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Regulatory Matters

Information & Access

Federal Budget

Nonprofit Issues

Sunset Commission Bill Imminent

A sunset commission bill could arrive this week, if House leadership sticks to its previously announced plans.

As OMB Watch reported earlier, House leaders intended to hold a vote on sunset commission legislation within the first couple of weeks of returning from the July 4 recess.

With Congress back in session, that promise means that a sunset commission bill should be introduced some time this week. Several bills have been introduced already, but House Majority Leader John Boehner has been leading negotiations with proponents of those bills to develop a compromise package that will enjoy the previously guaranteed floor vote.

Among the details yet to be known is whether the final bill will exempt any programs. from the sweep of a sunset commission. Earlier reports suggested that excluding the Department of Defense was a point of contention in the Boehner-led negotiations.

Scattered reports have suggested as well that the final bill could go straight to the House floor, bypassing the committee process.

Congress to Limit Public Participation in Forest Service Decisions

After courts in California and Montana struck down Forest Service rules that limited public participation in certain logging decisions, the Senate has added language to an appropriations bill that would reinstate those rules.

Forest Service Acts to Limit Public Participation

Under the guise of limiting forest fires, the Forest Service issued a series of regulations in the summer of 2003 that created categorical exclusions for four types of logging projects. This allowed the Forest Service to avoid the environmental assessment and impact statement requirements of the National Environmental Policy Act (NEPA) for land management decisions involving those categorically excluded projects. The regulations also allowed the Forest Service to avoid the public notice, comment, and administrative appeal requirements of the Forest Service Decisionmaking and Appeals Reform Act (ARA).

Under the NEPA, agencies are required to assess the environmental impact of federal projects. The act, however, does allow agencies to exempt projects deemed to have an insignificant effect on the environment. The Forest Service regulations significantly expanded the number of logging projects that fall under the categorical exclusions. Environmental groups warned at the time that the exclusions could serve as a backdoor to increased logging.

"This clears the way for the timber industry and its friends in government to loot public forests and pocket the proceeds, free from public input or environmental review," said Amy Mall, a forest and land specialist at the Natural Resources Defense Council. "Make no mistake - this is not about healthy forests. It's about healthy profits for campaign contributors and healthy budgets for bureaucrats."

Courts Reject Limitations to Public Notice, Comment, Appeal

Prompted by litigation brought by environmental groups, courts in both Montana and California upheld the categorical exclusion of logging projects from environmental review. The courts, however, did rule that the Forest Service had improperly exempted land management decisions from the public notice, comment, and administrative appeal

requirements of the ARA.

Courts have invalidated the following controversial rules:

1. a rule declaring that land management decisions categorically exempted from NEPA would be further exempted from ARA appeal, *see Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 1004-05 (E.D. Cal. 2005);
2. a rule declaring that land management decisions signed directly by the Secretary or Under-Secretary of Agriculture are transformed into some other category of agency business and excluded from ARA notice and comment, *see id*. at 1005-06; and
3. a rule limiting ARA administrative appeal rights to people who submitted "substantive written or oral comments" during NEPA comment periods, without regard for the ARA's extension of appeal rights to commenters as well as people "involved in the public comment process . . . by otherwise notifying the Forest Service of their interest," *see* *Wilderness Society v. Rey*, Civ. No. 03-0119 (D. Mont. April 24, 2006).

Congress to Reinstate Forest Service Regulations

In reaction to the court decisions, the Senate is moving to add language to the appropriations bill for the Department of Interior and Related Agencies (H.R. 5386) that would restore the exemption from notice, comment and appeal for all projects categorically excluded by an agency. The Senate language was approved in subcommittee on June 27. If the language survives the Senate floor, remains through conference and is enacted into law, the public will be stripped of its ability to comment or appeal logging decisions deemed insignificant by the Forest Service.

