes the use of classified investigative techniques without disclosing the type of activities that could be included or any detail on restrictions on the use of such methods. In fact, the concern of disclosure is so great that the guidelines caution on use of the methods because "inappropriate use of classified investigative technologies may risk the compromise of such technologies." The new rules also make several references to classified directives that provide additional information on searches, determining a person's U.S. status, and certain predicated investigations.

Critics argue that these new rules allow for looser foreign intelligence gathering standards to now apply to the way the FBI collects domestic information. Anthony Romero, Executive Director of the American Civil Liberties Union, said, "The guidelines will all but obliterate accountability, because agents will have the power to begin pre-investigations with near complete autonomy.... What is needed is more oversight, not less." Mukasey's memorandum categorized the differences in standards applicable to national security activities versus criminal law enforcement activities as "arbitrary."

Telecom Surveillance to Receive Get-Out-of-Jail-Free Card

The Department of Justice (DOJ) is seeking retroactive immunity for the telecommunications companies that cooperated with the National Security Agency's (NSA) warrantless surveillance program, utilizing power granted in the FISA Amendments Act of 2008.

On Sept. 19, the DOJ filed a motion to dismiss *Hepting v. AT&T* and more than 40 other lawsuits against telecommunications companies that provided data to the NSA. This motion was enabled by the FISA Amendments Act of 2008 (H.R. 6304). These cases were initially pursued by the Electronic Frontier Foundation (EFF), which has called the NSA program "dragnet surveillance."

The FISA Amendments Act states that cases can not be maintained if the Attorney General certifies that the defendant's actions were authorized by the president. Mukasey issued a blanket certification the same day he filed the motion to dismiss. The letter does not specify which telecommunications companies assisted the government because, according to Mukasey, releasing such information "would cause exceptional harm to the national security of the United States." Nor does the public certification specify which one of five provisions of the amended FISA renders the companies exempt from litigation.

Mukasey asserted that eavesdropping was narrowly targeted solely to al Qaeda affiliates and not a wider dragnet. Mark Klein, a former AT&T engineer turned whistleblower, disputed this in a 2006 statement about equipment he helped the NSA install that intercepted all of AT&T's Internet and phone traffic, conducting what he called "vacuum-cleaner surveillance." Klein

served as a plaintiff's witness for the telecommunications lawsuits.

NSA has not been alone in eavesdropping. The FBI has been criticized for improperly gathering telephone records in terrorism cases. In April, EFF obtained documents through the Freedom of Information Act (FOIA) that indicated the FBI was collecting Americans' phone and Internet usage data. Moreover, the *Washington Post* reported that an FBI request for expanded authority on what types of information the agency could collect is currently under review by the Federal Communications Commission.

Pastors Challenge Church Electioneering Ban

On Sept. 28, 33 pastors around the nation participated in Pulpit Freedom Sunday, an initiative designed to challenge a 1954 amendment to the Internal Revenue Code (IRC) that prohibits religious organizations and charities from supporting or opposing candidates for political office. The Alliance Defense Fund (ADF) released a list of the pastors who participated in hopes that the Internal Revenue Service (IRS) will investigate the churches. The action generated controversy, with Americans United for Separation of Church and State (AU) filing complaints against seven of the participating congregations.

In May 2008, ADF, a conservative legal alliance, announced Pulpit Freedom Sunday to encourage pastors to intentionally violate federal tax law by endorsing a political candidate from the pulpit. Organizations that are tax-exempt under section 501(c)(3) of the IRC, which include religious organizations, can lose their tax-exempt status if they engage in prohibited partisan electioneering. ADF is hoping to challenge the ban on pulpit electioneering in federal court and is providing legal assistance to participating congregations.

Three former high-level IRS officials, including Marcus Owens, an attorney with Caplin & Drysdale, and a former IRS Exempt Organizations director, filed an ethics complaint against ADF with the IRS, asserting that ADF's actions surrounding Pulpit Freedom Sunday violate Circular 230, which governs attorney practice before the IRS. The complaint also asks the IRS to investigate ADF's tax-exempt status due to the group's role in organizing Pulpit Freedom Sunday.

BNA (subscription) reported that on Sept. 17, Michael Chessman, director of the IRS Office of Professional Responsibility, sent a letter acknowledging the complaint and saying the IRS has agreed to "review this information carefully and give it all due consideration." Sen. Charles Grassley☼ (R-IA), the ranking member of the Senate Finance Committee, told Iowa reporters prior to Pulpit Freedom Sunday, "A minister ought to be able to speak politically just like anybody else can. The only thing that I would say, he can't use the resources of a church or a nonprofit organization for political purposes."

ADF believes that the initiative protects religious organizations' speech rights. According to an ADF press release, the organization will fight any attempt the IRS makes "to remove a church's tax-exempt status because a pastor exercised his constitutional right to engage in religious

speech from the pulpit. The goal is to have the Johnson Amendment [the 1954 amendment to the IRC that prohibits religious organizations from engaging in partisan electioneering] declared unconstitutional."

But there is no consensus in the religious community on this issue. Rabbi Jack Moline, chairman of the Interfaith Alliance board, told the *Washington Post* that "a sanctuary should not be a place of political agitation on behalf of a candidate. On behalf of issues, yes. Of candidates, no." Also, two Ohio pastors, the Rev. Eric Williams and the Rev. Robert Molsberry, asked clergy to preach about the benefit of the separation of church and state on Sept. 21. The Ohio pastors led a group of 55 religious leaders who filed a complaint with the IRS asking the agency to force ADF to stop encouraging pastors to violate federal tax law on Pulpit Freedom Sunday.

AU filed IRS complaints against six congregations the day after their pastors endorsed candidates from the pulpit. Five of the six pastors in question openly endorsed Sen. John McCain☼ (R-AZ). The sixth pastor did not mention McCain, but he did criticize Sen. Barack Obama☼ (D-IL), stating, "According to my Bible and in my opinion, there is no way in the world a Christian can vote for Barack Hussein Obama. Mr. Obama is not standing up for anything that is tradition in America." AU later filed a complaint against a seventh church in which the pastor told congregants that Christians should vote for McCain.

Many organizations believe that it is especially important to investigate Pulpit Freedom Sunday to ensure that the IRS does not create the perception that the agency only initiates investigations against activities and speech that it strongly disagrees with. An Alliance for Justice statement on the matter noted that "while the necessity of this tax law prohibition is often up for debate, the equal enforcement of the law is not." In addition, a new OMB Watch commentary notes that the IRS investigated All Saints Episcopal Church of Pasadena, CA, although there was no endorsement or opposition to a candidate in that case. The agency concluded, "The IRS found that a 2004 All Saints' anti-war sermon violated the prohibition on intervention in elections…Inaction by the IRS would also encourage others to willfully violate the IRS' prohibition."

Recent surveys also indicate that the American public supports the ban against partisan electioneering. According to an article by the Pew Forum on Religion and Public Life, "While a strong majority of Americans support religion's role in public life, a solid majority also expresses opposition to churches coming out in favor of particular political candidates."

Efforts to rescind the electioneering ban have also been criticized because they would allow religious organizations to engage in partisan politics at taxpayers' expense. Critics believe allowing churches to engage in partisan political activity would also create a disparity between religious and non-religious nonprofit organizations by giving religious groups greater speech rights. Groups in support of the efforts believe that the ban inhibits religious organizations' ability to speak about the moral and social issues of the day, even though the prohibition only applies to partisan support or opposition of a candidate, not genuine issue advocacy.

Treasury Promotes Private Philanthropy through USAID

Should U.S. charities and foundations be required to turn over funds to the United States Agency for International Development (USAID) in order to support humanitarian aid and development in areas where designated terrorist groups are operating? The Department of the Treasury (Treasury) is promoting a partnership between USAID and American Charities for Palestine (ACP) as a model for providing assistance and complying with counterterrorism laws. Treasury recently indicated such coordination may become a requirement. This approach has the potential to undermine the independence of grantmakers and nonprofits and to fundamentally alter their relationships with grantees and local communities. It is based on an expansive interpretation of counterterrorism laws that seeks to prohibit vaguely defined "abuse and exploitation" of charities by terrorists.

In a Sept. 25 speech at Treasury's annual Iftar dinner (an evening meal for breaking the daily fast during the Islamic month of Ramadan), Deputy Treasury Secretary Robert M. Kimmit told attendees the new project between USAID and ACP is an example of "alternative distribution mechanisms" that can get aid into areas where designated terrorist groups are operating. Kimmit said ACP "raises funds from the American charitable sector and donor communities and *transfers these funds to USAID* in order to finance specific projects...." (emphasis added) He characterized the project as "protecting the integrity of giving."

The USAID-ACP project was also promoted by Treasury Assistant Secretary for Terrorist Financing Patrick O'Brien at a meeting with Muslim charities on Aug. 15. In his introductory remarks, O'Brien said:

> "[T]his type of partnership allows individual U.S. donors to tap into the government resources and distribution networks, thereby leveraging counterterrorism mechanisms only available to the government. It is our hope that this type of collaboration will take root and serve as a model for other areas of concern as well as encompass other funding streams including that of the international community."

Few details of the project have been made public. On Aug. 1, USAID and ACP signed a Memorandum of Understanding (MOU) establishing the partnership to channel charitable donations from U.S. individuals and entities to the West Bank and Gaza Strip. The USAID press release on the project is consistent with Kimmit's indication that the funds will be controlled by USAID, saying it "seeks to offer a secure and efficient means of transferring charitable donations from individuals and entities in the U.S. *to USAID-managed programs* for the Palestinians." (emphasis added) According to founder Dr. Ziad Asali, ACP is a 501(c)(3) organization formed specifically for the joint project with USAID by the American Task Force on Palestine (ATFP). Although a link to the MOU was originally posted on the ATFP website, OMB Watch staff were not able to view it, and it has since been taken down.

O'Brien called the project a "safe and effective way for individuals to contribute" without violating U.S. laws that bar any interaction with designated terrorist organizations, even if they control areas where aid is needed and all funds are used for charitable purposes. O'Brien makes the false assumption that independent aid distribution mechanisms operated through foundations and U.S. charities are not as "safe" or "effective" as those provided by the government. The government method for screening out interaction with terrorist organizations is likely to be based on USAID's pilot Partner Vetting System (PVS), which would require grantees to provide U.S. intelligence services with personal information on their leaders and employees as well as those of their grantees and partners. PVS has been strongly criticized by the U.S. nonprofit sector. The "alternative delivery mechanism" could have the practical effect of extending this requirement to private philanthropy and programs with no federal funding.

In a Sept. 22 conference call between the Treasury Guidelines Working Group (TGWG) — a group of foundations and charities concerned about the Treasury counterterrorism guidelines covering philanthropy — and officials from Treasury's Office of Terrorism and Financial Intelligence, Treasury's Chip Poncy indicated that the USAID-ACP partnership may be expanded. Call participants expressed concern that the USAID-ACP pilot may lead to a requirement that donors and grantmakers go through such an entity in global hot spots. Poncy responded that it is not clear where this project is going, and this is a potentially necessary way of getting aid into certain areas because of the threat of "terrorist abuse."

Treasury's references to preventing terrorist "exploitation and abuse" of charities have been increasing since nonprofits have challenged the agency to show evidence of earlier claims that charities are a significant source of terrorist financing. That evidence has not been forthcoming. However, Poncy told the TGWG that Executive Order 13224 extends Treasury's regulatory authority through language referring to those "associated with or otherwise working on behalf of" terrorist organizations, and the issue is "more complicated than direct support." This is a shift from the first few years after 9/11 when Treasury's statements were focused on diversion of funds to terrorism. This changed when Treasury published the Annex to the latest version of the Anti-Terrorist Financing Guidelines in September 2006, but the agency has never defined "exploitation" or "abuse."

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In This Issue

Nonprofit Voter Protection Efforts Going Full Tilt

Nonprofit organizations have taken an active role in voter protection efforts this election season, leading the way with voter registration initiatives, fighting unlawful voter purges, protecting student voting rights, and fighting voter ID requirements, among other activities.

Many nonprofits are working to ensure that all eligible individuals who desire to register to vote are able to do so. The Nonprofit Voter Engagement Network has an array of resources on its website to assist nonprofits in various voter engagement activities, such as information on conducting voter registration drives, toolkits, voter guides, and voter links and hotlines.

The Lawyer's Committee for Civil Rights is operating an extensive voter protection program. As part of the program, the group has launched an election protection hotline, website, and legal field program. The hotline and website serve as a resource to answer voter questions, to assist voters in locating polling places, and to report any Election Day problems. The legal field program trains volunteer attorneys, law students, and paralegals to staff election protection hotlines and serve as mobile legal volunteers at polling places around the nation. The organization is also helping to recruit poll workers and monitoring efforts to disenfranchise

voters.

Voter purging has been a big issue this election cycle. There have been efforts across the nation to illegally purge voters from the voter rolls. The Brennan Center for Justice recently released a publication titled *Voter Purges* that gives a synopsis of voter purging issues around the nation and offers policy recommendations on how to address these issues. In one such effort, the United States Student Association Foundation, the American Civil Liberties Union Fund of Michigan, and the American Civil Liberties Union of Michigan filed suit on Sept. 17 against the Michigan Secretary of State, the Michigan Director of Elections, and the City Clerk for the City of Ypsilanti to prevent the state from implementing two voter removal programs. As a result of the suit, a federal judge ordered the state of Michigan to halt one of two methods used to purge voters and to restore 1,438 names to the voter rolls.

In Florida, the "No-Match, No-Vote" law requires that a person's drivers license number or Social Security number be verified before they are registered to vote. The Florida NAACP and various local groups filed suit to prevent the state from enforcing the law. The law was upheld and the state began enforcing it in September. Additionally, the Campaign Legal Center, along with other nonprofit organizations, is seeking to enter a case to prevent the state of Wisconsin from purging voter rolls.

Voter ID requirements have the potential to disenfranchise many eligible voters. Some states have instituted voter ID requirements to prevent voter fraud, even though numerous studies suggest that there is not a widespread voter fraud problem. According to the Brennan Center for Justice, up to 12 percent of eligible voters do not have a government-issued ID. "[T]he percentage is even higher for seniors, people of color, people with disabilities, low-income voters, and students." Several nonprofits, including the ACLU, the Brennan Center, AARP, and the NAACP Legal Defense Fund, filed amicus briefs in *Crawford v. Marion County Election Board*, a case challenging Indiana's voter ID law, which is the most restrictive voter ID law in the nation.

In Alabama, nonprofits are working to ensure that eligible ex-offenders are able to register to vote. Alabama law prohibits individuals convicted of felonies of "moral turpitude" from voting unless their rights are restored. According to the *Birmingham News*, the Alabama Attorney General has named approximately 70 crimes "that have by statute or appellate decision been defined as crimes of moral turpitude," but the state has been using a list of more than 400 crimes to disqualify individuals from voting. The NAACP Legal Defense Fund filed a lawsuit to allow Reverend Kenneth Glasgow to resume registering eligible voters who are incarcerated in Alabama prisons.

Nonprofits are also working to ensure that students are not disenfranchised. The Student Association for Voter Empowerment (SAVE), which was founded and is run by students, has been bringing attention to issues that affect student voters. The group held a press conference last month where political leaders affirmed their commitment to ensure that student voter rights are protected. Rock the Vote has been very instrumental in encouraging young people to vote and holding voter registration drives on college campuses. The Brennan Center for Justice

has produced a student voting guide. According to the Brennan Center, the guide "explains the basic residency, registration, identification, and absentee voting requirements for student voters in each of the 50 states and the D.C."

Judge Says Shuttered Charity Must Be Given Due Process

In the first decision of its kind, a federal judge issued a temporary restraining order barring the Department of the Treasury (Treasury) from designating KindHearts for Charitable Humanitarian Development (KindHearts), a U.S. charity, as a supporter of terrorism without affording the organization basic due process. Treasury shut down the group "pending investigation" in February 2006, but the investigation has never been concluded and the group's assets, including about $1 million, remain frozen.

The Treasury action against KindHearts is based on a provision of the Patriot Act that expanded economic embargo laws to allow all the sanctions used to seize and freeze assets of Specially Designated Global Terrorists (SDGT) when an investigation is pending. (See 50 U.S.C. 1702(a)(1)(B), 1705 and Executive Order 13224). There are no deadlines for the investigation to be completed.

On Feb. 19, 2006, Treasury froze KindHeart's bank accounts and seized all of its records, computers, and documents. Treasury did not provide formal notice with reasons for its actions, only stating generally that the assets "are blocked pending investigation" into whether the group is "controlled by, acting for or on behalf of, assisting in or providing financial or material support to, and/or otherwise being associated with Hamas." Treasury issued a press release announcing the action that provided some specific assertions that KindHearts refuted in a letter seeking reconsideration. For example, Treasury alleged that KindHearts gave more than $250,000 to the Sanabil Association for Relief and Development, which was designated as a terrorist organization in August 2003. However, according to the *Toledo Blade*, KindHearts board chair Dr. Hatem Elhady said the contract with Sanabil to provide aid in refugee camps occurred before Sanabil was designated.

On Oct. 9, KindHearts filed suit in the United States District Court for the Northern District of Ohio challenging the constitutionality of the process.

The complaint states that:

- The lack of substantive criteria for freezing assets pending investigation and for designation is unconstitutionally vague, violating KindHearts' First and Fifth Amendment rights.
- The asset freeze violated KindHearts' due process rights under the Fifth Amendment because the organization did not receive adequate notice of the basis of the freeze, did not have an opportunity for a hearing, and was not afforded a meaningful opportunity to challenge the freeze.
- There is no time limit on how long the freeze may last.

- KindHearts was not allowed to use its funds to pay for counsel or to access its own records to prepare a defense.
- Freezing KindHearts' assets and seizing files and computers is not authorized under the International Emergency Economic Powers Act (IEEPA), which is limited to sanctions against individuals and organizations of foreign countries.
- KindHearts will suffer irreparable damage to its reputation if it is designated as an SGDT, even if the designation is later lifted.

The temporary restraining order effectively maintains the *status quo* while KindHearts' constitutional challenge proceeds. The group is represented by the American Civil Liberties Union (ACLU) and several co-counsel.

According to the complaint, KindHearts was formed in 2002 to provide humanitarian aid, primarily in Palestine and Lebanon. It provided clean drinking water to schools, ran clinics, and sent disaster relief to victims of Hurricane Katrina and the earthquake in Pakistan. It had planned to open a hospital in Gaza in January 2007. On page 9 of the complaint, the group states, "Assistance was provided to the poor and needy without regard to political affiliation or belief. It identified recipients based on need alone, not ideology or association." These standards are consistent with the International Red Cross and Red Crescent Movement's Principles of Conduct in Disaster Response Programmes, but may be inconsistent with U.S. laws barring material support to terrorism, which bar all transactions, including humanitarian aid, with SDGTs. In areas where designated organizations control infrastructure and have popular support, it may be impossible to enforce a non-discrimination policy.

Pages 8-12 of the complaint detail extensive measures KindHearts took to comply with U.S. law, including adoption of Treasury's Anti-Terrorist Financing Guidelines. The Guidelines have been criticized by major nonprofit sector organizations, which have called for their withdrawal.

The complaint also describes KindHearts' post-shut down efforts to defend itself. Because it is illegal for any U.S. person to engage in a transaction with a group once it is designated and shut down, KindHearts' attorney had to get a license from Treasury granting permission to provide legal services. However, Treasury refused a request to allow legal fees to be paid from frozen funds until June 4. It limited the defense effort to two paid attorneys and imposed a ceiling on the number of hours to be paid. During this time, counsel wrote letters to Treasury seeking reconsideration of the asset seizure, the specific allegations against the group, and copies of KindHearts' files to assist in preparing a defense. After long delays, Treasury allowed limited access for counsel to view unclassified evidence, but the agency denied the attorneys security clearances to view the classified information the government had relied on.

On May 25, 2007, Treasury notified KindHearts' attorneys that it had "provisionally" decided to designate the group as a SDGT, but no further action has been taken. Since KindHearts has no right to a hearing where it can confront the evidence against it, and because there are no provisions for independent review of Treasury's decisions, the only remedy available was the

legal challenge.

In its brief, KindHearts pointed to court decisions affording rights to Guantanamo detainees that the charity currently does not have. For example, in *Parhat v. Gates*, the United States Court of Appeals for the District of Columbia held that the government must provide the defense with the sources of information used to support a designation as an "enemy combatant," and that defense counsel can be given security clearances or other means to "permit an appropriate assessment of the information's reliability while protecting the anonymity of a highly sensitive source." In *Bismullah v. Gates*, the same court held that attorneys for Guantanamo detainees must be allowed to review classified evidence against their clients.

EPA to Reduce Airborne Lead, but OMB Bedevils the Details

The Bush administration recently tightened the national public health standard for airborne lead, drawing rare praise from clean air advocates. However, shortcomings in the network for monitoring lead pollution persist, and a new requirement to increase the number of pollution detectors was watered down by the White House Office of Management and Budget (OMB).

The U.S. Environmental Protection Agency (EPA) announced the new standard Oct. 16. EPA tightened the exposure level to 0.15 μg/m^3 (micrograms per cubic meter), from 1.5 μg/m^3. The adjustment marked the first time EPA had revised the standard since it was first set in 1978.

Lead is a potent neurotoxin and does not easily break down in the environment. Children are particularly susceptible to the effects of lead. According to EPA, lead exposure can affect brain development and "can lead to IQ loss, poor academic achievement, permanent learning disabilities, and delinquent behavior." EPA expects improvements in lifetime IQ levels as a result of reducing airborne lead pollution.

Environmentalists and public health advocates who have often found fault with President Bush's clean air regulations complemented the decision to finalize a stricter rule on lead. The Natural Resources Defense Council called it a "big step toward protecting children."

Critics of the Bush administration's record on science-based policy were also pleased. In setting the standard, EPA Administrator Stephen Johnson took the advice of his scientific advisors who had recommended a standard below 0.20 μg/m^3.

In past rulemakings, Johnson has ignored the advice of EPA's Clean Air Scientific Advisory Committee (CASAC), a panel of independent scientists, researchers, and medical professionals who specialize in the effects of air pollution on human health. In March, for example, Johnson set a new standard for ozone, or smog, higher than CASAC had recommended.

The decision on ozone came after industry representatives and White House officials lobbied EPA to leave the standard unchanged. Many feared the lead standard would follow a similar

course. Lobbyists from the battery recycling industry, which will bear some of the costs of complying with the new standard, visited with White House officials to plead their case. The lobbyists presented the White House and EPA with material attacking EPA's scientific justification for pursuing a stricter standard.

Despite the praise for resisting industry pressure and setting a strong new lead standard, some dispute EPA's method for calculating the level of lead in the air. EPA will continue to average air concentrations over a calendar quarter. CASAC recommended EPA average concentrations every month.

Strengthening the so-called averaging time to one month would effectively establish a standard more protective of public health. A one-month averaging time would better account for big spikes in emissions. Conversely, under the three-month method, two months of low emissions could attenuate emissions spikes in the third month.

Frank O'Donnell of Clean Air Watch told *The Washington Post*, "A three-month average would permit smelters and other lead polluters to belch high levels of lead periodically and still be considered legal."

EPA's advisors say switching to a one-month averaging time would be more protective of those populations most sensitive to lead's effects, such as those who can be hurt by higher, albeit shorter, exposures.

New monitoring requirement undercut by OMB

To address concerns that EPA's system for monitoring airborne lead pollution is inadequate, the agency announced an expansion of its monitoring network. However, officials at OMB watered down a new requirement, which could allow more than 100 polluting facilities to go unmonitored.

Critics say the Bush administration has allowed the national system for detecting airborne lead to founder. Currently, state and local authorities operate 133 monitors nationwide, according to an EPA spokesperson. In 1980, 800 monitors were in operation.

EPA used its revision to the air quality standard for lead to set criteria for the placement or relocation of new monitors. EPA estimates the new criteria will require an additional 236 monitors.

One criterion that triggers the placement of monitors is the amount of lead pollution emitted by industrial facilities. The new regulation requires state and local officials to set up monitors near sources emitting one ton or more of lead pollution per year. In a public proposal EPA unveiled in May, the agency signaled its intent to set the threshold between 200 kg and 600 kg (about 0.22 tons and 0.66 tons). An OMB Watch investigation of EPA's rulemaking docket discovered documents that indicate officials from OMB pushed for the weaker threshold

requirement.

A draft of the final rule attached to an Oct. 13 e-mail from EPA to OMB contains language stating the emissions threshold would be set at 0.5 tons per year. The 0.5-ton threshold would have been consistent with EPA's May proposal.

But another e-mail from EPA to OMB sent late on Oct. 14 — less than 48 hours before the final rule was publicly announced — stated, "[I]f OMB wants a 1 ton threshold, it would have to provide a rationale for that point of view." The e-mail requested "a technical rationale, and not policy views." The final rule provides no such rationale.

The e-mail indicates EPA Deputy Administrator Marcus Peacock spoke to officials at OMB, possibly Susan Dudley, the head of OMB's Office of Information and Regulatory Affairs (OIRA). OIRA reviews and sometimes edits drafts of agency regulations.

Dudley and Peacock previously scuffled over the aforementioned ozone rulemaking in which EPA and White House officials disagreed over whether to set a separate standard to protect plant life. Dudley won that policy battle after President Bush was brought in to arbitrate.

The change from a 0.5-ton threshold to a one-ton threshold could have real consequences. EPA estimates the one-ton threshold will apply to 135 facilities. However, the 0.5-ton threshold would have applied to at least 259 facilities. The change means state and local officials will not be required to place new lead pollution monitors near at least 124 facilities that emit lead.

FDA to Open Regulatory Offices in Foreign Countries

On Oct. 16, Department of Health and Human Services (HHS) Secretary Michael Leavitt announced that the U.S. Food and Drug Administration (FDA) will send personnel overseas to staff offices to help ensure the safety of imported food and drugs. The plan calls for staff to be assigned to offices in China, India, Europe, and Latin America. Many assignments will begin before the end of 2008.

In a press release, FDA Commissioner Andrew C. von Eschenbach said, "The globalization of the food supply and medical product manufacturing has demanded that we do things differently. Through our Beyond our Borders initiative, we won't have to send our experts to another country to work with foreign governments and regulated industry to improve our oversight — we'll have staff living there and working on the ground 365 days a year."

The change comes as a result of problems with mostly uninspected products increasingly coming from firms that have shifted their manufacturing and production overseas. For example, in 2007, the problems included melamine contamination of pet foods that sickened and killed pets, toothpaste contaminated with antifreeze ingredients, and an FDA ban on five different types of seafood that had been contaminated with microbial agents not approved for use in the U.S. More recently, melamine has been discovered in Chinese milk-based products

such as infant formula and various candies sold both here and abroad.

There have also been concerns about drugs and medical devices commonly used in the U.S. For instance, FDA said many allergic reactions and even some deaths were attributed to ingredients in Heparin, a popular blood thinning drug. The agency also barred from import more than 30 generic drugs made in India because of poor quality control at the factories, according to an Oct. 16 *Washington Post* story about the HHS announcement.

HHS announced that it will open an office in Beijing before the end of 2008, and two other offices will open in other Chinese cities in 2009. A total of eight U.S. officials will operate in China. Ten employees will be posted in India once arrangements are negotiated with Indian officials. Other offices will open in nine Latin American countries, in Europe, and in the Middle East. According to an Oct. 17 BNA article (subscription), there will be about 43 employees total assigned to the foreign offices. The article notes it will cost $30 million to establish the offices by the end of 2009 and an estimated $20 million annually to maintain the offices.

The FDA staff will work with government officials and the companies producing the goods in an effort to improve quality assurance. They will inspect facilities, provide technical assistance, and help create third-party certification programs, according to the announcement. The certification programs require HHS to accredit independent organizations that would inspect manufacturing and production facilities and declare that the products meet U.S. import standards. Once their facilities are certified, the firms' products would gain expedited entry at American ports. Companies that do not meet certification would continue to work with FDA staff and government officials to improve the safety of their products.

The HHS plan grew out of an interagency working group, chaired by Leavitt, established by President Bush in 2007 to address the increasing number of safety scares consumers faced. The report issued by the working group in November 2007 largely calls for a series of incentive programs to get businesses to voluntarily comply with standards that may be established either by industry groups or the regulating agencies and then used by third-party inspectors. Incentive programs can be effective if based on the threat of direct regulatory action, but they are less effective when used with voluntary standards. (See OMB Watch's analysis of the working group report here)

According to the *Post* article, Leavitt and von Eschenbach admitted that new staff would not be able to meet the growing need for inspections of facilities in growing economies around the world. The two "hoped manufacturers would voluntarily pay for inspections by independent parties — including foreign governments and companies — to verify their plants meet U.S. standards," according to the article. Expedited access to American consumers would provide the incentive for firms to seek out independent inspections. The FDA does not, however, have the authority to accredit these independent inspection organizations. It would have to seek such authority from Congress.

A variety of legislative alternatives have been proposed and/or passed to address FDA's inspection capabilities, as well as other problems the agency has in meeting its food and drug

safety responsibilities. For example, on Sept. 20, 2007, Rep. John Dingell☼ (D-MI), chair of the House Energy and Commerce Committee, introduced H.R. 3610, which calls for mandatory user fees on food and drugs imported into the U.S. FDA would use the money for increased inspections and testing of imports. It also contains enhanced civil penalties for violations and other provisions expanding FDA's responsibilities. In the meantime, Congress reauthorized the Prescription Drug User Fee Act (PDUFA), which increased user fees on drug companies to pay for safety and approval programs. User fees on food imports have not yet been authorized.

SEC Wants Transparency in Wall Street Credit Gambling

Securities and Exchange Commission (SEC) Chairman Christopher Cox recently emphasized the urgent need for transparency of currently unregulated credit transactions, called credit default swaps (CDS), that contributed to the ongoing economic crisis. Cox is using the SEC's program to modernize its electronic disclosure system as a platform to call for oversight while the agency investigates alleged fraudulent transactions. Meanwhile, two other federal agencies are vying for regulatory oversight of CDS and industry is lobbying to minimize the impact. At issue will be whether transparency is accompanied with any other forms of accountability.

The SEC project, the 21st Century Disclosure Initiative, launched in June, seeks to change the way companies report financial information to the SEC and the way the commission distributes information to investors. The SEC plans to replace the current system — the Electronic Data Gathering, Analysis and Retrieval (EDGAR) — with one that utilizes interactive data structures. EDGAR relies on corporate reporting through paper government forms, whereas the new approach will utilize electronic submission and interactive tagging in a system called Interactive Data Electronic Applications (IDEA). The SEC proposed that companies be required to use the new submission method as early as 2009.

In an Oct. 8 speech at a small conference on modernizing the SEC's disclosure system, Cox made a strong case for transparency, contending that lack of transparency of CDS contributed to our current economic crisis. CDS were originally a form of insurance against bond defaults but have grown into a wildly popular vehicle for speculation. Because CDS are totally unregulated, no one knows how large the market is, although some have speculated that it could be around $55 trillion. The market for these transactions, according to Cox, has drawn the world's major financial organizations into "complex interconnections [that] pose risk to the financial system precisely because of the complete lack of information about who is exposed to whom." To address this transparency problem, Cox approved orders in September to require hedge funds, broker-dealers, and institutional investors to file statements under oath concerning trading of securities including credit default swaps. The statements were due Oct. 6; information about compliance or the content of submitted statements is not yet available.

Credit Default Swaps

CDS are contracts that guarantee to cover losses on certain securities in case of a default, thus

acting as a form of insurance. Swaps can occur when banks or hedge funds sell often risky investments such as mortgage-backed securities, municipal bonds, or corporate debt to another financial institution, often anonymously. Ideally, the institution purchasing CDS rests easy, paying premiums to cover itself in case of a default. However, since the Federal Reserve chooses to categorize CDS as "credit derivatives" rather than insurance, the market for the swaps goes entirely unregulated. Over the past number of years, CDS have become more a form of speculation on the health of the companies issuing the bond rather than insurance. The swaps are often reissued to hedge against a default. The end result is the potential $55 trillion in swaps, which is based on roughly $5 trillion in bonds. This can be dangerous for parties that purchase or sell them. For example, the American Insurance Group (AIG) had issued $440 billion in swaps but was unable to meet the promises to cover the defaults on debt. This led to the federal government loaning $123 billion to shore up AIG.

Being unregulated, there are no requirements on CDS sellers to maintain any specific amounts to cover possible defaults. The lack of transparency adds to the problem by preventing purchasers from knowing who the CDS seller is or if they possess the resources to cover the losses.

The CDS market was deregulated by congressional legislation less than 10 years ago with the passage of the Commodity Futures Modernization Act of 2000 (H.R. 5660 and S. 3283). According to Cox, the rate of these transactions has doubled in the past two years, creating increasingly dangerous connections of risky transactions between the world's major financial institutions. In fact, the contracts have increased 86 times since 2000. The SEC fears that CDS, as a tool for speculation, could manipulate stock prices of companies.

That is why the SEC has called for CDS reform as well as transparency. Cox defended CDS in part by stating they "play an important role in the smooth functioning of capital markets by allowing a broad range of institutional investors to manage the credit risks to which they are exposed." As early as September, Cox proposed that Congress create new legislation that would monitor CDS transactions for speculation, grant the SEC rulemaking authority to further prevent manipulation of the market, and establish an official platform for the market so institutions know the parties trading. By requiring reports on these contracts, Congress and the SEC would allow investors to be able to properly assess the risks being taken on by financial institutions and thus better understand their stability. Cox has argued that in the current crisis, such transparency would help investors "make informed decisions about where to put their resources," thus restoring confidence so that money and credit will once again be accessible.

The relationship of CDS to the economic crisis has attracted sharp-eyed attention in congressional investigations and the state of New York. During an Oct. 7 hearing, the House Committee on Oversight and Government Reform lambasted CDS as a key component in the near-collapse of AIG. Rep. John Sarbanes☼ (D-MD) equated AIG's entry into CDS trading to "opening a casino." In New York, Gov. David Paterson (D) announced that the state plans to begin regulating CDS. Such state action, however, would reportedly only cover one-fifth of the entire CDS market. Additionally, the Federal Reserve Bank of New York is proceeding with

new transparency requirements for those activities under its jurisdiction. There is also discussion about the Commodities Futures Trading Commission getting involved in regulatory oversight.

The battle over transparency and regulation is heating up in Congress as well. The business industry is lobbying hard to minimize regulation of these private-sector contracts. Action is expected soon.

Mixed Grades for Government on Free Speech and Science

A recent report card grading 15 federal agencies found inconsistent policies for releasing scientific information to the public. The analysis also showed that several agencies stifle their scientists' communication, causing scientists to fear retaliation for speaking their minds. Although some agencies have satisfactory policies or recently improved media policies, it appears much still needs to be done to ensure scientific information gets to the public.

On Oct. 17, the nonprofit scientific research and advocacy group Union of Concerned Scientists (UCS) released its report grading fifteen federal regulatory and scientific agencies on their policies controlling communication between staff scientists and the news media and the public. The report examined agencies' official policies governing such communication, as well as the implementation of the policies. The report card assigned each agency two scores: a letter grade (A through F or incomplete) for its media policy and a ranking (unsatisfactory to outstanding) for its practices.

Numerous federal agencies did poorly on both policy and practice, although there were a few exceptions; inconsistency across the government was the key finding of the report. The Occupational Safety and Health Administration (OSHA) received the only failing grade of the fifteen agencies for its media policy. At OSHA, most agency scientists told UCS they could not speak freely or feared retaliation for stating their personal scientific opinions. The U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, the Consumer Product Safety Commission, and the Bureau of Land Management all received a grade of D for their official media policies. These agencies did just as poorly in practice, receiving ratings of "unsatisfactory" or "needs improvement" for the implementation of their media policies.

A few agencies, however, did well in the media communication rankings. The Centers for Disease Control and Prevention (CDC) received the only A grade for its policy governing communication between its scientists and the media. However, although the official policy received an A, the implementation of the policy was deemed to need improvement. One CDC scientist complained that in practice, the agency's chief information officers "have power to kill publications if they don't like the message by not clearing the manuscript, and sometimes do, even when it is good science."

Other high-ranking policies were identified at the Nuclear Regulatory Commission (NRC), which earned a B+, and at the National Institute of Standards and Technology (NIST), the

National Oceanic and Atmospheric Administration (NOAA), the National Aeronautics and Space Administration (NASA), and the Census Bureau, which each received a grade of B. The respectable score earned by NASA represents a major improvement to an agency that had received much criticism in the past for its science communications policy.

The report concludes by urging the next administration to require all federal agencies to adopt policies that ensure free and open communications between scientists, the media, policymakers, and the public. New guidelines established by the president's Office of Science and Technology Policy provide a good starting point for improving the openness policies of other agencies. These guidelines, listed in a memorandum released in May, encourage clear, well publicized policies for making scientific data available to the public; affirm the right of scientists to discuss their research publicly; and promote policies to resolve disputes.

Two tenets of scientific communication should underlay an agency's media policies, according to the report's authors. First, government scientists should be allowed to publicly express their personal views, provided they express a disclaimer that they are not representing the views of the agency. Second, scientists should be allowed to review, approve, and comment on any government document that draws on their research or scientific views.

UCS tracked down each agency's official media policy, either on the agency's website or through a Freedom of Information Act request. If no policy was found, the agency received a grade of "incomplete." Policies were evaluated on six broad categories that included dealing with promotion of openness, handling disputes, and protecting scientific free speech. Each agency's practice evaluation was based on the results of more than 6,000 questionnaires UCS sent to government scientists, of which 739 surveys were completed. The questions covered issues related to protections of scientific free speech, openness, the handling of disputes, safeguards against abuse, and more.

The report card comes after several years of controversy surrounding the White House's science communications policies, especially regarding climate change. The administration has been repeatedly accused of politicizing science. The policies controlling communications between government scientists and the public have been criticized extensively in recent years by watchdog groups and by the Government Accountability Office. Numerous reports of editing and censoring scientific information for partisan political purposes have brought the issue to the forefront.

The open exchange of scientific data among scientists and the public is vital to creating sound public policies and implementing them effectively. The report's authors describe a strong democracy as dependent on "well-informed citizens who have access to comprehensive and reliable information about their government's activities."

Agency	Policy Grade	Practice Grade
Bureau of Land Management	D	Needs Improvement
Census Bureau	B	Needs Improvement
Centers for Disease Control and Prevention	A	Needs Improvement
Consumer Product Safety Commission	D	Unsatisfactory
Environmental Protection Agency	D	Unsatisfactory
Fish and Wildlife Service	D	Unsatisfactory
Food and Drug Administration	Incomplete	Needs Improvement
NASA	B	Satisfactory
National Institutes of Health	C	Needs Improvement
National Institute of Standards and Technology	B	Satisfactory
National Oceanic and Atmospheric Administration	B	Satisfactory
National Science Foundation	Incomplete	Outstanding
Nuclear Regulatory Commission	B+	Satisfactory
Occupational Safety and Health Administration	F	Unsatisfactory
U.S. Geological Survey	C	Satisfactory

Project Makes Transparency Recommendations for Next President

More than 100 groups and individuals from across the country have been working collaboratively to develop recommendations for the next president on how best to improve federal government transparency. The effort, the 21st Century Right to Know project, was organized by OMB Watch, and it involves organizations and individuals from across the political spectrum. A draft set of recommendations is now available for review and endorsement.

Acknowledging the growing secrecy in government and anticipating opportunities a new president and Congress could bring to reversing the secrecy trend, OMB Watch launched the 21st Century Right to Know Project over a year ago to develop recommendations on how to improve government openness. Working hand-in-hand with the steering committee of the OpenTheGovernment.org coalition and with other right-to-know leaders, the project set an ambitious agenda to change the underlying policies, priorities, and practices regarding public access for the executive branch of government.

The project began in July 2007 with a two-day event involving conservatives, libertarians, and progressives representing journalism, good government groups, professional associations, academia, and others. From its beginning, the project proceeded on a "transpartisan" basis.

OMB Watch interviewed more than 100 people to identify past and new ideas for reform. There was also a string of listening sessions around the country, including meetings in Jacksonville, FL; Phoenix, AZ; Seattle, WA; and Minneapolis, MN. Data from these efforts were provided to three panels of experts, which were tasked with drafting initial recommendations in three main areas: security and secrecy, usability of information, and policies and mechanisms to support government transparency. In addition to the three expert panels, recommendations were developed for the first 100 days of the new president and for a long-term vision to strengthen government openness. The draft recommendations were the basis for a weekend retreat in September, involving nearly 70 people from across the country. During the retreat, each of the more than 60 recommendations was reviewed; some were revised, some added. Based on that weekend, a new report was developed and participants called for an open process to review the recommendations.

The latest draft report of the 21st Century Right to Know project is now available for review and comment through a.nnotate.com, which allows readers to place virtual Post-It Notes on the document. Alternatively, readers can download a copy and e-mail reactions to smoulton@ombwatch.org. Given the final report must be ready to give to the new president's transition team the day after the election, comments must be provided no later than Oct. 27.

The draft report currently consists of five chapters:

- Chapter A — Introduction: describes a brief history of government openness tracing back to the Continental Congress and the current status of government transparency, which has seen many threats but also some improvements.
- Chapter B — First 100 Days: depicts the need for major reforms in light of the current state of excessive secrecy and restricted public access and provides five recommendations for the president to immediately undertake.
- Chapter C — National Security and Secrecy: provides specific recommendations to addresses the increase in government secrecy that has occurred under the excuse of national and homeland security concerns.
- Chapter D — Usability of Government Information: focuses on recommendations for how interactive technologies can make information more easily accessed and used by the public, including protecting the integrity of information and use of best formats and tools.
- Chapter E — Creating a Government Environment for Transparency: addresses recommendations for incentives and other shifts in government policies and mechanisms to encourage transparency.

Over the past several years, the release and disclosure of government information, whether it be health, safety, environmental, financial, or national security information, has taken a backseat to misguided homeland security policies and efforts to protect special interests. With a new president and Congress, we expect there will be increased awareness of the need for greater disclosure of federal government practices and information. This project seeks to capitalize on that opportunity and create a unified message to the next president that great improvements in government transparency are desperately needed to help restore the public's

trust in government.

Commentary: Despite Record Deficits, Stimulus Package Warranted

Although enactment of an economic stimulus package could push the federal budget deficit above $1 trillion, political consensus on its necessity is emerging. Political factions are split on the issues of how large and what form a stimulus package should take. Economists, however, indicate that targeted spending can be a powerful weapon to address recession and the effects of economic hardship on American families, even if it increases the deficit. Now is exactly the time to be enacting such fiscal policy.

As the government wrestles with the true costs of the financial bailout, some commentators are saying this country cannot afford another economic stimulus package to help Americans hard hit by the economic downturn. They say that a second stimulus package could push the deficit to around $1 trillion in Fiscal Year 2009. However, targeted spending can be a powerful weapon to address recession and the effects of economic hardship on American families, even if it increases the deficit.

The growing budget deficit and commensurate mounting national debt are indeed causes for concern, even when the economy is faltering, but they should take a backseat to preventing economic disaster and blunting the effects of the looming recession on our nation's families. Since the beginning of 2008, 760,000 net jobs have been lost, 1.8 million workers have become unemployed, nearly a million more workers claim unemployment benefits, and food prices have sharply increased as real wages continue their downward slide. The credit crisis gripping Wall Street, while related to the overall deterioration of the economy, is not the root cause of the slide, and the $700 billion financial rescue package will do little to prod economic expansion. The data points are bleak and show no sign of abating, prompting ideological consensus around the need to pursue expansionary (i.e., deficit-increasing) fiscal policy.

Debate on a second fiscal stimulus package is no longer over whether or not there should be one, but rather over how big it should be and what form should it take. On Oct. 20, Federal Reserve Chairman Ben Bernanke testified before the House Budget Committee that "with the economy likely to be weak for several quarters, and with some risk of a protracted slowdown, consideration of a fiscal package by the Congress at this juncture seems appropriate." Within hours, White House Press Secretary Dana Perino said that the administration will "remain open to the idea" but qualified Bush's support by saying "we'll just have to see...what sort of package [Congress] want[s] to draft into legislation...and see if it actually would stimulate the economy."

Bush and Bernanke appear to be in agreement with the sentiments expressed in an enlightening discussion on the *National Journal* website, where a cadre of economic experts, from the arch-conservative American Enterprise Institute to the center-right Concord Coalition to the left-leaning Economic Policy Institute, have responded to the question, "Is

there room for fiscal stimulus?" While contention swirls around what is and is not most effective, a consensus has formed around recognizing that a deficit-increasing economic stimulus package is warranted.

Desmond Lachman, Resident Fellow at the American Enterprise Institute, succinctly states the case for fiscal stimulus:

> With monetary policy rendered largely impotent by the present financial market travails, the case for early, substantive, and well-targeted fiscal policy stimulus would appear to be overwhelming. The argument that this might compromise the longer run US budget position overlooks how very much worse the US budget position would be in the event of an even deeper recession than that already in train.

The ideological cohesion around the need for a government injection of money into the economy should serve to ease passage of a second round of fiscal stimulus, but given the White House's stated opposition to aid to "individuals who may need support during an economic downturn," details on what may be enacted will certainly remain in flux.

In a meeting convened by House Speaker Nancy Pelosi (D-CA) on Oct. 13, a group of economists, including Nobel laureate Joseph Stiglitz and former Treasury Secretary Lawrence Summers, indicated that a spending package should total two to three percent of GDP, or about $300 billion. Pelosi, however, said last week that Democratic legislators were looking at putting together a $150 billion (or about one percent of GDP) bill.

Details of the contents of such a bill are murky, as House members are currently at the drawing board, but a final economic stimulus package will likely contain elements from a previous version of a stimulus bill (H.R. 7110), which was passed by the House 263-158 in September. That bill included an unemployment insurance extension and increased funding for state aid, Food Stamps, and infrastructure. House Minority Whip Roy Blunt (R-MO), however, rejected "a huge public works plan" or "bailing out states who spent a lot more money than they should have." Republicans are also maintaining their fidelity to tax cuts and drilling for oil and gas.