Senate Will Hold Hearing on Federal Spending Transparency

A Senate hearing has been scheduled for July 18 to discuss the need for publicly available information surrounding federal spending and how the Federal Funding Accountability and Transparency Act (S. 2590) will create this transparency.

Sen. Tom Coburn (R-OK), the chairman of the Subcommittee on Federal Financial Management, Government Information, and International Security, announced the hearing to focus on legislation he introduced with Sens. Barack Obama (D-IL), Tom Carper (D-DE), and John McCain (R-AZ). The bill would require the Office of Management and Budget (OMB) to ensure that a single searchable website provide free public access to information about contracts, grants, loans, and other forms of federal assistance.

Coburn and Obama are rumored to be working with OMB to strengthen the bill. One

controversial provision still being debated deals with collecting grant and contract information from sub-recipients. Currently, the federal government does not collect information about sub-grants or most subcontracts. Increasingly, federal grants are going to intermediary groups that re-grant funds, as is the case with many faith-based grants. Tracking subgrants would increase accountability; however, to do so would also be extremely difficult. State and local governments, which receive the largest share of grants, commingle federal funds with their own, making it difficult, if not impossible, to track sub-recipients. How Coburn and Obama will resolve this issue remains unclear.

Information about federal spending is largely divided into two government databases. The Federal Assistance Award Data System (FAADS) provides information supplied by federal agencies regarding most types of federal spending. FAADS, however, does not include federal contracts and expenses within the federal government, such as spending for salaries. The Federal Procurement Data System (FPDS) provides access to information supplied by most federal agencies regarding federal contracts. Unfortunately, both databases have serious deficiencies and neither provides comprehensive information as some agencies are not required to report.

The Census Bureau provides FAADS data for free in quarterly downloadable files. While it is easy to download these files, it is very difficult to search within them for specific information. Users must have significant computer expertise and resources to access one quarterly file, let alone multiple quarters.

The FPDS data was administered by the General Services Administration until 2003, when the agency awarded a five-year, $24.3 million contract to Global Computer Enterprises Inc. of Reston, Virginia, to replace an antiquated procurement data collection system starting in 2004. The new system, called FPDS-NG (NG is for Next Generation), seems to focus primarily on providing an electronic vehicle for reporting and integrating agency procurement systems. Little to no emphasis appears to have been placed on public access to the data.

Access to information about federal spending has been gaining attention recently. The House has passed a bill that calls for an online, searchable database of federal assistance, but not federal contracts. According to *The New York Times*, Rep. Thomas Davis (R-VA), a sponsor of the House bill, justified not addressing public disclosure of contracts in his bill by claiming that contracts are "more self-policing" and less "susceptible to abuse" than grant, because they are "awarded in a much more competitive environment."

Interestingly, OMB Watch analysis found that, in Fiscal year 2004, 53 entities received grants or cooperative agreements worth $152.2 million in Davis' congressional district. In that same year, 899 entities received $3.9 billion in contracts in his district and of those contract dollars at least $670 million was awarded without competitive bids. In fact, Davis' district is among the top 10 recipients of contract dollars but receives a relatively small share of federal assistance awards (e.g., grants, loans).

Maybe if such data were publicly available, comments from politicians, such as those from Davis, might have more context.

Senators 'Holds' EPA Nominee to Protest Cuts to Pollution Reporting

New Jersey Sens. Frank Lautenberg (D) and Robert Menendez (D) have placed a hold on a Bush administration nominee to protest a set of Environmental Protection Agency (EPA) proposals to dismantle the Toxics Release Inventory (TRI). Last year, EPA proposed significant cuts to the TRI program, our country's most complete inventory of toxic pollution, that would according to Lautenberg, "deny thousands of communities - including 160 in New Jersey - full information about the release of hazardous toxic emissions in their neighborhoods."