In a letter to Pelosi on Oct. 13, House Minority Leader John Boehner (R-OH) enumerated House Republican stimulus demands. The set of proposals set forth includes:

- A package of tax cuts for energy production
- Cutting corporate income taxes
- Suspension of the capital gains tax
- A federal government guarantee of lending among banks
- Suspending a law that forces retirees to begin withdrawals from Individual Retirement Accounts at the age of 70½

In the Senate, Majority Leader Harry Reid (D-NV) is taking a different approach. He would use the tax code to "encourage businesses to hire more Americans here at home" while "extending

tax-free unemployment benefits for those looking for work." In addition to increasing aid to states and for home energy bills, Reid's plan would also push the federal government to renegotiate mortgage terms.

A Congressional Research Service report summing up the opinions of economists on economic stimulus states that "that spending proposals are somewhat more stimulative than tax cuts since part of a tax cut will be saved by the recipients. The most important determinant of the effect on the economy is its size." The report also indicates that "[t]he primary way to achieve the most bang for the buck is by choosing policies that result in spending, not saving ... many economists have reasoned that higher income recipients would save more than lower income recipients since U.S. saving is highly correlated with income." Additionally, the report presents a set of revenue and spending proposals and their likely effect on economic growth. The estimates are derived from *Moody's Economy.com* economic models and predict that corporate income and capital gains tax cuts return relatively little in the way of stimulus, while spending provisions provide the most.

Policy Proposal	One-year change in real GDP for a given policy change per dollar
Tax Provisions	
Non-refundable rebate	1.02
Refundable rebate	1.26
Payroll tax holiday	1.29
Across the board tax cut	1.03
Accelerated depreciation	0.27
Extend alternative minimum patch	0.48
Make income tax cuts expiring in 2010 permanent	0.29
Make expiring dividend and capital gains tax cuts permanent	0.37
Reduce corporate tax rates	0.30
Spending Provisions	
Extend unemployment compensation benefits	1.64
Temporary increase in food stamps	1.73
Revenue transfers to state governments	1.36
Increase infrastructure spending	1.59

Source: Mark Zandi, Moody's Economy.com in CRS Report RL 34349

Whatever specific elements are included, the package should provide temporary relief targeted at those who need it most and be enacted as soon as reasonable consideration will allow. Given that the FY 2008 budget deficit was the largest nominal-dollar deficit in history, particular attention should be paid to targeting; that is, Congress should seek to get the most "bang for the buck." By appropriately directing spending at the unemployed and the underemployed,

Congress can not only maximize the amount of economic aid provided by a stimulus package, but it can help the millions of families that need it most. And while adding to the national debt presents challenges to policymakers in the years to come, they must prioritize the needs of the nation by investing in its families today.

The concern about the size of the deficit will be a central issue for the next administration. Certainly, the next president should undertake every possible effort to reduce unnecessary spending (aimed heavily at military spending) and study options for reining in skyrocketing health care costs. Even though tax increases are unpopular, the next president should begin efforts to increase revenue. In the meantime, the next president should not be afraid to propose bold spending initiatives that will result in greater revenue. For example, a 21st century version of the Works Projects Administration that puts rebuilding our nation's infrastructure as a top priority would be wise deficit spending. If such initiatives generated public-private sector green jobs and critical local, state, and federal revenues, the entire nation would benefit tremendously.

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In This Issue

Midnight at the White House: Bush Using Rules to Cement Legacy

The Bush administration is working on a spate of rules it hopes to finalize before its time in power expires. The last-minute rules cover a broad range of policy, but many share a common trait: relaxing existing requirements on businesses. The Bush administration appears to be pushing to deregulate in areas like environmental protection, worker leave, and auto safety. Many of the controversial rules are expected to be finalized in the coming weeks. The administration is pushing to finalize rules in November, not January, in order to assure they cannot be undone by the next president.

Tying the Hands of the Next Administration

Regulations are considered final upon publication in the *Federal Register*, but generally, federal law requires agencies wait at least 30 or 60 days before making the rules effective. By the time a new president takes the reins of government, the Bush administration hopes to make sure all of its regulations are not only final but effective.

The Clinton administration published many rules in the *Federal Register* in January 2001, just days before leaving office. Because those rules were not yet effective, the incoming president, George W. Bush, took a second look at those rules and suspended many of them. Although

Bush's move was of questionable legality, it was never challenged in court.

Bush was able to derail a regulation that would have precluded businesses in repeated violation of the law (including tax laws, labor laws, employment laws, environmental laws, antitrust laws, and consumer protection laws) from receiving government contracts.

Now, the Bush administration is pushing rules a future administration might find objectionable. However, by ensuring those rules are in effect by Jan. 20, Bush is preventing the next president from employing the same strategy of suspending last-minute rules.

The White House Response

The White House foreshadowed this November push when, in May, it instructed agencies to finalize rules by Nov. 1. In a memo, White House Chief of Staff Joshua Bolten wrote, "[R]egulations to be finalized in this Administration should be proposed no later than June 1, 2008." All final rules were to be completed by Nov. 1 except in extraordinary circumstances, according to the memo.

Many upcoming rules will miss the Nov. 1 deadline. However, the administration continues to push to finish rules by mid-November — at least 60 days before Bush leaves office.

Bolten claimed the deadline was meant to curtail the usual flurry of last-minute activity that has characterized the final weeks of previous administrations. White House spokesman Tony Fratto made the same assertion on Oct. 31. He claimed, "What the Chief of Staff wanted to avoid was this very charge that we would be trying to, in the dark of night in the last days of the administration, be rushing regulations into place ahead of the incoming, next administration."

Disputing news reports that claim regulatory activity is increasing, Fratto said, "We're not doing that in this administration." Speaking of the White House Office of Management and Budget's mandatory review of agencies' significant regulations, he said, "There's no great increase in the number of regulations that we're reviewing right now."

According to an OMB website, OMB's Office of Information and Regulatory Affairs (OIRA) reviewed 83 final rules from Sept. 1 to Oct. 31. During the same period in 2007, OIRA reviewed 34 final rules; in 2006, 42 final rules; and in 2005, 33 final rules.

However, it is the quality, not the quantity, of rules that worries critics most. Several rules will rollback existing requirements that prevent environmental pollution. Others will require recipients of government funding to endorse the administration's policies.

The last-minute push is consistent with the Bush administration's Janus-faced view on government regulation — relaxing requirements when they impose burdens on businesses and adding requirements when they impose conservative ideology on regulatory agencies and/or the public.

The Rush to Regulate

Like the Clinton administration, the Bush administration is rushing through rules to ensure an administrative legacy. However, the Bush administration is doing so in a more compressed timeframe. Agencies have truncated the development and review process for some of these rules. For several rules, the Bush administration accepted public comment for only 30 days. The standard comment period for major controversial rules lasts 60 days.

Rushed rulemakings can lead to policy that does not take into account the views of all stakeholders and benefits neither the public nor the regulated community. Eli Lehrer of the Competitive Enterprise Institute, a conservative think tank advocating for a smaller role for government, recently told Reuters, "At this point, in the current economic climate, it would be especially harmful to push through ill-considered regulations in the final days of the administration."

A Department of Labor rule on calculating the severity of on-the-job risks, specifically exposure to toxic chemicals, sped through Labor Secretary Elaine Chao's office without consultation with occupational health experts in the department. The rule is based largely on a report prepared by an outside consultant paid $349,000 by the department. That report has not been disclosed to the public.

A rule that could allow government-approved projects to intrude on the habitats of endangered species is also moving rapidly. In response to public outcry, the Department of the Interior extended the comment period to 60 days from 30 days. The Department received about 300,000 comments, mostly negative.

An internal e-mail uncovered by the Associated Press showed that senior Interior officials pushed staff to review all the comments in just one week. One calculation claims staff would have to review seven comments per minute to meet that mandate.

In October, Interior released a separate document that examines the environmental impact of the rule. As required by law, the document was opened to public comment, but the period only lasted ten days.

Fratto defended the Bush administration's procedures for finalizing regulations saying, "We're going to deal with regulations and ... we're going to do it in an open and transparent way and make sure that the public is involved and that everyone can review the regulations that we put forward."

Relaxing Requirements on Industry

While some rules have been rushed, others have been in development for years. Critics have long feared upcoming rules that will make it easier for power plants to avoid installing pollution controls or allow trucking companies to force their drivers to work 11-hour shifts.

A rule to ease restrictions on mountaintop mining companies was first proposed in January 2004. The rule would allow the companies to dump the waste generated by mountaintop mining into rivers and streams. Critics fear the change will further degrade the environment and endanger public health in the Appalachian region.

Other rules seem to reflect the concerns of industry, and public interest advocates fear what the final rules may hold. An upcoming rule that will make it more difficult for employees to claim unpaid leave for family and medical emergencies mirrors part of the request of the National Association of Manufacturers, a lobbying group.

Industry lobbyists are working hard to make sure their views are known to administration officials. Even amid the hurried pace of rulemaking, White House officials continue to meet with industry representatives. For a rule that would exempt factory farms from reporting air emissions from animal waste, officials from the White House and the U.S. Environmental Protection Agency met with representatives from the poultry, pork, and turkey farm lobbies.

A controversial rule that will allow factory farms to self-police their runoff into bodies of water was one of the only Bush administration rules to meet the Bolten memo deadline. Clean water advocates saw the Oct. 31 announcement of the rule as proof the administration is trying to secure a pro-industry legacy. "It's outrageous to see the environmental yard sale that marks the Bush Administration's final days in office," said Jeffrey Odefey, staff attorney at the Waterkeeper Alliance. "Clearly, industry lobbyists are picking up last-minute deals intended to preserve their right to pollute for years to come."

Imposing an Ideological Agenda

Other rules reflect a conservative ideology. Several rules currently under development would attach strings to federal funds in order to make sure they are not used for actions inconsistent with the administration's ideological positions.

The Department of Health and Human Services (HHS) is rushing through a rule that would require health care providers receiving federal funds to allow their employees to opt out of providing health care services they find morally objectionable. Critics fear the rule is aimed at restricting funding for abortion and possibly the dispensing of contraception.

Another HHS rule would restrict funds to organizations providing HIV/AIDS relief. The rule would force grantees to choose between adopting government policy (explicitly and unequivocally opposing prostitution and sex trafficking) for their entire organizations or setting up completely separate affiliated organizations. However, the degree of separation proposed is so severe that it is impractical to implement. Another rule would impose similar funding restrictions for grantees providing aid to the victims of sex trafficking.

Critics, including OMB Watch, object to such certification requirements as an unconstitutional coercion of speech. The Bush administration has consistently used the threat of cutting grants to control both the charitable and health services sectors.

Options for Repeal

The next president will be unable to repeal or reverse any Bush-era regulations that are final and in effect. Short of actions taken by the courts in the face of potential lawsuits, the new administration's only option would be to restart the rulemaking process. A typical rulemaking can take years to complete.

Congress could take advantage of a little-known procedural law that allows lawmakers to nullify agency regulations. The Congressional Review Act gives members of either chamber 60 legislative days to introduce a so-called resolution of disapproval. If the resolution moves to the floor for a vote, it enjoys fast-track status and cannot be filibustered in the Senate.

However, because Congress is currently in recess and may only reconvene for a few days after the elections, fewer than 60 legislative days remain in the current Congress. Under the law, that would give a new Congress a new 60-legislative-day window in 2009 in which to introduce resolutions of disapproval for individual rules.

The Congressional Review Act has only been successfully used once. It is difficult for Congress to utilize because the president may veto the resolution, and he is unlikely to accept congressional disapproval of his administration's own policies. Congress's only successful use of the act came in the early days of the Bush administration when a Clinton-era rule that would have required better ergonomics in the workplace was rejected.

Even if Congress and the courts are able to overturn Bush-era regulations eventually, the public may feel the impact for years to come. Contaminated water is difficult to clean up. It can be nearly impossible to reverse some public health damage. Is that the legacy the Bush administration really wants to leave?

The Bush administration is attempting to finalize many controversial regulations before its time in office expires. A White House memo instructed agencies to finalize rules by Nov. 1. Although many rules will miss that deadline, OMB Watch believes the administration will push to finalize rules in the coming weeks so they are in effect when a new administration comes into office. (Regulations are considered final upon publication in the Federal Register, but generally, federal law requires agencies wait at least 30 or 60 days before making the rules effective.)

This list is a broad sample of so-called "midnight regulations."

CIVIL LIBERTIES

Rule Description	Proposal Date	Current Status
Department of Justice – The rule would expand the power of state and local law enforcement agencies to investigate potential criminal activities and report the information to federal agencies. The rule would broaden the scope of activities authorities could monitor to include organizations as well as individuals, along with non-criminal activities that are deemed "suspicious." • Find out more from OMB Watch	July 31* (Proposal)	Final rule has not been sent to OMB.

TRAFFIC SAFETY

Rule Description	Proposal Date	Current Status
Federal Motor Carrier Safety Administration (Department of Transportation) – The rule would allow truck drivers to drive up to 11 consecutive hours. Because of the effects of fatigue, longer hours-of-service periods put both truck drivers and other motorists at risk. • Find out more from Public Citizen	Dec. 17, 2007 (Interim rule)	Final rule sent to OMB Oct. 21.
National Highway Traffic Safety Administration (DOT) – The rule would improve the national safety standard for roof strength in passenger vehicles. However, NHTSA's proposal is not as strict as auto safety advocates and some congressional members hoped and will make only minor safety improvements for passengers involved in rollover crashes. NHTSA also proposed preempting state law, including damages claims. • Find out more from OMB Watch	Aug. 23, 2005 (Proposal)	Final rule has not been sent to OMB; DOT is under court order to finish the rule by Dec. 15.

ENVIRONMENT

Rule Description	Proposal Date	Current Status
Office of Surface Mining (Interior) – The rule would allow mining companies to dump the waste (i.e. excess rock and dirt) from mountaintop mining into rivers and streams. • Find out more from Earthjustice	Aug. 24, 2007 (Proposal)	Final rule sent to OMB Sept. 22.

Department of the Interior – The rule would alter implementation of the Endangered Species Act by allowing federal land-use managers to approve projects like infrastructure creation, minerals extraction, or logging without consulting federal habitat managers and biological health experts responsible for species protection. Currently, consultation is required. • Find out more from Reg•Watch, OMB Watch's regulatory policy blog	Aug. 15* (Proposal)	Final rule has not been sent to OMB, but Interior officials are hastily reviewing public comments.
Environmental Protection Agency – The rule would ease current restrictions that make it difficult for power plants to operate near national parks and wilderness areas. • Find out more from the House Oversight and Government Reform Committee	June 6, 2007 (Proposal)	Final rule sent to OMB Oct. 30.
Environmental Protection Agency – Under the rule, concentrated animal feeding operations, i.e. factory farms, could allow farm runoff to pollute waterways without a permit. The rule circumvents the Clean Water Act, instead allowing for self-regulation. • Find out more from the Natural Resources Defense Council	March 7, 2008 (Proposal)	Final rule announced by EPA Oct. 31. (Final rule)
Environmental Protection Agency – The rule would change EPA's New Source Review program, which requires new facilities or renovating facilities to install better pollution control technology, by subjecting fewer facilities to its requirements. • Find out more from the Senate Environment and Public Works Committee	May 8, 2007 (Proposal)	Final rule has not been sent to OMB.
Environmental Protection Agency – The rule would exempt factory farms from reporting air pollution emissions from animal waste. • Find out more from OMB Watch	Dec. 28, 2007 (Proposal)	Final rule sent to OMB Oct. 24.
National Oceanic and Atmospheric Administration (Department of Commerce) – The rule would transfer the responsibility for examining the environmental impacts of federal ocean management decisions from federal employees to advisory groups that represent regional fishing interests. The rule would also make it more difficult for the public to participate in the environmental assessment process required by the National Environmental Policy Act. • Find out more from Pew Charitable Trusts	May 14, 2008 (Proposal)	Final rule has not been sent to OMB.

Environmental Protection Agency – EPA proposed two options: 1) to impose no new requirements on oil refineries; or 2) to impose minimal requirements. EPA is responding to a congressional mandate that it control toxic emissions from refineries, but option 1 would ignore that mandate, and option 2 would not go far enough, environmentalists say. • Find out more from the Natural Resources Defense Council	Sept. 4, 2007 (Proposal)	Final rule approved by OMB Oct. 30.

WORKER RIGHTS AND SAFETY

Rule Description	Proposal Date	Current Status
Department of Labor – The rule would change the way federal regulators calculate estimates for on-the-job risks. The rule would also add an extra comment period to new worker health standards, creating unnecessary delay. • Find out more from Reg•Watch	Aug. 29* (Proposal)	Final rule has not been sent to OMB.
Mine Safety and Health Administration – The rule would require mine operators to test employees in "safety-sensitive" positions for drug and alcohol use. • Find out more from Reg•Watch	Sept. 8* (Proposal)	Final rule has not been sent to OMB; MSHA held a public hearing Oct. 28.
Employment Standards Administration (Labor) – The rule would limit employee access to family and medical leave. Among other things, the rule would make it more difficult for workers to use paid vacation or personal time to take leave and would allow employers to speak directly to an employee's health care provider. • Find out more from the National Partnership for Women and Families	Feb. 11,2008 (Proposal)	Final rule sent to OMB Oct. 20.

HEALTH AND HUMAN SERVICES

Rule Description	Proposal Date	Current Status
Department of Health and Human Services – The rule could reduce women's access to federally funded reproductive health services. The rule would require health care providers to certify they will allow their employees to withhold	Aug. 26* (Proposal)	Final rule has not been sent to OMB.

services on the basis of religious or moral grounds or risk losing funding. • Find out more from the National Partnership for Women and Families		
Department of Health and Human Services – The rule would require HIV/AIDS grantees to choose between adopting government policy (explicitly and unequivocally opposing prostitution and sex trafficking) for their entire organizations or setting up completely separate affiliated organizations. However, the degree of separation proposed is so severe that it is impractical to implement. • Find out more from OMB Watch	April 17, 2008 (Proposal)	Final rule sent to OMB Oct. 24.
Department of Health and Human Services – As required by Congress, the rule would require organizations providing aid to the victims of sex trafficking to certify they do not promote, support, or advocate prostitution or risk losing U.S. funding.	Feb. 26, 2008 (Proposal)	Final rule sent to OMB Oct. 24.

GUN CONTROL

Rule Description	Proposal Date	Current Status
National Park Service (Interior) – The rule would end the 25-year-old ban on carrying loaded weapons in national parks. • Find out more from the National Coalition of Park Service Retirees	April 30, 2008 (Proposal)	Final rule has not been sent to OMB.

Notes:
*The rule missed the deadline set forth in a White House memo instructing federal agencies to propose by June 1 any rule they wished to finalize by the end of the Bush administration.

Joint Economic Committee Holds Hearing on the Need for Economic Stimulus

On Oct. 30, a group of economic experts testified before the Joint Economic Committee (JEC) on the necessity and scope of a second economic stimulus package. While committee members and witnesses agreed on the severity of the ongoing economic situation, there was a clear ideological divide on which course of action Congress should pursue. At the center of the divide were the competing concerns for families facing certain hardships inflicted by a contracting economy and for the consequences of an increase in the federal budget deficit, which would be required to aid those families and help reverse the current economic trend.

The hearing commenced within hours of a Bureau of Economic Analysis report that indicated gross domestic product (GDP) shrank in the third quarter of 2008. The 0.3 percent decrease in real GDP — a significant decline from the 2.8 percent annual growth rate measured in the second quarter — reflected declines in both consumer spending and investment. While consumer spending, residential investment, and disposable income all fell dramatically, spending on goods and services by the federal government increased, with the bulk of that increase due to defense spending.

Rep. Carolyn Maloney (D-NY), acting chairwoman of the JEC, asked each economist on the panel to give his outlook on the current state of the economy, as well as his recommendations for future policy. In her opening statement, Maloney, citing the weakness of the economic expansion of the past eight years, stressed the urgency of enacting a second round of economic stimulus at a time when declining consumer spending and rising unemployment are putting recessionary pressure on the economy. "Falling home values and rising debt have driven family balance sheets to their worst condition in decades, while at the same time banks have been curtailing access to credit," said Maloney. "As consumers cut back on their spending, this drags down the economy further."

Acting vice chair of the JEC, Rep. Kevin Brady (R-TX), voiced concerns that a likely stimulus package would be too small to impact the economy in any meaningful way. He equated the U.S. economy to a 100-yard football field, stating that a stimulus plan would represent no more than one yard; like many other fiscal conservatives, Brady is not convinced that adding to the current record-high budget deficit would be worth the additional hundreds of billions of dollars in federal spending that would be required to significantly boost economic growth.

Testifying before the committee, Nouriel Roubini, distinguished Professor of Economics at New York University, asserted that a new round of fiscal stimulus in the form of direct government spending on goods and services should be implemented as soon as possible. Roubini, who eerily predicted the current financial crisis in 2006, stated that government inaction will lead to a deeper, longer, and more protracted recession, with a cumulative fall in GDP of about four percent.

Roubini asserted that a second stimulus plan should provide about $350 billion and should be targeted at individuals most likely to spend the additional income. It should include grants to state and local governments; increased unemployment benefits; investment in infrastructure and green technology; and tax rebates for lower income households.

Citing excessive debt and insolvency as major factors in prolonging the severity of the economic downturn, Roubini stated that debt relief for households and the financial sector would be necessary to boost economic growth. While Roubini admitted that the cost of economic stimulus to the Treasury is high, he believes the cost of inaction may be even higher.

Following Roubini, Simon Johnson, professor of Entrepreneurship at the Massachusetts Institute of Technology, testified that a stimulus package would have to expend about $450 billion (roughly three percent of GDP) to cushion the effects of the looming recession. And like

Roubini, Johnson advocated for programs that encourage spending, rather than saving, in the short run and that promote investment and growth in the long run. Johnson cited direct aid to state and local governments, extended unemployment benefits, expanded food stamp aid, and loan modifications for distressed homeowners as part of a short-term proposal, while investment in infrastructure, job retraining programs, and expanded loans for students and small businesses should comprise the bulk of a longer-term package. Referring to the consumer-focused design of the first economic stimulus plan enacted in February, Johnson stated his preference for the emphasis of a second round of stimulus to be on infrastructure spending. "Given the choice, we would rather see investments in infrastructure than in consumption of flat screen TVs," he said.

The final witness, Richard K. Vedder, professor of economics at Ohio University and visiting scholar at the American Enterprise Institute, testified that the federal government's policies have already been too aggressive and interventionist. He urged the American people and Congress not to panic, because, although periods of sharply eroding public confidence have negative consequences, they do pass.

He objected to enacting a second economic stimulus package, citing two reasons: First, economic stimulus would not promote short-term recovery, and second, expansionary fiscal policy would "aggravate[e] an explosion in inflationary expectations that [he] already fears will erupt, having detrimental effects on labor and financial markets." And because of the practical difficulties of enacting and executing infrastructure spending in a timely manner, Vedder does not believe such spending on infrastructure is a short-term solution to relieve economic hardships on American families. He said that "if you're going to have a stimulus package, certainly a tax cut ... is preferable to a spending increase that would certainly take time to implement, and of course a tax cut would have some more positive long-run incentive effects" In his cautionary note to Congress, Vedder advised Congress that it "[has] done enough for now, probably more than enough," and it ought to "[r]elax and recover from [its] labors and allow the healing properties of markets to be asserted again."

Although this hearing did not present any consensus on the necessity of passing a second economic stimulus package, additional support for a package from Federal Reserve Chairman Ben Bernanke, House Speaker Nancy Pelosi (D-CA), and Minority Leader John Boehner (R-OH), not to mention tacit support from President Bush, are promising signs that Congress will act. It appears the main debate will center on how to deliver the stimulus and how large the package will be.

It is still unclear if Congress will act quickly after the election during a lame duck session or if it will wait a short period until the new president and Congress are sworn in in January.

Court Rules CIA Can Keep Any Secret It Wants

On Oct. 29, a federal court refused to examine statements made by Guantanamo Bay detainees during their tribunals; the statements were redacted by the Central Intelligence Agency (CIA).

The statements, which reportedly contain allegations of torture committed against the detainees while they were in U.S. custody, come at a time when the British government is seeking to investigate the treatment of one of its own residents held at the detention facility.

The Department of Defense posted redacted versions of the statements to the agency's website and released copies of the redacted material to the American Civil Liberties Union (ACLU) in response to a 2007 Freedom of Information Act (FOIA) request. The documents include statements made by high-value detainees Khalid Sheikh Muhammad, Hambali, and Bashir Bin Lap. After unsuccessful administrative appeals asking for the redacted information, the ACLU filed a lawsuit to obtain the material.

Wendy Hilton, a CIA information review officer, issued a sworn affidavit on behalf of the agency, in which she described the details that were not publicly released as "the conditions of the detainees' capture, the employment of alternative interrogation methods, and other operational details." The CIA contends that disclosure of such information is likely to degrade the agency's ability to effectively question terrorist detainees and elicit information necessary to protect the American people. The agency believes that public disclosure of the CIA's methods would allow al Qaeda and other terrorists to train in "counter-interrogation" tactics.

Chief Judge Royce Lamberth of the U.S. District Court in Washington, DC, turned down the option to review the documents *in camera*, which occurs when a judge reviews potentially sensitive material privately in chambers to determine the veracity of a party's claims. Lamberth issued an opinion that the CIA's declaration was in good faith and that he was "disinclined to second-guess the agency in its area of expertise."

The ACLU criticized Lamberth for not exercising appropriate judicial oversight on a key issue of the Bush administration's detainee policy — torture allegations. The ACLU argues that the redacted statements contain detainee allegations of torture. Ben Wizner, an ACLU staff attorney, said that the information was initially redacted by the CIA to "protect itself from criticism and liability. It is unlawful for the government to withhold information on these grounds."

The British government is also accusing the U.S. of withholding information concerning torture allegations by a British detainee. Baroness Patricia Scotland, the Attorney General of Great Britain, is reviewing evidence for possible criminal proceedings against American officials who allegedly abused a British resident, Binyam Mohamed, while he was imprisoned in Morocco and Afghanistan. Mohamed has been in Guantanamo since 2004. According to reports, the review was requested by Home Secretary Jacqui Smith, who obtained access to secret evidence that U.S. officials, as well as British Foreign Secretary David Miliband, are attempting to suppress.

Climate Change Disclosure Becomes an Investor Thing

Recent actions by investors and the New York State Attorney General are pressuring

companies to disclose their greenhouse gas emissions and the risks they face from climate change. Many regard such information as essential to investors' right to know about the potential liabilities facing thousands of industries as the climate warms and new emissions regulations become a near certainty.

Numerous industries face high risks from the environmental changes already resulting from greenhouse gas emissions. Companies tied to industrial agriculture, for example, face financial risks from increased droughts, more frequent and severe floods, and the rising costs of fossil fuel-based inputs like synthetic fertilizer and pesticides.

Investors Demand More Disclosure

On Oct. 22, the Investor Network on Climate Risk (INCR) sent a letter to the Securities and Exchange Commission (SEC) requesting the agency require greater disclosure of the climate change risks that businesses face. The INCR letter was sent in response to an SEC request for public comment on its 21st Century Disclosure Initiative, which proposes to modernize the current SEC disclosure system. The 14 signatories to the letter include institutional investors such as California's Public Employees' Retirement System (CalPERS) and the California State Teachers Retirement System (CalSTRS), and the Maryland, New Jersey, New York City, and New York State public pension funds or treasurers.

The signatories found that "significant material risks exist" to the companies in their portfolios because of climate change, triggering a need for disclosure on SEC filings. According to Nancy Kopp, the Maryland State Treasurer, "Action by the SEC to require disclosure of climate risks — as well as additional environmental, social and governance risks — would result in better, more informed decisions for investors."

"What we seek is not radical, but rooted in the SEC's duty to follow the most fundamental investor protection principle there is: the right to know," said California State Treasurer Bill Lockyer.

The INCR is a network of institutional investors and financial institutions overseeing more than $7 trillion in assets, according to the group's website. The INCR is a project of Boston-based Ceres, a national coalition of investors, environmental organizations, and other public interest groups. Ceres works with companies and investors to address sustainability challenges such as global climate change.

Attorney General Subpoenas Corporate Climate Change Data

On Oct. 23, the day after the INCR letter, New York State Attorney General Andrew Cuomo announced that, in response to a subpoena issued by his office, a large energy company had agreed to voluntarily disclose information about its climate risks, including its annual greenhouse gas emissions. Dynegy, a Texas-based company operating coal, oil, and natural gas power plants, was one of five large energy companies the attorney general subpoenaed in the fall of 2007 to investigate whether investors were informed about the financial risks of

operating the plants. Another energy company, Xcel Energy, agreed in August to disclose its climate risks.

"Investors have the right to know all the material financial risks faced by coal-fired power plants associated with global warming," Cuomo said in a statement. The attorney general was joined in his announcement by former Vice President Al Gore.

Dynegy and Xcel Energy have agreed to disclose analyses of their material risks from present and future climate change regulations, litigation, and the physical impacts of climate change. Additionally, they will report current carbon emissions, projected increases in emissions from their coal-burning plants, and strategies for managing the emissions. The attorney general last year petitioned the SEC to require such disclosures in securities filings.

Future Climate Change Disclosures

These actions by the New York Attorney General and by investors represent a growing interest in evaluating and disclosing the risks businesses will face when greenhouse gases are eventually regulated, as well as the financial risks to industries impacted by the physical changes wrought by climate change. If a price is imposed on greenhouse gas emissions, as is likely under several regulatory proposals, emitters, especially energy producers, would be hit by increasing costs to continue polluting. The greater the emissions, the greater the potential financial risk to investors.

The disclosures sought by the investors and the attorney general would also help to prepare businesses for reporting to an eventual registry of greenhouse gas emissions. Before any cap-and-trade program or other regulations can be instituted, there must be a thorough accounting of how much companies are emitting. Currently, businesses may report their emissions to the Carbon Disclosure Project or to the Climate Registry, two nonprofit organizations that collect mostly voluntary reports from states and businesses on their greenhouse gas emissions.

Though no mandatory national government registry exists, the Department of Energy manages the Voluntary Reporting of Greenhouse Gases Program. Also, in December 2007, Congress required the U.S. Environmental Protection Agency (EPA) to propose a reporting rule for industrial plants and other large sources of greenhouse gases. The EPA missed the Sept. 26 deadline and has yet to comply with the law.

Complaints about Church Electioneering Continue

The 2008 election cycle has produced a number of complaints about religious and charitable organizations illegally opposing or endorsing candidates. The final weeks leading up to the election were no exception, as Americans United for Separation of Church and State (AU) filed three new complaints to the Internal Revenue Service (IRS).

On Oct. 22, AU announced it asked the IRS to investigate the Roman Catholic Diocese of

Paterson, NJ, for a letter Bishop Arthur J. Serratelli published on the Diocese's website and in its newspaper that attacked presidential candidate Barack Obama.

Unlike Pulpit Freedom Sunday's recent endorsements from the pulpit, AU says the Oct. 9 column in *The Beacon*, the Diocese newspaper, indirectly opposed the election of Obama because of his pro-choice stance on abortion. While the Bishop did not mention Obama by name or expressly tell parishioners not to vote for him, he said, "Along with 108 members of Congress, the present democratic candidate for President continues his strong support for the Freedom of Choice Act. In a speech before the Planned Parenthood Action Fund last year, he made the promise that *the first thing* he would do as President would be to sign the Freedom of Choice Act. What a choice for a new President!" AU executive director Rev. Barry Lynn said, "Bishop Serratelli is essentially telling congregants that they have to vote against Obama or they'll lose basic freedoms."

AU also wants the IRS to investigate Rock Christian Fellowship in Espanola, NM, for posting a large display that encourages voters to support Republican candidates over Democratic candidates. According to the AU complaint, the display had a picture of an aborted fetus with the last names Obama, Udall (referring to Tom Udall, a Democratic U.S. Senate candidate in New Mexico) and Lujan (referring to Ben Ray Lujan, Jr., a Democratic congressional candidate for New Mexico's 3rd district) underneath it. Next to that picture is a photo of a healthy baby with the last names of Republican presidential candidate John McCain, Steven Pearce, the Republican Senate candidate, and Daniel East, the Republican congressional candidate from New Mexico's 3rd district, underneath it. AU also notes that Michael Naranjo, the pastor of the church, told the *Santa Fe New Mexican* that his purpose is "educating on who stands pro-life and who is pro-death" and that "I'd rather lose my 501(c)(3) than my soul."

On Oct. 30, AU filed an IRS complaint against the General Baptist State Convention of North Carolina for engaging in partisan electioneering. The Convention hosted Michelle Obama, wife of Democratic presidential nominee Barack Obama, at an event on Oct. 29. According to AU, Michelle Obama praised her husband and told the group about the type of president that her husband would be. AU also stated in its IRS complaint that Ms. Obama's "appearance took on the trappings of a campaign rally, and during it Ms. Obama promoted her husband's candidacy and appealed for votes." Rev. Rule 2007-41 provides factors that determine if prohibited campaign intervention has occurred when a political candidate speaks at a tax-exempt organization's event. One factor used is whether the organization gave an opportunity for the opposing candidate to appear. It is not known if the McCain campaign was provided an opportunity to speak. In his letter to the IRS, Lynn said that the "appearance by Ms. Obama before this religious group raises a host of issues, and I urge the IRS to investigate the matter."

Many IRS complaints that have surfaced over the past few months may be eliminated if the organizations that are engaging in the potentially prohibited activities have more guidance up front. A bright-line rule would not only prevent organizations from unknowingly participating in prohibited activities, but it would also enable organizations to engage in issue advocacy without the fear of unintentionally violating rules that are too vague for many organizations to

understand.

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In This Issue

Panel Sends Regulatory Recommendations to Obama, Congress

On Nov. 14, a panel of regulatory experts released a report calling for significant changes to the federal regulatory process. The recommendations are directed to President-elect Obama and the new Congress and are designed to achieve a more effective, efficient, and timely process that is now burdened with excessive requirements and assessments.

The report, *Advancing the Public Interest through Regulatory Reform: Recommendations for President-Elect Obama and the 111th Congress*, outlines many of the problems that afflict the regulatory process and calls for specific actions to resolve those problems. The recommendations are both short term, urging immediate steps in the first 100 days of Obama's administration, and ongoing, such as recommending changes to statutes that impact how federal agencies develop public protections.

The report identifies numerous symptoms of the problems with a regulatory process that "no longer adequately protects the public." The symptoms include "the crises in the housing and financial sectors; mine and crane collapses; contaminants in consumer products like

toothpaste and pet food; contamination of spinach, jalapeños, meat, and other foods; dangerous chemicals used in popular medicines; and the exploitation of our public lands and natural resources." In addition, agencies are understaffed, require significantly more resources to respond to the challenges they face, and are required to perform a wide range of analyses, some of which are unrelated to the goal of producing effective regulations.

Among the high-priority recommendations described in the report are a call for Obama to impose an immediate 60-day moratorium and review of any new regulations finalized but not yet in effect, and for the creation of a blue ribbon commission to suggest "fundamental changes" to improve the regulatory process by reducing unneeded analytical requirements and bureaucratic hurdles.

The report also addresses the relationship between White House offices and the agencies responsible for promulgating regulations. The authors write, "We believe that the White House has been too involved in the substantive review of agency rulemakings, at times disagreeing with agency experts and changing the science presented by the agencies." Throughout the report are recommendations that place the locus of decision making within agencies, reserving the role of the White House Office of Management and Budget (OMB) as more of a coordinator.

According to the report, the authors differed on one of the most contentious aspects of the current regulatory process, the use of cost-benefit analysis. They agreed, however, that the prescriptive directives, such as the OMB Circular A-4, *Regulatory Analysis*, that require one government-wide approach to performing cost-benefit analysis, should be curtailed. The panel strongly agreed on principles that should guide the use of the cost-benefit tool, including using it in ways consistent with legal requirements and not as a determining factor in selecting regulatory options unless required by statute. Additionally, the report notes that agencies should have flexibility in deciding when and how to apply cost-benefit analysis to regulatory work.

The report notes that agencies must be given the resources necessary to initiate, write, and enforce regulations. The report is critical of the loss of agency experts and the impact limited funding has had on agencies' ability to do their regulatory jobs. The report provides a variety of recommendations to deal with the politicization of science, including improvements in the integrity of science and the suggestion that all research used in rulemaking be publicly available and part of the rulemaking record.

Following a chapter on recommendations for the first 100 days, the report is organized by several themes. The thematic recommendations address ways to improve regulations, restore integrity to the information used by agencies, improve the implementation and enforcement of regulations (including increasing resources for agencies), increase the transparency of the regulatory process, and improve ways for the public to participate in the process.

According to the report, the recommendations are based on six principles:

- Regulatory decisions should be timely and responsive to public need.
- The regulatory process must be transparent and improve public participation.
- Regulatory decisions should be based on well informed, flexible decision making.
- Authority to make decisions about regulations should reflect the statutory delegation granted by Congress.
- Agencies must have the resources to meet their statutory obligations and organizational missions.
- Government must do a better job of encouraging compliance with existing regulations and fairly enforce them.

The Steering Committee for the project on *Advancing the Public Interest through Regulatory Reform* consists of 17 regulatory experts with different perspectives on the problems with the current regulatory process. Many of the committee members, who work in public interest organizations, academia, scientific organizations, business, and local government associations, have often expressed differing opinions about regulatory matters. What is unique about this group, according to the report, is that, because they agreed that the current process is broken, the committee members found ways to sidestep disagreements to offer concrete recommendations to improve the rulemaking process.

The group began its work in July 2007 in order to have recommendations ready for the next president and Congress. The project was initiated and staffed by OMB Watch, but the consensus recommendations are the result of committee meetings over the course of the project. The panel commissioned four task forces to address broad regulatory topics and drew on that work and other information to inform its decision making.

Bush Changes to Employee Leave among First Midnight Rules

The Department of Labor has finalized a new rule that will affect the way workers take medical and family leave. It is among the first of many rules the Bush administration is expected to cement in the coming weeks.

The Family and Medical Leave Act of 1993 (FMLA) allows employees to take up to 12 weeks of unpaid leave each year to care for themselves or a family member without risking their pay, benefits, or position. The Department of Labor estimates 7 million workers took FMLA leave a combined 10.5 million times in 2007.

The rule, published in the *Federal Register* Nov. 17, will make it more difficult for employees to use paid leave when taking FMLA leave. Because FMLA leave is unpaid, employees often attempt to use paid leave, such as paid vacation time, to avoid disruptions in their pay.

Other changes require workers to provide greater advance notice of FMLA leave claims and give employers more time to respond. The changes require employees to give advanced notice

in a way that "compl[ies] with the employer's usual procedures for calling in and requesting leave, except where unusual circumstances exist." Employers will be able to delay or deny FMLA leave claims if the employee does not comply. The rule also gives employers five days to respond to leave claims. Currently, employers must respond within two days.

The Labor Department backed away from a controversial earlier proposal, which would have allowed an employee's direct supervisor to speak directly to that employee's health care provider. However, the rule change will allow human resource professionals to contact health care providers.

Worker advocates criticized the department for those changes and say the revisions make it more difficult for workers to take leave. Debra Ness, president of the National Partnership for Women and Families, said, "The new FMLA regulations for workers take us in the wrong direction, and are harmful and unnecessary."

John Sweeney, president of the AFL-CIO, said, "Given the worsening economic situation facing families, we should be talking about how to expand successful laws like the FMLA to provide workers more job security and flexibility to deal with urgent family situations, not less."

The National Association of Manufacturers (NAM), a group that lobbies for business interests, said the rule would "provide greater clarity and understanding." NAM asked the Labor Department for certain changes to the FMLA, including direct employer access to employee health care providers.

A part of the rule expands family and medical leave protection for military families and is being roundly lauded. Responding to a mandate from Congress signed into law in January, the rule will grant employees up to 26 weeks of leave per year to care for a family member injured during military service. Ness said expanding FMLA leave for military families will "help ease the strain of a family member's deployment."

The rule is one of many the Bush administration is expected to finalize in its waning days. Presidential administrations typically increase regulatory activity near the end of their tenures in order to ensure their priorities are in place before a new president takes over.

Unlike some other controversial rules, the changes to the FMLA have been in development for some time. The Labor Department first solicited public input on a rule change in December 2006 and officially proposed the rule on Feb. 11, 2008.

The administration appears to have worked to assure the rule is cemented in place by the time Bush leaves office. Because the Labor Department expects the FMLA rule to have an annual economic impact of more than $100 million, the agency is required by law to wait at least 60 days before making the rule effective. The rule is set to become effective Jan. 16, 2009.

White House officials have pushed agencies to finish their rules by early or mid-November. In May, White House Chief of Staff Josh Bolten issued a memo instructing agencies to finalize

rules by Nov. 1, absent "extraordinary circumstances." That deadline has slipped, but many agencies are attempting to finish their work as quickly as possible.

The Clinton administration published many rules in the *Federal Register* in January 2001, just days before leaving office. Because those rules were not yet effective, the incoming president, George W. Bush, took a second look at those rules and suspended many of them. Although Bush's move was of questionable legality, it was never challenged in court.

The FMLA rule will take effect just four days before Bush leaves office, thereby making it extremely difficult for Barack Obama to impact the rule in any way once he takes office.

Other rules that have already been finalized and are set to become effective by Jan. 20 include:

- A rule to allow oil shale development, an environmentally intrusive process, in Western states
- A rule to cut low-income citizens' access to health care under Medicaid's outpatient services programs
- A rule redefining solid waste and removing existing requirements that certain hazardous materials be disposed of in environmentally sensitive ways
- A rule allowing truck drivers to drive up to 11 consecutive hours and setting the required rest time at only 34 hours

Coalition Makes Right-to-Know Recommendations to President-elect

On Nov. 12, the right-to-know community published a set of transparency recommendations for President-elect Barack Obama and the 111th Congress. These recommendations are supported by a group of over 280 individuals and organizations and published in a report, titled *Moving Toward a 21st Century Right-to-Know Agenda: Recommendations to President-elect Obama and Congress*.

Seventy recommendations urge the new president and the incoming Congress to act quickly on a number of key government openness issues while encouraging a more systemic, longer-term approach to a variety of other transparency problems that plague the federal government. Among the top recommendations is a call for strong leadership and vision on government transparency from the president, starting with a statement on the importance of government openness in the inaugural address. Other top recommendations are for a new government policy that urges agencies to proactively disclose information where possible, rather than waiting for Freedom of Information Act requests; a new initiative to provide information about government spending, influence of lobbyists, and the revolving door for political appointees; and adequate funding to implement new policies.

Government openness advocates also placed a high priority on modernizing the government's use of technology to manage and disclose information. Greater exploration of wikis, comment

sections, collaborative projects, public review of pending policies, and online dialogs were also seen as innovations that would greatly improve the connection between government and the people. Additionally, the community took a strong position against the almost reflexive deference to secrecy by the executive branch when it comes to national security. While the need for national secrets was recognized, the group urged the president to challenge the mindset that secrecy makes us safer. The widespread use of "sensitive but unclassified" labels that has impeded interagency information-sharing and public disclosure of government activities was highlighted as a key security issue that needs to be addressed quickly.

The report consists of five chapters, each broken into subsections:

- Chapter A — Introduction: describes a brief history of government openness tracing back to the Continental Congress and the current status of government transparency, which has seen many threats but also some improvements.
- Chapter B — First 100 Days: depicts the need for major reforms in light of the current state of excessive secrecy and restricted public access and provides five recommendations for the president to immediately undertake.
- Chapter C — National Security and Secrecy: This is divided into six parts: Overclassification, Pseudo-Secrecy, State Secrets Privilege, Federal Secrecy Imposed on State and Local Officials, Failed Checks and Balances, and the Imperative of Real Accountability.
- Chapter D — Usability of Government Information: This section is divided into three parts: Using the Internet to Promote Interactivity, Electronic Records Management, and Scientific Openness & the Media.
- Chapter E — Creating a Government Environment for Transparency: This chapter is divided into five parts: Policy Statements, Resource Requirements, Incentives to Promote Disclosure, Improved Oversight & Enforcement, and Long-Term Vision for Government Transparency.

As reported in a previous issue of *The Watcher*, the recommendations were created as part of a two-year effort known as the 21st Century Right to Know Project, coordinated by OMB Watch. It brought together dozens of individuals and organizations from across the country and across the political spectrum to find common ground in possible solutions to what all involved saw as intolerable levels of secrecy in the federal government. The parties involved were also frustrated that government has not yet fully embraced the power of interactive technologies, noting that government agencies are largely functioning with 20th century tools and policies. Participants included conservatives, libertarians, and progressives representing good government groups, professional associations, traditional reporters, bloggers, unions, representatives of the philanthropic community, technology experts, and members of academia.

Gary D. Bass, Executive Director of OMB Watch and one of the key people involved in the project and the report, said, "Taken in total, the recommendations in this report propose a transformational role for government. The report calls for reconnecting our government with all of us, 'We, the people.'" Bass continued, "It calls on government to move its methods for

serving the public's right to know into the 21st century. And it calls on government to make itself more open than any past administration in order to rebuild trust and accountability."

This project started at the beginning of 2007 with a discussion by the OpenTheGovernment.org steering committee. OpenTheGovernment.org is a coalition dedicated to less government secrecy and more openness. Working hand-in-hand with the coalition, OMB Watch spearheaded this initiative. It included a series of sessions across the country, various surveys and interviews, and leadership from three expert panels. The expert panels were chaired by Meredith Fuchs of the National Security Archive, Ari Schwartz of the Center for Democracy and Technology, and Patrice McDermott of OpenTheGovernment.org.

Several other organizations are also calling for increased transparency. The National Security Archive released memoranda to the President-elect concerning Freedom of Information Act efficiency, classification system reform, and Presidential Records Act compliance. The Center for American Progress announced the January release of its book, *Change for America*, which it calls "a progressive blueprint for the 44th president." The book includes a chapter on government transparency in the Internet age.

Readers can access *Moving Toward a 21st Century Right-to-Know Agenda* at http://www.ombwatch.org/21strtkrecs.pdf. Though the report is no longer in draft form, the 21st Century Right to Know Project is still accepting report endorsements. Please do not hesitate to add your endorsement through our online web form.