Voicing outrage over EPA's proposals, the New Jersey senators have placed a hold on Molly O'Neill, the Bush administration's nominee for EPA Assistant Administrator in charge of the Office of Environmental Information (OEI) - the office in charge of the TRI program. The OEI position has been vacant since January 2006, when Kimberly Nelson left the position. O'Neill was nominated March 27. The Senate Environment and Public Committee then held a May 17 confirmation hearing to consider O'Neill's qualifications, during which several members of the committee questioned O'Neill about EPA's proposals to weaken TRI reporting and raised their concerns about the cuts.

In September 2005, EPA announced three proposed changes to the TRI program that would allow industry to: (1) release ten times the amount of toxins before detailed reporting is required; (2) withhold information on Persistent Bioaccumulative Toxins (PBTs), like lead and mercury; and (3) report every other year, instead of annually.

The agency's plans immediately raised controversial, because, for nearly 20 years, the TRI has been the essential tool in alerting emergency responders, researchers, workers, public health officials, environmentalists, community residents, and federal and state officials to the presence of toxic chemicals.

The TRI changes has faced growing public opposition. The agency has received more that 122,000 public comments on the proposals - all but a handful of which strongly oppose EPA's plans. Officials and agencies from at least 23 states have also weighed in with the agency claiming that the TRI proposals would damage states' abilities to track pollution, set environmental priorities, and protect public health and the environment.

"This shift in policy is just plain wrong and reckless, which is why we are placing a hold on this nominee," states Menendez. "New Jersey communities have a right to know about pollutants released into their air, their soil, and their water. Once again the Bush administration is abandoning its responsibility to protect Americans. The Bush

administration may side with toxic polluters, but we won't."

Coincidentally, the day after O'Neill's confirmation hearing, on May 18, the House accepted an amendment to the Interior Appropriations bill that would block EPA from moving forward on the TRI changes. The House voted 231 to 187 in favor of the Pallone-Solis Toxic Right-To-Know Amendment, which would bar EPA from spending any money to finalize the proposals. There has been widespread speculation that a similar amendment will be proposed to the Senate version of that appropriations bill.

Placing a hold on a nominee, such as O'Neill, is part of the Senate's unwritten code in which a Senator indicates that a filibuster may await the nominee if brought to the floor for a confirmation vote. Such holds, especially those that involve more than one senator, often effectively block the nominee from being considered for confirmation by the full Senate. Instead, there are often behind-the-scenes negotiations to remove the hold. In this case, the two New Jersey senators are very clear on what it would take to remove the hold: drop the EPA proposals to cut the TRI program.

With the Senate expected to be in recess for most of August and October, the president could do a recess appointment. While such appointments are temporary, they avoid the necessity of a Senate confirmation vote.

FOIA's 40th Anniversary - Bigger Backlogs and Poor Planning

This July 4th marked the 40th anniversary of the Freedom of Information Act (FOIA), signed into law by President Lyndon Baines Johnson. Open government advocates marked the occasion by releasing two reports that simultaneously underscored the importance of FOIA 40 years later and the need for improved agency procedures.

Forty years ago FOIA established the public's right to access government information, however, as OpenTheGovernment.org notes, "from its inception the implementation and usability of the Freedom of Information Act have been matters of concern." In response to increasing pressure to relieve agency backlogs and improve FOIA procedures, President George W. Bush issued Executive Order 13392 on Dec. 14, 2005. The order required, among other things, that agencies develop a plan to improve FOIA procedures, reduce backlogs, and increase public access to highly sought-after government information.

In its review of the recently released FOIA improvement plans, OpenTheGovernment.org found that "many of the improvement areas were either not addressed or rated as poorly addressed." The Securities and Exchange Commission and the Office of Management and Budget plans received the worst ratings and, of the 27 identified improvement areas, failed to address 24 and 22, respectively. Generally, reviewed agencies and offices

produced reports focused on a narrow set of problems and only explored short-term solutions with little effort to consider larger issues or longer term improvements.