Groups Seek More Congressional Transparency

The Sunlight Foundation recently launched the Open Senate Project as part of its ongoing attempt to improve congressional transparency. The project is a bipartisan initiative to study the Senate's current information sharing practices and subsequently develop recommendations for improvement, particularly through the use of technology.

The first stage of the project is to establish a dialogue among interested individuals and groups about the Senate's current practices and policies for disclosure, information sharing, and interaction with the public. The Sunlight Foundation has established an open Google Groups e-mail list, as well as a blog, to initiate the online discussion on Senate transparency reform.

The project has been endorsed by Senate Majority Leader Harry Reid (D-NV), who stated that he would welcome the recommendations resulting from the collaborative effort. Specific recommendations from the project are expected next spring.

While many government openness groups and access advocates have focused on executive branch openness issues, the Sunlight Foundation has concentrated on congressional transparency. The legislative branch, which has passed several laws to require greater openness by executive agencies, has appeared reluctant to significantly increase its own transparency requirements. Since the executive branch has no authority to impose such

requirements on Congress, the situation will only improve when Congress chooses to set new standards for itself.

The Open Senate Project is paralleling another Sunlight Foundation project started in 2007, called the Open House Project. The House-focused project began with the same Google Groups approach to identify issues and generate ideas. The project culminated in a May 2007 report on transparency in the House of Representatives. The Open House recommendations focused on technical areas such as coordinating web standards, removing web-use restrictions for members of Congress, and creating video access to congressional proceedings.

The Open House Project has made significant progress over the years on several of its recommendations. Among the successes was the Library of Congress' decision to create permanent links on THOMAS, the government's online federal legislative information directory. A summary of other progress can be found in the project's retrospective report.

Other organizations have made efforts to improve congressional transparency. For instance, Taxpayers for Common Sense has published a database of congressional earmarks for Fiscal Year 2008. Still other groups focus on Congress's role in making executive branch transparency efficient and accountable. The right-to-know community's recent report, titled *Moving Toward a 21st Century Right-to-Know Agenda: Recommendations to President-elect Obama and Congress*, contains recommendations concerning Congress in the areas of oversight, funding, and new legislation.

Public Wants More Info on Food Labels

A national poll shows strong consumer support for improved food labeling and more frequent inspections of food-processing facilities. According to food safety advocates, Americans want labels that identify use of genetically engineered or cloned ingredients, as well as expanded country-of-origin labeling. Labels are one of the most effective means to inform the public about the health, safety, origins, and environmental impact of a product.

The public opinion poll, conducted by Consumers Union, a nonprofit consumer advocacy group, shows interest in expanding the information available to consumers on food labels. Dr. Urvashi Rangan, a senior scientist and policy analyst at Consumers Union, said in a statement that the "American public wants to know more about their food, where it comes from, how safe it is, and will vote with their dollars to support highly meaningful labels."

The survey found that by wide margins, consumers are concerned about issues such as harmful bacteria in food, the safety of imported foods, and meat and dairy produced with synthetic growth hormones or genetic engineering. Approximately 95 percent of poll participants wanted clear labels on food products made from cloned or genetically engineered animals. A large majority also agreed that meat and dairy products from cloned animals should be labeled. Nearly 70 percent of respondents believe that cloning of food animals should be prohibited, and nearly six in ten consumers polled are concerned about meat or milk products

from cloned or genetically engineered animals.

The Food and Drug Administration (FDA) recently proposed allowing foods with genetically engineered ingredients to be sold without labels. The Center for Food Safety estimates that more than 60 percent of processed foods on supermarket shelves — including items such as soda, soups, crackers, and condiments — contain genetically engineered ingredients.

In January, the FDA determined that meat from cloned animals is "virtually indistinguishable" from meat from their conventional counterparts. *The Washington Post* reported that executives from the nation's major cattle cloning companies have not been able to keep track of how many offspring of clones have entered the food supply. Hundreds of cloned animals have already been produced for breeders in the United States.

Ninety-five percent of those polled agree that processed or packaged foods should be labeled by their country of origin and labels should be available at the point of purchase. Mandatory country-of-origin labeling for meat, fish, produce, and peanuts was implemented on Sept. 30. Several loopholes in the labeling rules remain, such as for processed and mixed-ingredient foods, and survey respondents agree that these loopholes should be closed.

According to Jean Halloran, Director of Food Policy Initiatives for Consumers Union, "If a food safety problem is identified in a particular imported product, as happened with jalapeño and serrano peppers from Mexico earlier this year, then consumers will be able to avoid that product."

Two-thirds of survey respondents thought the FDA should inspect food-processing facilities at least once per month. Only two percent said the FDA should inspect facilities every two or more years. The reality is that FDA inspects domestic food production plants every five to ten years, according to Consumers Union and expert testimony before Congress in July. Despite similar demand for regular FDA inspections of foreign food-processing plants, inspections are even less frequent than at domestic facilities.

The survey also revealed the vast majority of consumers want the government to be able to act quickly in response to a food safety problem with recalls and information to the public. More than 80 percent want the government to be able to quickly and accurately recall food. Almost all respondents agreed (96 percent) that the government should publicly disclose information about schools, healthcare facilities, and other institutions that receive recalled meat. The same proportion of respondents believe that when food safety problems arise, FDA should disclose information on the origin and retailer location of potentially harmful food, as the USDA is currently required to do for meat.

The survey results are being used to counter proposed changes to the organic label requirements for fish. This week, the U.S. Department of Agriculture (USDA) National Organic Standards Board (NOSB) will meet to decide what the USDA "organic" label should mean for fish. The proposed changes to the definition of organic fish would allow the use of fish food made from wild fish and open net pens. According to food safety advocates, wild fish have the

potential to carry mercury and PCBs, which would then contaminate the farmed fish. The potential for contamination would violate the strict standards behind the organic label.

Farmed salmon is the most prominent industry that would be impacted by the proposed organic rule changes. Salmon cannot be raised on a vegetarian diet; thus, critics of the organic fish standard essentially say the whole concept of organic salmon should be put on hold until researchers develop sources of organic feed, rather than lowering the standards of the USDA organic label. Survey respondents agreed by large majorities that fish labeled organic should be produced from 100 percent organic feed like all other organic food animals.

Additional survey findings show that although 73 percent of those polled regard the overall food supply as safe, nearly half (48 percent) said their confidence in the safety of the nation's food supply has decreased over the last several years. A slight majority of Americans (54 percent) feel the government is doing all it can to ensure food safety.

The Consumers Union designed the poll, which has a sampling error of 3.2 percent. The Consumer Reports National Research Center conducted the telephone survey in October, using a nationally representative sample of 1,001 adults.

TARP Purchases Increasing as Oversight Languishes

As Treasury Secretary Henry Paulson continues to purchase hundreds of billions of dollars in bank equities under the Troubled Asset Relief Program (TARP), oversight of the program remains meager. TARP, as created through the Emergency Economic Stabilization Act (EESA), gives Paulson wide latitude in selecting firms and individuals to implement the program and equally wide latitude in disbursing the $700 billion in authorized funds. However, with $290 billion already committed, two of three oversight institutions created by EESA have yet to be implemented, signaling that oversight and transparency in TARP are second-tier objectives for Congress and the Treasury Department.

Since backing away from the program's original purpose to purchase toxic mortgage-related assets from banks, Paulson has initiated the Capital Purchase Program (CPP). CPP will inject $250 billion into the banking system through direct purchases of bank equity. An additional $40 billion of TARP money has been promised to insurance giant AIG. The combination of CPP and the AIG package have committed the Treasury to $290 billion in expenditures, but Treasury's website indicates that only $149 billion has been spent on transactions involving 29 banks.

Outside watchdog groups have had to step in to provide information about the TARP program because the Treasury Department has done such a poor job in its obligation to release information on how the bailout money is being spent. According to the investigative news source *ProPublica*, Treasury has approved billions of dollars more in bank stock purchases. Tracking news media reports of which firms have been approved for participation in CPP, *ProPublica* indicates that over $175 billion has been promised to over 60 banks. The

discrepancies in Treasury's and *ProPublica*'s figures are based on the statute that mandates Treasury report TARP asset transactions. The Treasury Department is required to publish online details on transactions completed, whereas *ProPublica* notes approvals of bank stock purchases. While the difference in the two reporting methods is real and significant, both sets indicate that the federal government has spent well over $100 billion, yet contrary to TARP authorizing legislation, scant oversight has been conducted.

EESA contains a set of provisions that create several oversight bodies and mechanisms. The first of these is the creation of the Financial Stability Oversight Board (FSOB). The FSOB is composed of the Federal Reserve Chairman, the Treasury Secretary, the Department of Housing and Urban Development Secretary, the Director of the Federal Housing Finance Agency, and the Chairman of the Securities and Exchange Commission. Within days of TARP being signed into law, the FSOB held its first meeting. Since then, it has met two other times to discuss the operations of the program. While the expeditious formation of the FSOB is to be lauded, the second executive branch oversight institution has yet to be implemented: a Special Inspector General for TARP (SIGTARP).

SIGTARP would provide an independent assessment of the execution of TARP and, like other IGs, have the ability to seek evidence and issue subpoenas — the tools necessary to expose any improprieties in the program. As EESA indicates, the president must nominate, and the Senate must confirm, the SIGTARP. And although EESA was signed into law on Oct. 3, President Bush waited over a month to announce his nominee — Neil Barofsky, an assistant U.S. attorney in the Southern District of New York — for this post on Nov. 14. The Senate Finance Committee held a hearing on Nov. 17 to begin the confirmation process, but after $155 billion in bank stock purchases and millions of dollars spent to administer the program, SIGTARP will be coming late to the game. Any complaints submitted to SIGTARP or any investigations into alleged misconduct will hinder Congress's ability to conduct oversight. Unfortunately, Congress is also tardy in implementing its own oversight body.

The Congressional Oversight Panel is to be composed of five members appointed by the Speaker of the House and majority and minority congressional leaders. On Friday, Nov. 14, House Speaker Nancy Pelosi (D-CA) issued a press release stating that the Democrats had selected their three panel members. Republican congressional leadership has yet to announce their selections.

The panel's first report to the relevant congressional committees — on "the use of contracting authority and administration of the program;" "impact of purchases made under the Act on the financial markets and financial institution;" "extent to which the information made available on transactions under the program has contributed to market transparency;" "effectiveness of foreclosure mitigation efforts;" and the "effectiveness of the program from the standpoint of minimizing long-term costs to the taxpayers and maximizing the benefits for taxpayers" — is due Nov. 25. It is doubtful the panel will be able to issue a meaningful oversight report within in the legislated time frame.

Speaking to *The Washington Post*, the Inspector General of the Treasury Department, Eric M. Thorson, called oversight of TARP a "mess." While EESA gives the Treasury Secretary the ability to suspend certain contracting rules in hiring firms to implement TARP activities, he is still obliged to avoid conflicts of interest and ensure program activities remain above-board. Contracts for several firms that have been hired to execute TARP are available on the EESA website, yet portions of the contracts — specifically staffing costs — are redacted.

Further, there is little proof that sufficient conflict-of-interest screening has been conducted in the execution of these contracts. Reports indicate that delays in forming the Congressional Oversight Panel were caused by difficulty in finding individuals with the necessary knowledge of the financial industry who would not have conflicts of interest. The reports also suggest that such conflicts are more likely than not to exist. An article in *The New York Times* on the bevy of lobbyists who are lining up to influence Treasury officials underscores the urgent need for an independent oversight body.

Despite the lack of EESA-mandated oversight institutions, Congress has already begun holding hearings on the implementation of TARP. Last week, on Nov. 13, the Senate Banking Committee conducted a hearing entitled "Examining Financial Institution Use of Funding Under the Capital Purchase Program." Committee chairman Sen. Christopher Dodd (D-CT) and his fellow committee members questioned executives of CPP-participating banks on their use of TARP funds. The following day, the House Committee on Oversight and Government Reform Subcommittee on Domestic Policy held a hearing to determine if TARP was, as specified in EESA, working to mitigate foreclosures. Bipartisan ire was raised at Treasury Assistant Secretary Neel Kashkari as lawmakers questioned Treasury's emphasis on assisting banks over homeowners. In addition, in late October, House Committee on Oversight and Government Reform Chairman Henry Waxman (D-CA) sent letters to the eight banks that received the first cash installment of CPP, inquiring after executive compensation.

The blog *BailoutSleuth*, which has also been tracking TARP activities, notes that some banks participating in CPP have increased their dividend payments to shareholders, essentially passing taxpayer funds to the wealthier corners of the economy that receive dividend payments rather than increasing the liquidity of the banking system.

With the first tranche nearly exhausted — the first $350 billion of the $700 billion originally authorized by Congress — both the executive and legislative branches have yet to implement the systematic oversight that was written into EESA. Unsurprisingly, there are already allegations that banks are not using TARP funds for their intended purposes. Implementation of the program remains opaque, and if the experience of congressional Democratic leadership's Congressional Oversight Panel selection is an indicator, the federal government must remain vigilant of conflicts of interest in TARP. Disturbingly, hasty writing and passage of EESA has not been matched with equally quick action on enacting its oversight institutions.

Unemployment Insurance in Need of Overhaul

As the anticipated severity of the recession increases and unemployment estimates for 2009 reach as high as eight percent, Congress is under increased pressure to enact an extension of unemployment insurance (UI) benefits, perhaps as early as the current lame-duck session. Yet a broader overhaul of the UI program is needed to improve this important safety-net program for American workers.

Recent economic data certainly support action by Congress to extend current benefits. On Nov. 7, the Bureau of Labor Statistics (BLS) reported an October unemployment rate of 6.5 percent, marking a 14-year high. That week also saw initial weekly jobless claims rise to 516,000, the largest since the weeks after the Sept. 11 attacks.

Extension of UI benefits is a common tool used by Congress to help alleviate hardship during economic downturns. During the past five recessions, Congress has temporarily extended federal unemployment benefits under the Emergency Unemployment Compensation (EUC) program. The EUC program provides an additional 13 weeks of jobless benefits to all workers who exhaust their 26 weeks of state benefits, ensuring that those who are hardest hit by economic downturns receive necessary assistance. Not only are the benefits of the EUC program set to expire in March 2009, but with this recession predicted to be especially severe and prolonged, there is a need for even larger extensions of UI benefits.

Before Congress recessed for the fall elections, the House did pass legislation to extend UI benefits. The Unemployment Compensation Act of 2008, which passed the House on Oct. 3 by an overwhelming vote of 386-28, would provide 20 weeks of benefits for long-term jobless workers in all states (up from 13 weeks) and 33 weeks of benefits for workers in high-unemployment states (those states where unemployment rates exceed six percent). This legislation is essential in avoiding the disruption or discontinuation of assistance to jobless workers. Those who exhausted their benefits in October cannot collect insurance retroactively, meaning they cannot collect benefits for those weeks in which they received no assistance, thus making debt traps and poverty much more likely.

The Senate did not consider the House legislation, nor did it take up legislation addressing the extension of UI benefits before the recess. But Senate Majority Leader Harry Reid (D-NV) hopes to pass legislation during the lame-duck session of Congress that includes a UI extension. On Nov. 17, Reid, along with Sen. Robert Byrd (D-WV), introduced the Economic Recovery Act of 2008, a $100.3 billion economic stimulus and recovery package. Included in this legislation is an extension of UI benefits for seven weeks in all states and up to 13 weeks in high-unemployment states.

Although current conditions warrant this action by Congress, a larger overhaul of the UI program is desperately needed. The UI program was first created in 1935 by President Franklin D. Roosevelt to address the needs of unemployed families in the midst of the Great Depression. But changes in our economy and workforce demographics over time have increased the need to

modernize the program.

Recent studies have shown that the UI system currently in place fails to meet the demands of the changing economy. Because the UI program is antiquated, there are many workers who end up falling through the cracks. According to *Helping the Jobless Help Us All*, a new report released by the Center for American Progress in conjunction with the National Employment Law Project, only around 37 percent of unemployed workers actually collect benefits, with certain populations, such as low-wage, part-time and female workers, particularly burdened by state eligibility rules that are outdated. In addition, states do not have adequate funding to provide the basic services needed to those applying for unemployment benefits — the average worker receives only $293 a week in benefits, replacing only 35 percent of the average weekly wage. Further problems, such as administrative issues and staffing shortages, create a mismatch between the number of people who need help and the number who actually receive it.

The Unemployment Insurance Modernization Act (UIMA), which passed in the House in 2007, would provide $7 billion to states that reform their systems. It encourages states to adopt the "alternative base period" (ABP), which counts the last three- to six-month wage period so that low-wage workers are not shut out from receiving benefits. Once states adopt the ABP method, they can receive their federal incentive payments. Also, the proposed law would automatically provide all states with $500 million to address the administrative needs of maintaining an efficiently run UI system that will better process the growing number of UI applications. UIMA payments to states will also help to offset the low unemployment-trust reserves by infusing local economies with resources.

Recent recessions have demonstrated that unemployment may not reach its peak until well after the recession has ended, and even then, labor-market recoveries are generally slow. The need to reform the UI program to ease the suffering of struggling workers and provide states with sufficient funding is critical. As the effects of this recession become more pronounced, and unemployment rates continue to rise, passage of extension of the current program will merely be a stop-gap solution. True reform of the UI system will be needed to create a more efficient and effective safety net for the nation's unemployed workers in the long run.

Study Says Nonprofits Help, Not Hinder, the War against Extremism

On Oct. 30, the Fourth Freedom Forum and Kroc Institute for International Peace Studies at the University of Notre Dame released *Friend Not Foe: Civil Society and the Struggle Against Violent Extremism*. The report urges countries, including the United States, to move away from counterterrorism measures (CTMs) that harm nonprofits and do not improve security. The report also calls on nonprofits to be more proactive in countering misinformation and shaping policy alternatives.

According to the report, civil society groups "help to advance international norms and treaties on behalf of an array of important causes, including human rights, the environment, development of democratic governance, and conflict prevention." They are an essential piece of the complex web of connections that bridge nations, foster healthy relationships, and aim to ease current and future tensions that plague many parts of the world. As a result, the report says the U.S. must lead the world in formulating CTMs that do not curtail the civil liberties and human rights of the very groups that can curtail extremism.

The report cites adverse effects CTMs have on civil society, including the use of national security as a pretense to limit dissent or carry out human rights abuses. It notes that "In Sri Lanka, Colombia, the Palestinian Territories, Somalia and other zones of conflict, peace and reconciliation groups are sometimes seen by governments as political adversaries...." In the U.S., the PATRIOT Act has permitted draconian policies that stifle humanitarian aid, advocacy, and the legal process. In addition, the report says the U.S. Department of Treasury's Risk Matrix for charities unfairly targets groups that assist with creating social, economic, or environmental changes in conflict zones. Instead of embracing these groups as the "means of overcoming conditions conducive to violent extremism," the federal government and other institutions have singled these organizations out "as high risk and ... more difficult to fund."

According to the report, American policy on combating terrorism should acknowledge that nonprofit groups often work in the world's humanitarian disaster zones. It recommends that governments have "sunset clauses in all counterterrorism and emergency security measures" and work with civil society groups in "the process of reviewing and assessing the effectiveness and impacts of such measures before they are reenacted." Standards for such assessment are available in a report, *Defending Civil Society*, by the International Center for Not-for-Profit Law. These criteria are based on widely accepted legal conventions and include:

- The right to entry, defined as the freedom to associate and form organizations;
- The right to operate without unwanted state interference;
- The right to free expression;
- The right to communicate and cooperate freely, internally and externally;
- The right to seek and secure resources; and
- The right to have these freedoms protected by the state.

Another resource for reform cited in the report is the Global Counter-Terrorism Strategy embraced by the United Nations General Assembly in 2006, which recommends protecting human rights and sustainable development as a means of thwarting terrorism. This expands counterterrorism strategy beyond a strictly military paradigm to acknowledge the complex challenges terrorism poses. According to the report, "military means alone cannot deter a shadowy force of nonstate fighters," and defeating terrorist threats requires "a range of complex political, economic and social responses that go beyond and in many cases are incompatible with the use of armed force."

Although the report is critical of many governmental approaches to fighting terrorism, it also says that "civil society groups and the development community generally have not engaged

sufficiently in the public debate over counterterrorism strategy and the proper approach to overcoming violent extremism ... It is imperative that civil society groups mobilize to protect their operational space and advocate more effectively on behalf of rights based development." To accomplish this goal, the report suggests an international network that will:

- Agree on a set of principles and policy recommendations;
- Develop a coordinated advocacy campaign for reforms;
- Reframe the debate, rebut false claims, and raise public awareness of the problem; and
- Support reasonable transparency and accountability measures.

Nonprofits to President-elect Obama: Strengthen the Sector

Now that the election is over, nonprofits are encouraging the incoming administration to take action that will strengthen the sector with capacity building, incentives for giving, and policies that encourage service and protect the integrity of the sector. Many organizations, including OMB Watch, are also making policy recommendations in their areas of expertise, ranging from education to transparency to health and safety protections.

The Starting Point: Obama's Campaign Commitments

With a former community organizer as president-elect, nonprofits have high hopes that they will find a White House that is sympathetic to their needs and goals. This is especially true in a time of financial instability when government needs civil society to help address community needs. President-elect Barack Obama has promised to invest in the nonprofit sector, expand youth involvement in service programs, and expand the Corporation for National and Community Service and Peace Corps. BarackObama.com states, "Obama and Biden will expand AmeriCorps from 75,000 slots today to 250,000 and they will focus this expansion on addressing the great challenges facing the nation."

During his campaign, Obama proposed the creation of a Social Investment Fund Network "to use federal seed money to leverage private sector funding to improve local innovation, test the impact of new ideas and expand successful programs to scale." In addition, he promised to create a Social Entrepreneurship Agency for Nonprofits within the Corporation for National and Community Service, which will be dedicated to building the capacity of the nonprofit sector. The Sept. 11 issue of *TIME* stated Obama's goals for national service: "We need to invest in grass-roots ideas, because the 'next great innovation' usually doesn't come from government. So I'll create a Social Investment Fund Network and bring together faith-based organizations and foundations to expand successful programs across the country."

Obama acknowledges some of the problems facing nonprofit leaders, such as insufficient federal support. In July, Obama criticized lack of funds for social services and outlined how he would alter the faith-based initiative, promising to bar religious discrimination in hiring for federally funded positions.

Proposals to Strengthen and Protect the Nonprofit Sector

A report from the Johns Hopkins University Nonprofit Listening Post Project, titled *Nonprofit Policy Priorities for the New Administration*, provided results of a survey on priorities within a subsection of the nonprofit community. The survey asked what a new administration could do to help nonprofit groups and their clients handle the economic crisis. The results were based on 448 responses from nonprofit executives, heavy on human services providers, resulting in a list of four specific priority measures:

- "Growth of funds for their field in the federal budget;
- Expansion of tax incentives for individual charitable giving;
- Federal grant support for nonprofit training and capacity building; and
- Reform of reimbursements under Medicare, Medicaid, and other federal programs to ensure that they cover the real cost of services."

Survey respondents also strongly supported preserving the estate tax and strengthening recruitment of nonprofit workers.

Diana Aviv, chief executive of Independent Sector, called on Congress to create a "Small Nonprofit Administration" when she testified before a House subcommittee in 2007. An article in the *Chronicle of Philanthropy* (subscription required) addresses this proposal: "Something akin to a Small Business Administration for nonprofit groups, a move that would acknowledge the financial clout of the charitable world and its status as a lead player in solving social problems. Others question whether new government programs would really help improve charities' operations — or would instead stifle nonprofit organizations' independence and invite further regulation."

The Center for American Progress Action Fund and the New Democracy Fund recommend that the Obama administration create a White House Office of Social Entrepreneurship to draw attention to the significant role nonprofits and social entrepreneurs play in solving societal ills. This proposal differs from Obama's in that the office would be located within the White House instead of the Corporation for National and Community Service. The proposal was included in *Change for America: a Progressive Blueprint for the 44th President*. According to the *Chronicle of Philanthropy* (subscription required), it also includes an "Impact Fund" at the Corporation for National and Community Service to help nonprofit groups collect data and better evaluate their success.

The Charity and Security Network, coordinated by OMB Watch, has proposed changes in national security and counterterrorism laws that have created barriers to nonprofit operations or that have been used to discourage dissent. These recommendations seek to update laws to address these barriers, ensure that frozen funds of designated terrorist organizations are used for charitable purposes, and increase government oversight over the impact national security laws have on humanitarian aid, development, and charitable programs.

Independent Sector has also put together a strong set of draft recommendations for the next administration and Congress. The platform, designed "to strengthen the ability of Americans to improve our communities and our world through nonprofit organizations," includes:

- Ensure adequate resources and fair and responsible fiscal policies to support vital programs that sustain, protect, and strengthen communities.
- Preserve and expand policies that help Americans give back to their communities.
- Ensure that nonprofits have the capacity and capital to serve the needs of our communities.
- Protect the rights of Americans to speak out through nonprofit organizations.
- Ensure that Americans are able to continue vital charitable work throughout the world without unduly jeopardizing their safety or their civil rights.
- Support funding and policies that provide for transparency and accountability to ensure integrity and public trust in our institutions.

Recommendations to Support Nonprofits' Public Interest Mission

Nonprofits are actively working to make sure their issues are on the Obama administration's agenda. For example, Every Child Matters (ECM) and other children's organizations plan to work with the administration and Congress to gain new federal investments in children, youth, and family services. During his campaign, Obama proposed numerous initiatives to protect children and strengthen families. ECM will urge Obama to make spending on children and families a priority in his budget. The Change for America document has proposals in numerous issue areas, including domestic, economic, and national security policy. Before the election, the American Constitution Society for Law and Policy released a package of proposals, which include two dozen papers covering a range of law and justice policy areas.

Nonprofits are being proactive and working diligently to develop consensus on various issues in preparation for January. OMB Watch convened a group of hundreds of individuals and organizations to put together recommendations on government openness, information, and other transparency issues. The 21st Century Right to Know Recommendations stress the need for the Obama administration and Congress to effectively use modern Internet technologies. The recommendations fall into three categories: National Security and Secrecy; Usability of Information; and Creating a Government Environment for Transparency.

In addition, to develop regulatory reform recommendations, OMB Watch organized a steering committee of regulatory experts to put forth a consensus document that reflects what it sees as the most important regulatory process issues for the president-elect and Congress. For more on these and other recommendations, see Renewing Government: Recommendations to President-elect Obama and the 111th Congress.

The Ongoing Oversight Role of Nonprofits and Civil Society

Shortly before the election, Pablo Eisenberg wrote an opinion piece for the *Chronicle of Philanthropy* (subscription required) that says, "Nonprofit groups have the obligation to

monitor, criticize, and, at times, oppose government efforts that are considered inappropriate or inadequate." Eisenberg goes on to call on nonprofits to "[m]aintain a strong advocacy role." He also urges these organizations to not "forget that one of the important missions of nonprofit organizations is to hold any administration and the federal government accountable and to fight against programs they deem harmful to their constituents."

The *Chronicle of Philanthropy* has a number of resources on what nonprofit groups would like to recommend to the next administration. One article (subscription required) discusses the results from interviews of charity officials and experts, asking what the new president can do to strengthen philanthropy. The results included support for federal assistance to nonprofits, working with charities on issues such as health care, encouraging and stimulating giving both domestically and overseas, requiring service for all students, reforming rules on charity solicitors, and much more.

One website has been set up, WhiteHouse2.org, which allows anyone to add his or her own content and express opinions on what Obama's priorities should be for his first 100 days. It adds up everyone's priorities and creates one list on the homepage of the top 25 recommendations. Change.org also has an online tool targeted toward transition recommendations. Change.org is asking people for their ideas, and the top suggestions will be submitted to the administration on Inauguration Day.

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In This Issue

Democrats, Obama Prepare Economic Stimulus Package for January

The passage of an unemployment insurance extension, which occurred at the end of November, is likely the last effort by the 110th Congress to enact legislation to stimulate the economy. With Republicans continuing to block immediate passage of a large economic stimulus package, Democrats are preparing to move legislation as soon as President-elect Barack Obama takes office in January 2009.

Although Senate Republicans and President Bush have vowed to continue to block enactment of broad economic stimulus spending, congressional Democrats mustered sufficient support to pass a seven-week extension to unemployment insurance benefits. The extension gives extra benefits to those who exhaust their 26 weeks of state benefits. In states with unemployment rates higher than six percent, the $6.1 billion bill will provide 13 additional weeks of jobless benefits. Approved by wide majorities in both chambers and promptly signed by President Bush, the bill is the current limit of bipartisan support for economic stimulus policy.

When the House passed a $61 billion economic stimulus package (H.R. 7110) in September, House Minority John Boehner (R-OH) called the measure a "monstrosity," and President Bush issued a veto threat, stating that the bill would "simply increase government spending including self-perpetuating entitlement spending by tens of billions of dollars," ultimately leading to "record tax increases or higher deficits [that] will not advance our economic recovery." On the other side of the Capitol, Senate Republicans blocked (52-42) that chamber's companion legislation (S. 3604), while Ranking Member of the Senate Appropriations Committee Thad Cochran (R-MS) chided Democrats for bringing up a bill that was "designed to fail." Because of these setbacks, congressional Democrats are focusing their efforts on the start of the 111th Congress, when the ability of a shrinking minority of Republicans to block stimulus spending will be considerably weakened.

As the clock winds down on the current Congress and the Bush administration, Democratic congressional leaders and President-elect Obama have signaled that a stimulus measure in the range of hundreds of billions of dollars will be at the top of the legislative agenda in January 2009. Citing a yet-to-be-defined plan to create 2.5 million jobs by 2011 and a stimulus package that would be "significant enough that it really gives a jolt to the economy," Obama has made clear his intention to push for far-reaching and costly stimulus legislation. Although he has resisted attaching a specific dollar amount to his plan, his economic advisors and outside economists have indicated that a two-year spending package totaling $500-700 billion will be necessary to provide the economic jump-start that Obama seeks.

Even some foes of using direct government spending to stimulate the economy are giving their tacit approval. Harvard economics professor Martin Feldstein, a former economic adviser to President Reagan and presidential candidate Sen. John McCain (R-AZ), has said, "I hate to say it, because I'm a guy who doesn't like government spending and doesn't like fiscal deficits, but I don't see any alternative."

While Democratic congressional leaders and Obama have continued to be vague about the specific size and composition of a potential stimulus bill, a proposal will most likely be composed of Food Stamps, Medicaid funding boosts, and infrastructure spending that Obama has called the "long-term investments in our economic future that have been ignored for far too long." These spending priorities have become increasingly pressing as the national economic downturn is straining state and family budgets.

Twenty-seven states are currently facing $26 billion in combined budget shortfalls that will only continue to increase as property tax revenues collapse and as the newly unemployed begin applying for assistance programs like Medicaid. The Kaiser Family Foundation notes that a one percent increase in the unemployment rate increases enrollment in Medicaid and the State Children's Health Insurance Program (SCHIP) by one million. Proposals to boost federal matching funds for Medicaid would reduce pressure on state governments to cut spending on other support programs, raise state college tuition, or increase taxes on working families. In addition, an injection of federal funds into state and local infrastructure projects will allow states to continue funding vital public services by freeing resources and mitigating job losses

that ultimately reduce state revenues.

Critics of infrastructure-spending-as-stimulus, however, say that while such projects may have their own merits, as economic stimulus, they would provide little short-term relief. However, according to the American Association of State Highway and Transportation Officials, there are $32 billion in infrastructure projects that are "ready to go," with more on the way. "Short term" is also relative. Nobel laureate and Princeton University economics professor Paul Krugman predicts that the current economic slump will last a number of months — long enough that spending on infrastructure would prove to be effective economic stimulus.

House members and senators have been instructed to begin crafting legislation in January 2009, an oddity immediately following presidential election years, which usually see Congress returning to work after the inauguration in late January. The move will allow President-elect Obama to sign a stimulus package into law in the first hours of his presidency. If the size and scope of the legislation match the seriousness and urgency with which Obama is approaching the economy, Congress could be poised to pass a spending bill of unprecedented proportion, greatly mitigating the hardships of millions of families while jumpstarting an effort to rebuild the nation's crumbling infrastructure.

TARP Oversight Helped, Hindered by Senate

A pair of bills designed to improve oversight of the Troubled Asset Relief Program (TARP) has been introduced in the Senate. The first would place restrictions on the use of federal funds and provide greater transparency, and the second would strengthen the role of the Special Inspector General for TARP (SIGTARP). TARP was created by the $700 billion financial bailout bill that Congress passed before the election.

Chances for and timing of passage of the bills remain unclear. However, as several senators are working to improve oversight of TARP, at least one other member of the Senate would prefer that SIGTARP remain a vacant post.

On Nov. 20, Sens. Diane Feinstein (D-CA) and Olympia Snowe (R-ME) introduced The Accountability for Economic Assistance Act (S. 3698). The bill contains four provisions that would place restrictions and reporting requirements on the use of TARP funds. It would prohibit those funds from being used for lobbying; require that firms provide to Treasury detailed, publicly available quarterly reports on the use of those funds; require companies to use corporate governance standards to ensure that TARP funds are not wasted; and provide penalties for firms not complying with those governance standards. The specification of penalties is a big step forward for accountability in TARP, as the original legislation was silent on if and how firms who abuse TARP should be punished.

Sens. Claire McCaskill (D-MO) and Chuck Grassley (R-IA) have also introduced legislation that would slightly improve TARP's thin oversight provisions. Their bill would allow the SIGTARP to quickly ramp up operations by bypassing the normal civil service process for six months.

The bill's other provision would extend SIGTARP's authority to "any and all action conducted as part of the Troubled Asset Relief Program."

In a related matter, a lone Republican senator has placed an anonymous hold on the SIGTARP nominee, which has stalled the Senate confirmation process. *TPMMuckraker* suspects that Sen. Jim Bunning (R-KY) placed the secret hold on the nomination of Neil Barofsky. Bunning has been opposed to the bailout program from the beginning, and during Barofsky's confirmation hearing, the senator expressed serious concerns about Barofsky's nomination.

While Bunning is within his rights to express objections to Barofsky's nomination, his confirmation is already tardy and the TARP program continues to operate without sufficient transparency or disclosure, both in regard to how the money is being spent and who is being given contracts to implement the program.

With almost $300 billion in TARP funds obligated, the SIGTARP already has a steep climb to bring more transparency and accountability to the TARP program. Without expressing his or her particular reservations about Barofsky, the secret holder is compounding the problems created by Barofsky's late nomination and delayed confirmation.

Plastics Chemical Could Remain on Market Despite Ban

Despite a clear directive from Congress, the Consumer Product Safety Commission (CPSC) says it may continue to allow the sale of children's products containing a controversial plastics chemical.

Effective Feb. 10, 2009, the Consumer Product Safety Improvement Act of 2008 bans the sale of children's products containing phthalates, a class of chemicals used to make plastics soft and pliable. Congress passed the bill in July, and President Bush signed it into law on Aug. 14.

Congress banned the substance in response to growing public concern over the health effects of exposure to phthalates. Scientists have linked phthalates to reproductive and developmental abnormalities in fetuses and infants.

However, a legal opinion from CPSC raises new questions on how the agency will implement the ban. CPSC General Counsel Cheryl A. Falvey says that although children's products containing phthalates cannot be manufactured after Feb. 10, 2009, those manufactured before Feb. 10 can continue to be sold indefinitely.

Sen. Barbara Boxer (D-CA), a lead proponent of the phthalate ban, criticized Falvey's legal interpretation in a Nov. 21 letter. Boxer said the law's intent is to ban the sale of children's products containing phthalates regardless of their manufacture date. She called the opinion "a pathetic and transparent attempt to avoid enforcing this law."

Boxer cited the operative provision in the law, which reads, "Beginning on the date that is 180 days after the date of enactment of this Act, it shall be unlawful for any person to manufacture for sale, offer for sale, distribute in commerce, or import into the United States any children's toy or child care article that contains" any of the phthalates identified in the law.

In her legal opinion, Falvey cited a different law, the Consumer Product Safety Act, which sets the framework for consumer product regulation and governs CPSC's regulatory process. "The Consumer Product Safety Act expressly states that consumer product safety standards apply only to product manufactured after the effective date of a new standard," Falvey writes.

Language in the Consumer Product Safety Act should supersede language in the phthalate ban, according to Falvey. The provision in the Consumer Product Safety Improvement Act of 2008 regarding phthalates says new rules "shall be considered consumer product safety standards under the Consumer Product Safety Act." However, that clause appears in a section of the act concerning "effect on state laws" and is aimed at preventing CPSC from using the phthalate ban to preempt stricter laws and regulations at the state level.

In her letter, Boxer called on Falvey to immediately withdraw her opinion. The views expressed in Falvey's opinion "have not been reviewed or approved" by the CPSC.

If CPSC backs away from Falvey's opinion and enforces the letter of the law, the economic impact will be significant. Making it illegal to "manufacture for sale, offer for sale, distribute in commerce, or import" children's products containing phthalates beginning in February 2009 will likely leave companies at each link in the supply chain with excess inventory.

Industry lobbying groups, such as the U.S. Chamber of Commerce, opposed a ban on phthalates when Congress was debating the Consumer Product Safety Improvement Act. Consumer safety advocates, long concerned with the health effects of phthalates, pushed for the ban.

The European Union and the state of California have already enacted restrictions on phthalates in consumer products. Other states are also considering restrictions.

The federal ban on phthalates was one of the final sticking points for Congress during the debate on the Consumer Product Safety Improvement Act. The provision bans three types of phthalates outright. Three other phthalates will be banned temporarily pending further study.

The new policy on phthalates represents a dramatic shift in the federal government's approach toward regulating toxic substances. Usually, chemicals enter and stay on the market without regulation and are only pulled if scientists prove a definitive health risk. In this case, the banned substances will only be allowed back on the market if their safety is proven.

In an August statement, OMB Watch Executive Director Gary D. Bass said, "The bill turns our usual system of chemical regulation on its head by requiring proof of safety, not proof of harm,

an approach we strongly support."

Gas Drilling Threatens Public with Undisclosed Chemicals

The natural gas drilling industry refuses to disclose what potentially harmful chemicals are used in thousands of hydraulic fracturing gas wells across the country, despite evidence that the chemicals are poisoning drinking water supplies. As concerns mount, several states are considering action to curb use of the process despite the federal government's efforts to encourage it with large subsidies and environmental exemptions.

During hydraulic fracturing, also known as "fracking," large amounts of sand and water are pumped at high pressure into a well. This causes small cracks and fissures to open deep in the layers of rock, releasing previously trapped molecules of natural gas. The mixture pumped deep into the ground usually contains a small proportion of chemicals included to reduce friction, prevent clogging of the fractures, and to prevent corrosion of machinery. These chemicals may end up in underground drinking water supplies, be spilled into surface waters, or evaporate as air pollution.

A recent investigation of hydraulic fracturing by ProPublica revealed documented cases of water contamination and other hazardous events resulting from the drilling process in several states. Drilling companies have consistently maintained that the procedure is safe, referring to a 2004 U.S. Environmental Protection Agency (EPA) study that found no risks to drinking water. However, ProPublica discovered several problems with EPA's conclusions, including statements within the report that fluids migrated unpredictably and to greater distances than previously thought, which were left out of the conclusions. Additionally, ProPublica noted that agency documents appear to indicate that EPA negotiated directly with the gas industry before finalizing its report conclusions.

Among the reports of damage to environmental and public health resulting from hydraulic fracturing are more than 1,000 cases of documented water contamination in Colorado, New Mexico, Alabama, Ohio, and Pennsylvania. In addition to contamination from the below-ground drilling, leaks and spills from trucks and waste pits are also causing problems. Tracking the contamination is especially difficult because drillers refuse to disclose the chemicals being used. Despite the secrecy, some information on the chemical mixture has been pieced together. Among the identified chemicals are volatile organic compounds (VOCs) such as benzene, toluene, ethyl benzene, and xylene.

According to a chemical analysis by the Environmental Working Group and The Endocrine Disruption Exchange (TEDX), a Colorado research organization, of the more than 300 suspected hydraulic fracturing chemicals used in Colorado, at least 65 are federally listed hazardous substances, and little is known about the rest. Despite the risks associated with the 65 hazardous chemicals, the drilling operations are exempt from environmental reporting requirements and use of the chemicals is not controlled. The drilling industries are exempt from numerous environmental regulations — and the accompanying reporting requirements

and public scrutiny — authorized by such laws as the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), and the Safe Drinking Water Act (SDWA). Reps. Diana DeGette (D-CO), John Salazar (D-CO), and Maurice Hinchey (D-NY) introduced legislation, H.R. 7231, on Sept. 29 to remove the SDWA exemption originally created by the 2005 Energy Policy Act. The legislation is expected to be reintroduced in 2009.

The health risks from fracking chemicals was made clear in the summer of 2008 when a Colorado nurse almost died from exposure while treating a gas field worker whose clothing had been doused with the chemicals. Despite the nurse suffering from heart, lung, and liver failure, plus kidney damage and blurred vision, the drilling company refused to reveal to her doctors the "proprietary" chemicals used in hydraulic fracturing. While the nurse eventually recovered, she was never told to what she had been exposed.

For Colorado health officials, the chemical exemptions, regulatory loopholes, and missing data are a cause for concern. "We are just working in the dark," says Dr. Martha Rudolph, director of environmental programs for the Colorado Department of Public Health and Environment in a report for *Newsweek*. "We don't know the impact on the potential health on humans might be. We need to."

Claiming that the specific chemicals used in the drilling process are confidential business information and that disclosure would threaten their "competitive advantage" over competing firms, drilling companies have managed to operate wells nationwide without revealing what chemicals they are using. Halliburton, the oil and gas services firm and a pioneer of hydraulic fracturing, has threatened to pull its affected operations out of Colorado if it is forced by the state to disclose the chemicals it is using.

A major expansion of natural gas drilling is being planned for upstate New York within the region supplying New York City's water. However, New York City and state officials have asked the state Department of Environmental Conservation (DEC) to ban all gas drilling in the city's watershed, which overlaps the Marcellus Shale, a geologic region of high natural gas potential underneath New York, Pennsylvania, and West Virginia, until further studies on its impact can be done. The Marcellus Shale is estimated to contain enough natural gas to fuel the country's gas needs for fourteen years.

There has been a dramatic expansion of gas and oil drilling across the United States during the last eight years. The Bush administration has allowed more oil and gas drilling on western public lands than any administration in at least 25 years, and fracking is used in nine out of ten of these natural gas wells. Not only has the government allowed fracking to occur with lax oversight and regulatory exemptions, the government has also actively encouraged oil and gas companies with significant federal subsidies for exploration and drilling, including fracking. An analysis by Friends of the Earth released in July found that oil and gas companies would receive more than $32.9 billion in different subsidies over the next five years, including seven new provisions that were included in the Energy Policy Act of 2005 (PL 109-58). A report released by Taxpayers for Common Sense (TCS) on Nov. 14 details those seven new provisions,

calculating they will cost taxpayers $2.3 billion through 2015.

Five Change.gov Clues to Obama's Approach to Governing

As the Obama transition team gathers policy information and vets potential appointees, many outsiders are eager to know what the new administration will do and how it will govern. The transition website, change.gov, may hold clues to some of these questions.

It is important to note that the purpose of change.gov, as a transition website, differs greatly from administrative websites such as those of the White House or an executive agency. As such, it is difficult to directly connect aspects of the transition site to specific tasks or policies the incoming administration may pursue. However, there are aspects of the site that offer clues about Obama's likely approach to governing.

Transparent

Despite the incredibly daunting task of needing to prepare to take over management of the entire federal executive branch in just a couple of months, the transition team is demonstrating a strong commitment to transparency just in the efforts to launch and maintain a robust public website. Many of the traditional activities of a transition team are behind-the-scenes-type work — collecting input from experts, considering candidates for key government positions, and researching problems the country is facing. Despite the insider nature of this work, one of the transition team's first activities was the public website launch. With each passing day, change.gov contains more useful information and features for users.

The commitment of time and resources to transparency during this hectic planning phase bodes very well for the importance of transparency during Obama's time in office. Exact transparency policies are impossible to determine at this stage, but that the administration will attempt to be transparent seems a near certainty.

Interactive

There are many aspects of the transition website that would lead a visitor to conclude the Obama administration will be placing great emphasis on interactivity with the public. First, the site has numerous requests for input from the public, with standing requests for visitors to share their stories and their vision for an Obama administration. The transition blog then uses excerpts from public input on stories about community service and climate change. These efforts convey a new attitude that attempts to make government and politics more participatory.

The site also ties into outreach on other popular sites with an Obama transition channel on YouTube and a photo account on Flickr. Using these services indicates an aggressive effort by the transition team to engage the public by going to where the masses are, rather than requiring the public to come directly to change.gov. The YouTube video and Flickr photo

postings also create opportunities for dialog with the public through the comments and feedback interested people can leave.

Another example of the emphasis on interaction and participation is the discussion thread recently launched on change.gov to gather input from the public on health care priorities. The thread discussion was initiated by a short video of comments and specific questions from Dora Hughes and Lauren Aronson of the Health Policy Transition Group. The site allows users to log in, leave comments, and vote for or against comments left by others. More than 3,600 comments have already been made on the health care question.

Missteps

Whenever new approaches are explored, there are bound to be initial missteps, and the Obama transition team's mistakes, though so far relatively few and minor, remind everyone to prepare for similar glitches from the administration as it seeks to establish new techniques and functions.

With high expectations for the Obama administration and intense scrutiny, these missteps have been immediately announced and discussed by dissatisfied experts. For example immediately on the heels of President-elect Obama's first "fireside chat" on YouTube, Ellen Miller, Executive Director of the Sunlight Foundation, noted the missed opportunity of the transition team's initial decision to disable the comments feature. Miller, whose organization explores innovative online tools for government transparency, wanted the interactivity that she knew the tool possessed.