The Coalition of Journalists for Open Government found that although FOIA requests were down in 2005, the backlog of unanswered requests rose from 20 percent of total requests made in 2004 to 31 percent in 2005. In addition to the increase in unanswered requests, requesters had to wait longer for replies. The worst median response time for complex FOIA requests was within the Department of Agriculture which had an average response time of 1,277 working days. The median response time of the Securities and Exchange Commission doubled from the previous year to 410 working days.

The increasingly dire state of FOIA procedures and backlogs across government agencies and the inadequacy of improvement plans may inspire Congress to resume consideration of FOIA improvement legislation. In February 2005, Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) introduced the Openness Promotes Effectiveness in Our National (OPEN) Government Act of 2005 (S. 394), aimed at strengthening FOIA.

"This bipartisan legislation will help to ensure an open and deliberate process in Congress, by providing that any future legislation to establish a new exemption to the federal Freedom of Information Act must be stated explicitly within the text of the bill," Cornyn stated at the time the legislation was introduced.

Then in March 2005, another bill sponsored by Cornyn and Leahy, the Faster FOIA Act of 2005, was reported favorably out of committee that would appoint a commission to study backlog problems and possible improvements of agency procedures.

These new reports may provide ammunition to critics of Bush's FOIA executive order, many of whom believe it to be window dressing to a serious problem that may have killed momentum for the Cornyn-Leahy legislation. Critics have also argued that the executive order cannot significantly improve FOIA, because no new resources were given to the agencies to help them speed up FOIA processing. The two reports appear to validate the critics' contention that, without additional resources, attempts to make government more transparent will be next to impossible.

Employees Weigh in to Save EPA Libraries

Presidents of 17 Local Unions representing more than 10,000 U.S. Environmental Protection Agency employees wrote to Senate appropriators on June 29 to protest deep cuts to EPA funding that would close the agency's libraries. The letter urges Congress to reinstate full funding to EPA libraries and explains how the cuts will impede EPA's ability to respond to public health, enforcement and homeland security emergencies and restrict public access to vital health and safety information.

President Bush's budget proposal released in early February included a whopping 80

percent slash in EPA's library budget from 2006 funding levels, dropping it from $2.5 million to only $500,000. In response to the cuts, EPA appears to be developing a plan to close the agency's Headquarters library and discontinue the Online Library System, an electronic catalogue, without which regional libraries will be unable to locate individual holdings. The EPA materials obtained by Public Employees for Environmental Responsibility (PEER) also consider the closing of other regional libraries or significantly reducing services.

EPA officials have repeatedly stated that the agency has made no decisions about the library budget situation. But according to the June 29 letter, the proposed cuts have already affected EPA library services in as many as 19 states. The unions maintain that "the dismantling of EPA libraries is already underway, without a coherent plan in place."

Proponents of the $2 million budget cut claim that library closures will promote efficiency, and that electronic access to the same information that the libraries provide will be maintained. However, in their letter, EPA staff claim that "nothing could be further form the truth," noting that EPA's repository of electronic documents, called the National Environmental Publications Information System, only holds about 13,000 documents, while the Agency has about 80,000 documents that should be retained. The EPA has not announced any plans to convert the nearly 67,000 paper only documents to an electronic format.

The letter also notes that contrary to claims that the budget cut is a necessary cost saving measure, a Nov. 2005 cost-benefit analysis done by the agency concludes that shutting libraries will actually lead to a much larger financial burden for EPA. *Business Case for Information Services: EPA Regional Libraries and Centers* found that EPA's library network saved more that 214,000 hours of EPA staff time, at a cost savings of approximately $7.5 million.

The library budget cuts will only become final if the Senate passes its Interior appropriations bill, which allocates funding for the EPA, with the library budget cut. If Congress chooses to it may alter President Bush's budget proposal and more fully fund the agency's libraries, which is what the EPA union letter called on Senate Appropriations Committee staff to do. After the House passed the Interior appropriations bill with the President's library funding cut on May 18, the Senate became the last resort for preserving the EPA's library resources.