Other missteps and concerns have been raised. Jim Jacobs of Free Government Information voiced concerns about the transition team's decision to exert copyright claims over materials contained on change.gov. Jacobs and other librarians argued that the copyright claims unnecessarily restricted use of the online materials and significantly reduced the potential benefits of the transition team's website efforts. Similarly, after the policy section of change.gov disappeared for a few days without explanation and was then reposted with much of the partisan campaign rhetoric removed, Tim O'Reilly, technology expert and advocate for open source and open standards, proposed that revision control be implemented for the website. Revision control, similar to the method used on Wikipedia, would only allow the public to see what changed and when.

Reactive

Change.gov also indicates that the Obama administration will utilize reactivity in governing. The transition team has demonstrated that the interactivity and information collection is being put to use. For instance, one of the videos posted on the President-elect's YouTube channel features a policy team member responding to questions on energy and environment issues, which were received from users via e-mail. Even more impressive has been the transition's responsiveness to complaints of missteps, as mentioned above. Within a few days of complaints about the inability to post comments on the transition videos, the feature had been

turned on for both the YouTube videos and the Flickr photos. Similarly, on Dec. 1, the transition team announced a new copyright policy using a creative commons license, which gives visitors more freedom to reuse content from the site. These activities indicate that the Obama administration may do more than just listen — it may actually respond to what it hears from the public.

Innovation

The final, overarching characteristic about the incoming Obama administration that can be gleaned from exploring change.gov is the willingness to try new technologies and innovative approaches to traditional tasks. The website's use of videos, blog posts, and message threads conveys a commitment to getting the most out of the available online tools better than any policy statement. The previously mentioned YouTube videos with comments from the public are a good example of such innovation. This modernizes the functional dialogues that allow the government to learn as much, or even more, about the public's thoughts on a given issue. The online tools transform the traditional "fireside chat" radio addresses into national talk radio call-in programs that can be played at any time.

As the transition process continues, additional insights into the coming Obama administration will likely be available. However, it is unlikely we will be able to determine to what extent these new approaches will be implemented in the administration — at least until after inauguration on Jan. 20, 2009.

Outdated Virginia Laws Lack E-mail Transparency

County supervisors in Loudoun County, VA, recently discussed a proposal to change the state's freedom of information laws in light of a court case that seeks personal e-mails from the county board. The controversy in Virginia reflects the broader problem of distinguishing between official and personal electronic records that plagues federal and state governments.

During their Nov. 18 business meeting, the Board of Supervisors in Loudoun County discussed a proposed legislative request to the Virginia General Assembly concerning the Virginia Freedom of Information Act (Virginia FOIA). The measure is part of a larger set of draft legislative proposals the board passed in September, which must be formalized before they are sent to the state legislature. The portion of the draft addressing the state FOIA asks that state information requests for private records be considered finalized upon initial denial.

Unless reworded, the legislation proposed by the county would give board members final authority in denying material from their private e-mail accounts that may include official business. At the November meeting, an attorney hired by the county, Roger Wiley, pressed the board to limit its formal request to seeking greater legislative distinction between public records and personal or campaign records. No final decision was made on what the board's specific recommendation to the legislature would be.

The Board of Supervisors' effort comes in response to a late 2007 Virginia FOIA lawsuit, in which the Loudoun County District Court ruled that local officials must disclose material from their personal e-mail accounts in response to a Virginia FOIA request. In October 2007, Judge Dean Worcester wrote, "It does not meet the purpose for FOIA that the official can decide what is public or private." In Loudoun County, supervisors review their own materials for disclosure. There is no process in state law designating who should review official material in personal e-mail accounts.

The case is currently on appeal, and arguments have been made before state Circuit Court Judge Thomas Horne. In January, Horne indicated that Worcester's decision was too broad and that not every record in possession of a public official is a public record subject to the Virginia FOIA. County attorneys argue that the state FOIA law is too vague because it does not define personal records. Horne has not yet issued a ruling on the larger question of which records fall under the state's freedom of information law. The court is waiting on the complainant to take an action before a ruling can be made.

E-mail Accounts are a Nationwide Recordkeeping Issue

While Loudoun County argues that the public should trust the word of their elected officials, extensive accounts of related issues, arising at every level of government throughout the country, suggest otherwise. Officials in both federal and state governments have been found using private accounts to conduct official business.

Most notably, the federal government lost e-mails between March 2003 and October 2005 when at least 88 White House officials relied on their Republican National Committee accounts rather than official government systems. The time period of the lost e-mails covered the beginning of the Iraq War. The White House responded by stating, "We screwed up." However, some White House aides proceeded to use private e-mail accounts through their cell phone providers to further circumvent public recordkeeping requirements.

The e-mail question also arose during the recent election season, when Alaska Governor Sarah Palin, the Republican nominee for Vice President, was asked to release over 1,000 e-mails in a state FOIA request. According to documents obtained by *The Washington Post* and *The New York Times*, Palin used a personal Yahoo e-mail account to conduct official state business.

The Right-to-Know Community, a broad group of more than 320 organizations and individuals, included several recommendations to the incoming Obama administration related to e-mails and other electronic records management in *Moving Toward a 21st Century Right-to-Know Agenda*. The report notes, "As our society continues to shift to a more electronic age, the proper management of electronic records becomes an increasingly important function of the government." While e-mail retention and review is a complex issue with significant challenges, the public deserves a process that ensures accountability. New technologies elicit the necessity of new record keeping methods and regulations, whether through legislation or greater definition by the courts.

Legal Battles Continue on What Constitutes Issue Advocacy

Although the election is over, the ongoing battle about the difference between issue advocacy and electioneering is headed to the U.S. Supreme Court in *Citizens United vs. Federal Election Commission*. Meanwhile, a new Advisory Opinion from the Federal Election Commission (FEC) also wrestles with this issue.

The Bipartisan Campaign Reform Act (BCRA) of 2002 prohibits corporations, including nonprofits, from airing broadcasts that refer to a federal candidate 30 days before a primary election and 60 days before a general election. This electioneering communications rule was modified by the Supreme Court in the case *Wisconsin Right to Life v. FEC* (WRTL) in 2007 to limit the prohibition to ads that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate."

The WRTL case did not resolve the debate over what constitutes issue advocacy and what constitutes an appeal to vote for or against federal candidates. As a result, the Supreme Court has agreed to hear arguments in the *Citizens United* case at the end of February 2009. Citizens United is a nonprofit organization which is tax-exempt under section 501(c)(4) of the Internal Revenue Code.

Citizens United's lawsuit, which was initially filed in December 2007 in the U.S. District Court for the District of Columbia, claims that television ads for its film, *Hillary: The Movie*, should not be subject to donor disclosure and disclaimer requirements under FEC rules because they are unconstitutional as applied to the group's three advertisements for the movie. The suit also contends that its ads for the film about Sen. Hillary Clinton (D-NY) are purely commercial, that the film itself is no different from documentaries seen on television, and that the film and the ads should be exempt from any type of regulation, including the prohibition on electioneering communications.

The district court ruled that the group could not run ads for its film without complying with the donor disclosure requirements and that any exception to disclosure requirements for TV ads for the movie would have to be granted by the Supreme Court. "Whether the Supreme Court will ultimately adopt that line as a ground for holding the disclosure and disclaimer provisions unconstitutional is not for us to say," the district court noted. In addition, the court said Citizens United offered no evidence that disclosing donors would lead to retaliation.

Second, the court determined that the film was not a constitutionally protected discussion of issues, under the test the Supreme Court established in the WRTL case, because it was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." Thus, the film and its ads were deemed "electioneering communications."

Even though the elections are over, the case is still ripe because Citizens United says it plans to release similar ads in the future. According to a blog that follows the Supreme Court, the "FEC

did not contend that the Court lacked jurisdiction to hear the appeal, and on [Nov. 14] the Court simply 'noted probable jurisdiction,' indicating that it agreed it had authority to decide the case."

Separately, the National Right to Life Committee, Inc. (NRLC) recently sought an Advisory Opinion from the FEC to determine the legal rules that apply to two radio advertisements they wanted to air before the 2008 election. Both were critical of then-Democratic presidential nominee Barack Obama's position on abortion. The first ad asks Obama to apologize to the NRLC for calling them liars. The second ad is the same, with the addition of the phrase "Barack Obama: a candidate whose word you can't believe in."

The FEC initially released a draft Advisory Opinion that concluded that the first ad does not constitute express advocacy and, thus, it "would not constitute an expenditure" and it "would be a permissible corporate-funded electioneering communication." The FEC draft opinion concluded that the second ad contains express advocacy and "the funds used to finance its broadcast would constitute an expenditure" because the second ad identified Obama as a candidate, and it re-worded his campaign slogan of "Change You Can Believe In."

However, in late November, the FEC issued Advisory Opinion 2008-15, a final opinion on the NRLC ads, which said, "The Commission concludes that the NRLC may use its general treasury funds to finance the broadcast of the first advertisement. The Commission could not approve a response by the required four affirmative votes regarding the NRLC's second advertisement." Thus, it is unclear if the second ad constitutes express advocacy or if its financing would constitute an expenditure subject to FEC rules.

Funds that advocate for or against a federal candidate are considered electioneering expenditures. Corporations, including nonprofit organizations, are prohibited from making expenditures related to a federal election but may use their general treasury funds to finance the broadcast of an advertisement that is genuine issue advocacy.

The ambiguity surrounding issue advocacy and electioneering for candidates is not new. During the election, a 527 group called The Real Truth About Obama, Inc. (RTAO) filed a lawsuit in the U.S. District Court in Richmond, VA, against the FEC and the U.S. Department of Justice (DOJ). RTAO planned to run issue ads examining then-Democratic presidential nominee Barack Obama's position on abortion and other policy issues. RTAO argued that is not a political action committee (PAC) because it did not plan to advocate for Obama's defeat or election.

The lawsuit challenges the FEC's definition of express advocacy for or against candidates. In WRTL, the Court sought to protect messages put out by political groups that engage in issue advocacy. However, according to RTAO, the regulation put in place after the WRTL decision is unconstitutionally vague and overbroad. RTAO is challenging this new regulation, which the group charges could restrict messages if they contain "indicia of express advocacy," such as references to political parties, and could exclude some "express advocacy."

Until the courts clarify the definitions, the current ambiguity will continue to create confusion among those who genuinely want to engage in issue advocacy, as well as a loophole for those who desire to exploit the lack of clarity to evade campaign finance restrictions.

Conviction of Holy Land Foundation Raises Questions, Concerns for Nonprofits

On Nov. 24, the two-month retrial against the Holy Land Foundation for Relief and Development (HLF) and five of its leaders ended with guilty verdicts on charges of supporting Hamas, which was designated as a terrorist organization in 1995. The convictions came even though the prosecution admitted that all funds went to local charities, called zakat committees, that are not on government watchlists. Attorneys for the defendants said they would appeal.

HLF was shut down in 2001 by the Department of the Treasury (Treasury), which accused the group of supporting Hamas, and the organization's assets were frozen. In 2004, the group and five leaders were indicted, and the first trial ended in a hung jury in October 2007. In the retrial, prosecutors dropped charges from 197 counts to 108 counts of supporting terrorism, money laundering, conspiracy, and tax fraud. There was a different judge, U.S. District Court Judge Jorge Solis, and some new witnesses and evidence at the retrial. Otherwise, the basic arguments were the same on both sides:

- The prosecution, using over 500 documents, videos, bank records, and wiretap records, said HLF wired $12.4 million to Hamas-controlled zakat committees after the 1995 designation. It did not allege that HLF supported violent acts and admitted the funds were used for hospitals, schools, and charitable programs. However, the prosecutor told jurors not to be distracted by this fact, since it is illegal to support Hamas with any kind of resources.
- The defense argued that the zakat committees were not on the government's list of illegal groups and that HLF made every effort to ensure funds were spent only for charity, on a "need, not creed" basis.

The jury deliberated for eight days. After the verdicts were announced, the defendants were taken into custody. They could receive up to 15-20 years imprisonment for each count.

HLF's Assets: Forfeited to the Government or Used for Charity?

The judge asked the jury to decide whether HLF's assets should be forfeited to the government, since money laundering charges are involved. The jury found both HLF and the five defendants liable for the $12.4 million they determined was illegally funneled to Hamas. The defense will be moving to stay forfeiture pending appeal. It is unclear what HLF funds remain in the accounts blocked by Treasury, but estimates are in the $5 million range. There is also real property located in California.

Forfeiture of charitable assets raises unique issues and problems, since under traditional charity law principles, these assets can only be used for charitable purposes. The forfeiture provisions in money laundering laws were passed to prevent convicted criminals such as drug kingpins and organized crime from enjoying the financial benefits of their crimes. In this case, forfeiture prevents refugees and others in need from receiving aid intended by donors.

The Zakat Committees: Not on Government Watchlists

The defense argued that it was not illegal for HLF to deliver aid through zakat committees because they have never been designated as supporters of terrorism by the U.S. The question of whether or not it was legal for HLF to work with the zakat committees is central to the case. Robert McBrien from Treasury's Office of Foreign Assets Control, a new witness, told the jury that designation is not necessary and that keeping up with front groups "is a task beyond the wise use of resources." Instead, he said Treasury targets umbrella groups. However, since Treasury has known about these particular groups since at least 2004 when it indicted HLF, that rationale does not explain Treasury's continuing failure to designate the groups. According to AlterNet, the same zakat committees have received aid from the International Red Cross and the U.S. Agency for International Development.

Treasury's legal theory makes it impossible for U.S. charities operating abroad to protect themselves by checking local charity partners against the list of designated supporters of terrorism. The threat of being shut down by Treasury has already discouraged international programs from operating in conflict zones, and now the potential for severe criminal sanctions could further exacerbate this situation.

After Hamas was designated in 1995, HLF hired a former member of Congress from Texas, John Bryant, to help the group communicate with Treasury about what groups were off-limits. Bryant testified that Treasury rejected their attempt to obtain guidance. The lack of known evidence about zakat committee ties to Hamas was described by another defense witness, Edward Abington, former U.S. consul general in Israel between 1993 and 1997. In the first trial, he testified that while in Israel, he got daily intelligence briefings on security threats and was never told Hamas controlled charities. In this trial, the CIA barred him from referring to his past affiliation with it. As a result, Abington was only able to refer to "government" briefings that did not include references to the zakat committees. The defense called this "a blatant attempt to interfere with the defendant's Fifth and Sixth Amendment rights to present a defense."

The prosecution alleged that the zakat committees were staffed and controlled by Hamas, using detailed charts to show Hamas affiliations with zakat committee leaders. In an unusual and controversial move, the government had two Israeli intelligence officials testify anonymously about documents and items seized in their raids on the zakat offices between 2002 and 2004. These items included key chains and other memorabilia memorializing suicide bombers. The judge overruled defense objections, and use of the anonymous witnesses is expected to be a major issue in the appeal.

More on the Evidence

To counter the defendants' argument that there is no criminal violation when all funds are used to support charitable programs, hospitals, and schools, the prosecution presented a new witness, Georgetown University professor Bruce Hoffman, as an expert on terrorism. He told the jury that throughout history, terrorist groups have used charities as fronts to raise money and build good will "almost without exception."

The prosecution spent the first four of its five weeks presenting witnesses and evidence that focused on the defendants' political views about the conflict in the Middle East and their ties to suspected militants. It also showed videos of violent attacks, although the defendants were not accused of violent acts. Much of this evidence centered on events that took place before Hamas was designated as a terrorist organization. For example, FBI agent Lara Burns testified about a 1993 meeting in Philadelphia attended by HLF representatives, which Hamas sympathizers are also alleged to have attended. Another FBI agent, Robert Miranda, testified about HLF-sponsored fundraising events and Palestinian festivals that included Hamas leaders and speakers. Other evidence focused on the defendants' political views and the "jihadist" content of songs and skits at these events.

Evidence about HLF communications with Hamas after the 1995 designation included a 1997 fundraising conference call with two alleged Hamas speakers, including one who praised a Hamas bomb maker. An ex-HLF employee, Mohamed Shorbagi, also testified that HLF raised money for Hamas at Palestinian festivals and by sending money via the zakat committees after 1995. The defense said Shorbagi lied in order to get a potential life sentence reduced to seven years in a deal that required him to plead guilty to using HLF to support Hamas.

The defendants presented two expert witnesses, Dr. John Esposito, a Georgetown professor and expert on Islam, and Dr. David McDonald, a professor at Indiana University and an expert on Palestinian culture and folklore. Their testimony sought to set the evidence about the content of songs and statements in context. For example, Esposito said the traditional meaning of the word "jihad" relates to spiritual struggle, not violence, and "economic jihad" refers to giving to the poor.

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In This Issue

2008 Year in Review Edition

An Assault on Public Protections: Regulatory Policy News in 2008

The federal government's ability — and sometimes inability — to protect the public drew national attention throughout 2008. President Bush's and senior administration officials' aversion to regulation and their penchant for allowing the market to operate unchecked appeared more and more outmoded in the face of the collapse of the financial market, the rising tide of dangerous imported products, and persistent examples of environmental degradation.

Throughout 2008, the Bush White House continued to meddle inappropriately in the affairs of regulatory agencies by distorting science, changing policy outcomes, and inventing a system whereby new agency rules would leave the incoming Obama administration with the task of implementing Bush-era priorities.

White House Interference

In April, the U.S. Environmental Protection Agency (EPA) announced it was changing its process for studying the risks of toxic chemicals under its Integrated Risk Information System program. The changes give the White House Office of Management and Budget (OMB) — an

office with little scientific knowledge — a greater role in the risk assessment process.

EPA will now involve OMB at every stage of the IRIS assessment process. OMB already reviews — and often edits — agencies' proposed and final regulations. The office will now have several opportunities to review and alter the scientific findings that serve as the basis for chemical exposure standards.

OMB and EPA have stuck by the changes despite criticism from Congress, a critical report from the Government Accountability Office (GAO), and objections of EPA staff over the role of OMB in agency science.

OMB also continued to alter the substance of individual agency rules. In most cases, OMB's interference weakened requirements proposed at the agency level. For example:

- In March, President Bush himself stepped in to force EPA to abandon its plan to set a seasonal standard for ozone exposure tailored especially to the needs of plant life. OMB challenged the scientific basis for EPA's decision and encouraged the agency to consider the economic impact of the new standard, even though the Clean Air Act prohibits EPA from weighing costs in setting air standards. After EPA resisted the pressure, Bush was brought in to arbitrate the dispute and sided with OMB.

- In October, EPA tightened the national public health standard for airborne lead, drawing rare praise from clean air advocates. However, shortcomings in the network for monitoring lead pollution persist. EPA was prepared to require installation of new monitors near facilities emitting 1,000 pounds or more of lead pollution. But an e-mail exchange between EPA and OMB less than 48 hours before the final rule was announced shows that OMB pressured EPA to raise the threshold to 2,000 pounds. The change means state and local officials will not be required to place new pollution monitors near at least 124 facilities that emit lead.

- The White House also watered down a rule expanding protections for the endangered North Atlantic right whale. The National Oceanic and Atmospheric Administration (NOAA) initially proposed extending the protection area in which the new rule would be enforced to 30 nautical miles off shore. When NOAA announced the final rule in October — after a White House review that lasted 573 days — the protection zone had shrunk to only 20 nautical miles.

OMB directed its most strident opposition toward new regulations that would have addressed climate change. The White House completely dismantled the efforts of EPA staff to curb greenhouse gas emissions.

A House investigation into EPA's 2007 decision to prohibit California from adopting its own tailpipe emissions controls showed the White House may have played a role in denying the state's climate change policy. EPA Administrator Stephen Johnson had been willing to grant California's request but changed his mind after a meeting with White House officials,

according to the House report released in May 2008. The denial precludes as many as 19 other states from adopting similar emissions reduction programs.

The White House also blocked federal efforts to reduce greenhouse gas emissions. After developing a regulatory roadmap to reduce both vehicle and stationary source emissions, White House officials prohibited EPA from releasing its plans to the public.

In response to a 2007 U.S. Supreme Court decision, EPA began to develop documents showing that climate change poses a danger to the public and a regulatory plan for addressing climate change by reducing greenhouse gas emissions.

But when EPA sent the material to OMB for review, OMB refused to open the e-mail. OMB officials feared the documents would make a compelling case for greenhouse gas regulation.

By March 2008, EPA completely abandoned its plans to begin regulating emissions. Johnson pledged to issue a so-called Advanced Notice of Proposed Rulemaking (ANPRM), which would only solicit opinions on climate change and regulatory methods for addressing it. The ANPRM, published in July, proved a disappointment. OMB prodded the agency to delete references to climate change's impact on public health and welfare.

Still not content, the White House distanced itself from the notice. Susan Dudley, head of the OMB's regulatory clearinghouse, the Office of Information and Regulatory Affairs (OIRA), said the policy "cannot be considered Administration policy or representative of the views of the Administration."

Other letters of disapproval came from the heads of the departments of Agriculture, Commerce, Energy, and Transportation; the White House Council of Economic Advisors and the Office of Science and Technology Policy; the Small Business Administration Office of Advocacy; and the White House Council on Environmental Quality.

Midnight regulation

A flurry of regulatory activity at year's end, prompted by the White House, stands in stark contrast to the pattern of obfuscation discussed above. The Bush administration launched a broad midnight regulation campaign in an attempt to leave an administrative legacy.

In May, the White House laid down a path for agencies to follow. White House Chief of Staff Joshua Bolten issued a memo instructing agencies to propose by June 1 rules they wished to finalize under Bush's watch and to finalize all rules by Nov. 1. The November deadline would prove the more critical one.

The administration worked furiously through the summer months. In spite of Bolten's June 1 deadline, agencies proposed rules intended to limit women's access to reproductive health services, open broad swaths of land in the west to energy development, and systematically alter the scientific basis for future rules that protect industrial workers from exposure to toxic

substances.

An Interior Department rule on the Endangered Species Act moved at warp speed. In August, Interior proposed allowing federal land-use managers to approve projects like infrastructure creation, minerals extraction, or logging without consulting habitat managers and biological health experts responsible for species protection.

The proposal met with fierce opposition. Interior received about 300,000 public comments, mostly negative, on its proposal after it was unveiled in August. According to an internal e-mail obtained by the Associated Press, Interior tried to review all the public comments in just four days, or about seven comments per minute.

By November, the campaign began to bear fruit when agencies completed several rules. The Department of Transportation finalized a rule allowing truck drivers to drive up to 11 consecutive hours and shortening required rest times. A Department of Labor rule announced in November will make it more difficult for workers to take unpaid leave to care for themselves or a family member. The administration even pushed through cuts to Medicaid — a particularly dubious decision considering the current economic climate.

The pace only accelerated in December. Many of the rules target the environment. Rules finalized in the first half of December would:

- Make it legal for mining companies to dump into rivers and streams the waste generated from mountaintop mining
- Exempt farms from reporting air pollution generated from animal waste
- Lift the 25-year-old-ban on carrying loaded weapons in national parks
- Remove the requirement for scientific consultation under the Endangered Species Act (as discussed above) and eliminate climate change as a factor in decisions about species protection

Bush's flurry of last-minute activity is typical for presidents in their waning days of power. President Bill Clinton generated tomes of *Federal Register* pages with his last-minute rules. As late as Friday, Jan. 19, 2001, the Clinton administration was sending rules to the Office of the Federal Register for publication the following Monday, when Bush would have already taken power.