The Senate Interior Appropriation Committee passed the Interior Appropriation Bill out of committee without reinstating the library budget. However, the bill may still be modified on the floor when the full Senate votes on the legislation. If the Senate did increase the library funding, such a provision would also need to make it past the conference process, by which differences between House and Senate bills are resolved.

Reports Show the Good and Bad in Agency Classification Procedures

Continuing its study of classification procedures, the Government Accountability Office (GAO) released two reports, one focusing on the Department of Defense (DOD) and the other on the Department of Energy (DOE). The reports offer a stark contrast, bemoaning DOD's "lack of oversight and inconsistent implementation" of classification policies, while praising DOE's "systematic training, comprehensive guidance, and rigorous oversight."

Previously, in *Managing Sensitive Information*, GAO found that both departments lacked clear policies, oversight, and training on handling sensitive but unclassified information. When it comes to procedures pertaining to classified information, however, the departments diverge markedly.

GAO concluded that DOE "had a largely successful history of ensuring that information was classified and declassified according to established criteria." GAO cited a National Archives' finding that DOE's management of classified information is among the best in the federal government. The agency has extensive classification guides that specify what information is to be classified, how it should be classified and at what level.

The GAO report also takes note of DOE's "extensive and rigorous oversight program." DOE regularly conducts onsite inspections at field offices, laboratories, and weapons manufacturing facilities across the country. DOE reviewed 12,000 documents from 2000 to 2005 and only 20 documents were found to be misclassified.

DOD's handling of classified information, on the other hand, lacks oversight and contains "weaknesses in training, self-inspection, and security classification guide management," according to GAO. The report reviewed a sample of 111 classified documents and found that 26 percent were misclassified. Moreover, of the 19 training programs reviewed, 8 failed to cover "fundamental classification management principles." GAO found that with over 1.8 million personnel possessing security classification authority, DOD suffers primarily from the lack of a centralized oversight process to ensure conformity with agency policy and existing law.

OMB Mid-Session Review Gives Limited Picture Of Budget Crisis

Today, the Office of Management and Budget (OMB) released its annual Mid-Session Budget Review, and has lowered by $127 billion the projected FY 2006 budget deficit - from $423 billion estimated earlier this year to $296 billion. The reduction is attributed to an unexpected rise in corporate and personal income tax receipts and revenues from capital gains taxes. Beneath the increased tax revenue, however, is a frightening reality:

the ever-widening gap between the very rich and the rest of us. Moreover, OMB's lowering of its initial projections is consistent with the White House agency's strategy of predicting drastically over-inflated deficits in order to release revisions that give the appearance of improving fiscal health.

The revised deficit figures are already being spun by the administration as good news and a mandate for their economic policies, but the short-term outlook obscures important facts about budget forecasts, revenue growth, and the long-term health and sustainability of current federal budget policies. Nothing in the new report provides optimism surrounding these concerns or the long-term budget outlook.

The mid-session report shows that for the first nine months of the fiscal year tax receipts increased by 13 percent, with corporate tax payments increasing 19 percent. Not only have corporate profits skyrocketed, but so have capital gains, which typically result when upper income earners liquidate large assets. Even as the upper end of the income scale prospers, average wages for workers have failed even to keep pace with inflation, lagging more than 1 percent behind inflation over the last year, further adding to growing income disparity in our society.

Budget deficits, while not always easy to pinpoint, can be predicted with some measure of accuracy. OMB is but one of several offices within the federal government that make such projections, and its predictions of the annual deficit earlier this year differed greatly from those of other analysts. In March, the Congressional Budget Office predicted a $336 billion deficit for FY 2006 , much more in line with private analysts' expectations than OMB's figures. When compared to CBO's projection, OMB's unexpected $127 billion in extra revenues is actually only a $40 billion "surprise."