But Bush's 11th hour push, pursued with great forethought and shrewdness, may prove more successful than Clinton's. Even after a rule is finalized and published in the *Federal Register*, agencies must wait at least 30 or 60 days (depending on the significance of the rule) before making the rule effective. Since Clinton waited until January 2001 to issue rules reflecting his priorities, Bush administration officials maintained some discretion to reevaluate those rules not in line with their views. As a result, several rules finalized and published under Clinton were killed by the new Bush officials.

Now Bush appears to be trying to prevent Barack Obama from doing to him what he did to

Clinton. Since the Bush administration finalized many of its rules in November and December, that 30- or 60-day window will be closed come Jan. 20, 2009. Sixty-day rules finalized before Nov. 20 will take effect, as will 30-day rules finalized by Dec. 19.

Ignoring Science

The Bush administration continued to ignore or downplay scientific evidence in its strategy to protect businesses from what it sees as a burdensome regulatory process. This is a continuation of the approach the administration has taken on so many public policy issues, from environmental protection to public health.

The U.S. Food and Drug Administration (FDA) continues to claim that there is insufficient evidence about the health effects of bisphenol-A (BPA), a chemical widely used in consumer products, to justify regulating the substance. Despite mounting evidence that BPA may affect human development and mental health, FDA continues to advise consumers that there is no reason to "discontinue using products that contain BPA."

The latest evidence on BPA are a Yale School of Medicine study that links the chemical to brain functions and mood disorders and a study published in the *Journal of the American Medical Association* (JAMA). The Yale study concluded that exposure to the chemical may result in memory loss, brain impairment, and depression at the exposure level the EPA has established as safe. (EPA has the responsibility for setting safe chemical exposure limits, while FDA can limit or ban the use of BPA in food-related items.)

The JAMA study was conducted by a team of British and American scientists and compared the level of BPA in human urine. They discovered a link between exposure and diabetes and heart disease. This and other recent studies follow earlier analyses of BPA that led to warnings and product withdrawals.

FDA, meanwhile, continues to claim the science regarding BPA is too uncertain to warrant regulation of the chemical in food products and is not recommending consumers change their habits regarding BPA-based products. An Aug. 14 *Draft Assessment of Bisphenol A for Use in Food Contact Applications* being circulated for FDA's scientific peer review program concludes that there is no adverse health effect from BPA. The draft assessment continues to rely heavily on two industry-funded studies that formed the basis of FDA's earlier assessment of BPA.

EPA has also balked in the face of scientific evidence. The agency routinely ignores recommendations from an advisory committee established to assist it in creating policies to protect children's health. On Sept. 16, a GAO official told a Senate panel that the advisory committee was "to provide advice, information, and recommendations to assist the agency in the development of regulations, guidance, and policies relevant to children's health." Committee members include public health officials from government, nonprofits, academia, industry, and health care organizations.

GAO concluded that in more than 30 meetings of the advisory committee in the first ten years, "EPA has rarely sought out the committee's advice and recommendations to assist it in

developing regulations, guidance, and policies that address children's health." EPA requested advice from the committee on regulations only three times, on guidance three times, and only once on developing a policy. Yet the committee sent over 600 recommendations for action to EPA on issues like particulate matter, ozone, lead, pesticides, mercury regulation, and farm worker protections over the period that GAO reviewed.

Before the White House watered down a new rule to expand protection for the North Atlantic right whale, as mentioned above, it delayed finalizing the rule while the office of Vice President Dick Cheney and other executive offices questioned the findings of scientists at NOAA. NOAA proposed speed limits on large ships traveling in Atlantic Ocean whale migration areas during seasons when the right whale is most active. Collisions with ships are a major cause of death of the right whale, one of the most endangered whale species in the world, according to NOAA.

The White House Council of Economic Advisors (CEA) changed and reanalyzed statistics in a model intended to determine the relationship between ship speed and the risk to right whales. Based on the recalculations, the CEA called NOAA's analysis "biased." Cheney's staff "contends that we have no evidence (i.e., hard data) that lowering the speeds of 'large ships' will actually make a difference." In response, NOAA staff cited records of collisions in which right whales were killed or seriously injured and again argued in favor of ship speed limits.

The right whale rule was sent to OIRA in February 2007. OIRA is supposed to complete its review within 120 days but held the right whale protection rule for 21 months. OIRA finally gave its approval Sept. 15, and NOAA published a weakened rule Oct. 10. The rule went into effect Dec. 9, according to NOAA's website.

Product Safety

Product safety issues remained a concern in 2008, although there were fewer crises in both food and consumer items than in 2007. Congress made progress in restoring some of the government's ability to safeguard products, but some incidents underscored how much work remains.

In July 2008, Congress reached agreement on legislation to enable the Consumer Product Safety Commission (CPSC) to better enforce safety standards in markets dominated by cheap imports and required new standards for dangerous substances like lead and phthalates. After months of negotiations, dating back to 2007, Congress passed the Consumer Product Safety Improvement Act of 2008, and President Bush signed the bill into law Aug.14.

The act authorizes increases in CPSC's budget to $136 million by FY 2014, nearly a 75 percent increase over current levels. However, the increases must still be appropriated in the spending bills Congress takes up each year. One part of the bill bans certain phthalates, a class of chemicals found in a variety of plastic products, from children's toys. Three other phthalates are banned temporarily pending further study. This action represents a dramatic shift in the government's approach toward regulating toxic substances. Usually, chemicals enter and stay on the market without regulation and are only pulled if scientists prove a definitive health risk. In this case, the banned substances will only be allowed back on the market if their safety is

proven. The act also bans lead in children's products to trace amounts. (Read a summary of the bill's contents here.)

The inability of government agencies to track food sources during foodborne illness outbreaks was again illustrated in the spring and summer months. Federal officials had significant difficulty providing consumers with information on two separate outbreaks. Investigators searched for months for the source of a salmonella outbreak, and officials were unable to provide detailed information for consumers on a batch of *E. coli*-contaminated beef, which had spread to a number of states across the country.

FDA announced a warning against consuming certain types of raw, red tomatoes June 7 after more than 100 consumers had been sickened by a rare strain of salmonella. But more than a month after announcing the warning, and almost three months since the first cases of salmonella were reported, the FDA still had not pinpointed the source of the contamination. The FDA subsequently expanded its investigations to include peppers and cilantro. After a three-month investigation focusing mainly on tomatoes, FDA traced the contamination to serrano and jalapeño peppers imported from Mexico. The outbreak sickened 1,442 people in 43 states, Washington D.C., and Canada.

The U.S. Department of Agriculture (USDA) also left consumers in the dark after an *E. coli* outbreak was linked to contaminated beef. In a June 30 announcement, USDA recalled half a million pounds and covered shipments sent to processors and wholesalers in Colorado, Illinois, Michigan, Nebraska, New York, Pennsylvania, and Texas.

On July 3, USDA expanded the recall to 5.3 million pounds. While USDA quickly identified the source of the contaminated beef — Nebraska Beef in Omaha — it gave no further indication as to where the Nebraska company had shipped the contaminated beef or how processors, wholesalers, retailers, and consumers could identify it.

A public health crisis originally thought to be limited to China crept into the U.S. when on Sept. 26, FDA announced recalls of products tainted by melamine. Then, on Oct. 3, FDA announced a new standard for melamine. FDA released an interim assessment that determined melamine to be safe in food at levels of 2.5 parts per million or lower while simultaneously saying that no amount of melamine in baby formula is safe. On Nov. 28, FDA reversed its baby formula position and set an allowable standard of one part per million of melamine if certain other chemicals are present, according to a *Washington Post* article.

The melamine recalls reignited concern over FDA's ability to adequately police the rising tide of imported food reaching American consumers. From 2002 to 2007, food imports increased 84 percent, according to the GAO.

In response to the many pressures put on FDA by the import safety crisis, Department of Health and Human Services (HHS) Secretary Michael Leavitt announced Oct. 16 that FDA would start to send personnel overseas to staff offices to help ensure the safety of imported food and drugs. The plan calls for staff to be assigned to offices in China, India, Europe, and

Latin America. Many assignments will begin before the end of 2008. A total of eight U.S. officials will operate in China. Ten employees will be posted in India once arrangements are negotiated with Indian officials. Other offices will open in nine Latin American countries, in Europe, and in the Middle East, according to an FDA press release.

The FDA staff will work with government officials and the companies producing the goods in an effort to improve quality assurance. They will inspect facilities, provide technical assistance, and help create third-party certification programs, according to the announcement. The certification programs require HHS to accredit independent organizations that would inspect manufacturing and production facilities and declare that the products meet U.S. import standards. Once their facilities are certified, the firms' products would gain expedited entry at American ports. Companies that do not meet certification would continue to work with FDA staff and government officials to improve the safety of their products.

The hostility exhibited by the Bush administration toward public protections has increasingly come under fire in the last few years. The importance of government's role in safeguarding so many aspects of our lives is illustrated most starkly by the impact of — and the public's shock at — the failure to regulate the financial and housing sectors. This failure comes on the heels of the threats from poorly regulated consumer products and the relentless attack on environmental protections. The time has come for a new administration and Congress to make real efforts to reform a badly broken regulatory process.

2008 Fiscal Policy Year in Review

It's been an exceptional year. 2008 saw not only economic indicators that evoked memories of the Great Depression, but also a record-breaking federal budget deficit. The federal government, through several agencies, activated trillions of dollars in loans and asset guarantees. Congress approved the largest supplemental spending bill in its history and gave the Treasury Department the authority to expend the equivalent of three-fourths of the federal discretionary budget on one sector of the economy. But in many other ways, Congress proved to be unremarkable by staying true to its recent history of underachievement.

While the national economic crisis drew the attention of Congress, prompting historic legislative action, the nation's lawmakers followed 2007's legislative blueprint in several key respects. Similar to 2007, Congress failed to adhere to the regular budget-making process and instead relied on a continuing resolution to fund the operations of the government for another six months. It once again used the emergency funding process to pay for wars that have lasted for more than six years and raised the national debt ceiling yet again. And Congress, like in 2007, waited until the absolute last minute to pass a package of expiring tax provisions.

Unlike Congress, OMB Watch's Federal Fiscal Policy Program is trying something completely different for the 2008 Year in Review *Watcher*. When we sat down to discuss what happened in 2008, we decided that instead of merely writing summaries of our *Watcher* articles and blog posts from this past year, we would invite you to virtually sit down with us and listen in on our

conversation. We now present to you a series of three videos, available on YouTube, in which we discuss the events of the year in fiscal policy — 2008.

In the first video, we discuss the economy, fiscal stimulus, and the Frank-Dodd housing bill.

In Part II, we talk about the Troubled Asset Relief Program (TARP), other federal bailouts, the budget process, and tax policy.

In the last segment, we discuss the federal budget deficit, the national debt, and federal contracting.

Joe the Discloser -- Government Transparency in 2008

This year's historic presidential campaign introduced the country to a plethora of vocational symbols. It not only featured Joe the Plumber, but also Tito the Bricklayer, Rose the Teacher, and more. There were also a few Joes and Janes who had prominent roles in the restriction — and in a few cases, the expansion — of public information that may have gone unnoticed during the year. Hopefully for the last time in the life of our Republic, the government transparency events of 2008 are presented below according to vocational nomenclature.

George the Shuffler — George W. Bush, President of the United States

The Bush administration began 2008 by quickly trying to rewrite the OPEN Government Act passed in December 2007. The act created an office at the National Archives and Records Administration (NARA) to monitor implementation of the Freedom of Information Act (FOIA) and oversee disputes before litigation became necessary. However, the administration slipped a provision into the Department of Commerce section of its FY 2008 budget proposal that would have reshuffled the office from NARA to the Department of Justice (DOJ). Thankfully, Sen. Patrick Leahy (D-VT), an original sponsor of the OPEN Government Act, discovered the location shift and successfully fought to keep the office at NARA.

Nancy the Immunizer — Rep. Nancy Pelosi (D-CA), Speaker of the House

Another issue that carried over from 2007 into early 2008 was the congressional stalemate between the Senate and the House on immunity for telecommunications companies that participated in the Bush Administration's warrantless wiretapping program. The Senate passed legislation (S. 2248) that contained retroactive immunity for telecommunications companies, while the House left immunity out of its bill (H.R. 3773). Initially, Rep. Nancy Pelosi, Speaker of the House, led Democrats in refusing to consider immunity, even to the point that several wiretapping authorities expired. However, after months of negotiations, Pelosi and House Democrats acquiesced and approved a bill (H.R. 6304) that essentially granted retroactive immunity by requiring courts to throw out lawsuits against any company that showed that its activities were authorized by the president. Pelosi had initially opposed modifying the Foreign Intelligence Surveillance Act in this manner, but when she changed her position, the new bill quickly passed the House and the Senate in July. President Bush immediately signed the bill into law.

Steve the Factory Farmer — Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency

Stephen Johnson, Administrator of U.S. Environmental Protection Agency (EPA), made many decisions in 2008 deemed questionable by critics, including several rules relating to farms and pesticides. For instance, EPA's late 2007 proposed rule exempting factory farms from reporting air pollution from animal waste was the subject of 2008 congressional hearings that discussed how large chicken farms and other concentrated animal feeding operations are major sources of pollution.

On another front, the conservation group Natural Resources Defense Council (NRDC) sued the agency for failing to provide the organization with an industry analysis of the dangers of a particular pesticide that was likely killing bees by the thousands. Following in Johnson's footsteps, the U.S. Department of Agriculture (USDA) also reduced the amount of pesticide information being collected and canceled the Agricultural Chemical Usage Reports, the only publicly available data on pesticide use in the country.

Andrew the Litigator — Andrew M. Cuomo, New York State Attorney General

There were some public officials who pushed for greater transparency and greater accountability to the public in 2008, and Andrew Cuomo, the attorney general for the State of New York, was one of them. Cuomo pressured the Securities and Exchange Commission to require businesses to report to investors their greenhouse gas emissions and the risks that climate change poses to their operations. Cuomo's investor right-to-know measure was paired with recent agreements his office negotiated with two major energy producers to disclose publicly their yearly greenhouse gas emissions and their plans to handle climate change risks. Cuomo's office also kept up its drive to expand reporting of toxic releases, persevering with a multi-state lawsuit against a 2006 EPA rule that relaxed reporting requirements under the Toxics Release Inventory (TRI).

Edward the Watchdog — Rep. Edward J. Markey (D-MA), chairman of the Select Committee on Energy Independence and Global Warming

Another strong advocate for increased accountability on how government uses scientific data was Rep. Edward J. Markey, chairman of the Select Committee on Energy Independence and Global Warming. Markey questioned members of the Bush administration regarding the delay of a decision to list polar bears under the Endangered Species Act until a controversial lease sale for oil drilling off of Alaska was completed.

Karl the Deleter — Karl Rove, Former Deputy Chief of Staff to President George W. Bush

Unfortunately, despite the ease with which e-mails and electronic information can be saved, this was not area in which that the government fared well in 2008. Back in 2007, investigations into the leak of CIA operative Valerie Plame's identity and the firing of a group of U.S. Attorneys uncovered serious problems with e-mail record keeping practices at the White House. Karl Rove, Senior Advisor, and other White House staff members were reportedly using Republican National Committee e-mail addresses to avoid requirements to archive official White House e-mail. Thousands of e-mails related to vital political issues of the time were lost. In response, the House passed a bill (H.R. 5811) to ensure oversight of e-mail preservation. However, the bill did not move in the Senate, and the lack of oversight and standards for preserving e-mails remains a problem.

States suffered from problems with e-mail, as well. Supervisors in Loudoun County, VA, were ordered to hand over e-mails from their personal accounts that may have contained official business. However, antiquated state laws in Virginia fail to define procedural guidelines on reviewing such material. The e-mail question also arose during the recent election season, when Alaska Governor Sarah Palin, the Republican nominee for vice president, was asked to release over 1,000 e-mails in a state FOIA request. According to press accounts, Palin used a Yahoo! account to conduct official business.

Steve the Loyal Soldier — Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency

Johnson returns to our line-up because he wore several hats related to transparency during the year. In 2008, a congressional investigation sought clarification on the administrator's decision to not label carbon dioxide a risk to public health and welfare. The investigation revealed that Johnson initially advised the White House that climate change was a threat to public health and merited regulation. Without reviewing the EPA's initial findings, the White House pressured the agency to change the findings. Johnson eventually revised the findings of the agency and downplayed the scientific evidence. The decision meant the administration could avoid regulating carbon dioxide under the authority of the federal Clean Air Act. The EPA's original findings are still unavailable to the public, and the agency has allowed only four senators to read it.

Tom the Information Screener — Ambassador Thomas McNamara, Information Sharing Environment (ISE) Program Manager

Despite moving forward with a new policy on controlled unclassified information (CUI) in 2008, the Bush administration and Congress have not made significant progress in addressing the full scope of the problem. In 2007, Ambassador Thomas McNamara had testified that over 100 CUI labels were being used, and many were redundant. In December 2007, McNamara offered recommendations for policy changes to improve information sharing. The administration responded in May with a memorandum establishing only three possible CUI labels for use by agencies, but it limited the framework solely to "terrorism related information" and made no attempt to limit the amount of information stamped with the new labels.

Congress, not fully satisfied with the administration's new policy, considered a June CUI bill (H.R. 6193) that would have established regular auditing and reporting to Congress on CUI but only for the Department of Homeland Security. Another bill (H.R. 6576) that addressed the issue government-wide was also introduced, but both only passed the House; they did not advance in the Senate.

John the Roadblock — Rep. John D. Dingell (D-MI), outgoing chairman, House Committee on Energy and Commerce

On many issues, Congress seemed to have difficulty passing legislation in 2008, and Rep. John Dingell's House Committee on Energy and Commerce seemed to be where more than a few legislative efforts to expand the public's right to know ran into insurmountable roadblocks. Dingell's committee failed to move on a measure to require natural gas companies to disclose the chemicals used in drilling operations, which were shown in a recent investigation to have polluted drinking water in several states. Chemical security bills also made little progress in Dingell's committee. A bill that would have fully replaced a temporary 2006 chemical security law with a more comprehensive program never got past a June 12 hearing in the House Subcommittee on Environment and Hazardous Materials. Perhaps in 2009, with Henry Waxman (D-CA) in charge of the House Energy and Commerce Committee, greater progress on these and other transparency issues will be achieved.

Molly the Librarian — Molly A. O'Neill, Assistant Administrator for Environmental Information and Chief Information Officer, U.S. Environmental Protection Agency

The EPA's Chief Information Officer, Molly O'Neill, played a significant role in environmental right to know issues in 2008. Her office, a political appointment, was given complete control over the agency's library network. Several of the EPA libraries began the year shuttered, with their contents scattered and unaccounted for. Congressional action late in 2007 forced EPA to schedule the reopening of three regional libraries and the Headquarters and Chemical libraries in Washington, DC. A subsequent agreement with one of EPA's employee unions produced a plan for more accountability and better conditions for the libraries and their users. Finally,

after two years, the libraries were reopened at the beginning of October.

John the Secret Law Giver — John Elwood, Deputy Assistant Attorney General

In May, the Senate Judiciary Subcommittee on the Constitution held a hearing on the role of decision making by the Department of Justice's Office of Legal Counsel (OLC), which interprets laws passed by Congress. These interpretations have great influence on executive branch action and are critical to deciding how laws are implemented. The OLC is infamous for John Yoo's secret 2002 torture memorandum, which limited the definition of torture to interrogation that results in "death, organ failure or the permanent impairment of significant bodily function." Despite the importance of these opinions, John Elwood, current head of the OLC, argues that the office's decisions should receive attorney-client protection from disclosure so the president can receive confidential advice. In a similar development, the DOJ developed in secret a policy for broader investigative powers for the Federal Bureau of Investigation (FBI). DOJ refused to share copies of the rule with legislators or the public until it was finalized.

George the Budget Butcher — George W. Bush, President of the United States

During 2008, as well as other years of the Bush administration, budget cuts meant the public would receive less information on health and environmental issues. A recent retrospective report produced by NRDC catalogues numerous instances where Bush administration budget cuts affected monitoring programs related to environmental and public health. The report, *Deepest Cuts: Repairing Health Monitoring Programs Slashed under the Bush Administration*, cites 22 health monitoring programs whose activities were reduced or whose budgets were either cut or eliminated, are inadequate, or were restored only after court intervention. Examples include budget cuts to the Centers for Disease Control and Prevention's (CDC) biomonitoring program, reduced EPA monitoring of lead levels in the air, and the reduced reporting requirements of the TRI program. Miriam Rotkin-Ellman, environmental health scientist at NRDC in San Francisco and an author of the report, said, "Not testing or tracking pollution doesn't make it go away. It just keeps us in the dark about real health threats."

Barack the ~~Wealth~~ Information Spreader — Barack Obama, President-elect of the United States

During the 2008 presidential campaign, Barack Obama (D) made strong commitments to new ethical standards, with improved government transparency and accountability prominently featured. As the president-elect's transition team busily prepares for the upcoming transfer of executive power, its use of interactive online tools has established high expectations for the next administration. The transition website, change.gov, features videos, interactive discussions, and questions, as well as a library of all materials the transition team is receiving, with an online discussion available for each document. The whole site is also being managed under a creative commons license that allows others to reuse the materials without infringing on copyright. Tune in at the end of 2009 to see how well Obama did in transferring these

policies to the federal government.

'Twas the Night before New Year

'Twas the night before New Year
And all through the Nation
The people were hopeful
Looking toward Inauguration.

Nonprofits were happy
Their voices might be heard
And silencing through
Rules and surveillance may be deterred.

We've been taking great care
To preserve nonprofit speech rights
Now we reflect on the past year
And the battles we had to fight.

There was Pulpit Freedom Sunday
Misguided at best
Where 33 pastors
Challenged the IRS.

They believe partisan electioneering
From the pulpit is OK
And churches should be tax-exempt
No matter what the preacher may say.

It would give religious groups rights
Other groups don't enjoy
And create an indirect taxpayer subsidy
For partisan sermons and other ploys.

The elections brought claims
Of voter suppression
But nonprofits were active
With voter protection.

There also were claims
Of voter fraud
But nonprofit research shows
That most claims are hogwash.

Helping voters register
By some states was precluded
But nonprofits pushed back
To make sure none were excluded.

Climate change groups
Ran into rules on campaign finance
That hindered their advocacy
On non-electoral issues they advance.

What constitutes express advocacy?
It isn't defined
But it triggers FEC limits
On donors and money combined.

Then the American Issues Project
Was news around the election
Its ads connecting Obama with Ayers
Were quite the obsession.

But it did raise the issue
Of the role of a 501(c)(4)
And how far such groups can go
Without a history of issues they explore.

The debate over donor disclosure
Was all in the press
Litigation was rampant
It is quite a mess.

The ACLU deftly exposed
The government error
Of spying on nonviolent advocacy
As if it were terror.

Our report *Collateral Damage*
Showed how laws meant to make us secure
Make aid hard to manage
And fairness standards poor.

With a New Year near
And a brand new administration
Hopefully, diminishing the speech rights of nonprofits
Will no longer be a sensation.

So as we look to the New Year
With 2008 in hindsight
Happy New Year to all
It's been quite a fight.

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