OMB's failure to accurately predict the budget deficit this year is far from a one-time occurrence. Over the last several years, OMB has made it a practice to play an artificial expectations game in its budget analysis. The current review is the latest example of the Bush administration overshooting budget deficits and then announcing, with much fanfare, that the deficit will be less than originally projected. The news is then used as evidence to support the president's misguided economic policies.

At the beginning of 2004, OMB projected a $521 billion deficit for FY 2004, and Bush was pleased to announce later that the deficit was only $412 billion at year's end. The next year a similar situation occurred: OMB forecast a $427 billion deficit, but later, when it became apparent that the projection was unrealistic, the president announced that the deficit would be only $318 billion for FY 2005. In both instances, the president mistakenly gave credit for the improved outlook to his tax cutting policies.

When discussing his fiscal policies and the federal budget deficit, President Bush often omits critical information that belie his claims of national fiscal health. Notably, when Bush announces progress in his quest to 'cut the deficit in half by 2009', he omits two critical pieces of information. First, the deficit that he endeavors to cut in half is wildly-

off-the-mark and just a projection used in OMB's expectations game. The OMB-projected FY 2004 deficit of $521 billion, for instance, never materialized because the analysis that produced it was deeply flawed.

Second, and perhaps more importantly, Bush consistently fails to mention what happens to the budget deficit after 2009. His FY 2007 budget, released in February, forecasts that the deficit will only be reduced to $183 billion in 2010, but will increase to $205 billion in 2011. In other words, the White House has no plan for even coming close to eliminating the budget deficit, and, in fact, the result of Bush policies will create increasing and sustained budget deficits over the long-term.

While a declining budget deficit is certainly a positive development, the short-term picture in OMB's mid-session review obscures a looming budget crisis. When the president or tax cutters in Congress talk about budget deficits, they usually refer to the "unified budget deficit." In short, the unified budget deficit refers to the difference between how much the government spends and how much revenue it brings in through taxes, fees, and other sources.

This deficit includes extra money brought in by payroll taxes collected to fund the Social Security trust fund in the future. Money from the fund is loaned to the federal government, which will need to pay back the loan when funds are needed to pay Social Security benefits to retiring Baby Boomers. By invoking budget figures as defined by this method of accounting, the president omits $170 billion in deficit spending - the money brought in this year for the Social Security program that must eventually be paid back. So, when the president's budget heralds a $318 billion deficit, he is actually boasting about a $488 billion deficit.

The federal budget is on an unsustainable track and our nation's long-term fiscal outlook, rather than looking brighter, is actually growing dimmer. Although OMB and the president will trumpet the positive news about short-term budget prospects, they obscure or outright hide several important facts in their discussions of the deficit. Erroneous and overtly simplistic assertions about the relationship between tax rates and economic expansion, glib talk about revenue "surprises", and convenient omissions of the long-term fiscal outlook do nothing to motivate solutions to fixable deficit problems.

The current policies that have created structural deficits endanger the ability of the government to repay its obligations right now, but especially in the future. The longer this administration puts off straight talk about the budget and the deficit, the more daunting future challenges will be.

Congress Running Out of Time for Approps Work

Lawmakers returned to Washington on Monday after a week-long 4th of July break. Both chambers of Congress are far behind in their work for the year and appear to lack

momentum toward completing contentious legislation, including immigration and pension reform, additional tax cuts, and budget process changes. This already nearly guarantees that a continuing resolution (CR) will be necessary for funding the federal government after the start of the fiscal year on Oct. 1, and that this Congress will then need to return after the November elections to wrap up essential legislation before the next Congress convenes.

While Congress has usually waited until September to declare dead the chances of completing must-pass appropriations bills on time, rumors have circulated all year long about the need for continuing resolutions and a post-election lame duck session. These rumors could be due to the extremely short length of this legislative session - among the shortest in the modern history of Congress. Yet the shortened session aside, this Congress has been particularly inept at finishing what should be its top priority - appropriations bills.

With just seven weeks left until the targeted adjournment for the year, the Senate has yet to pass one appropriations bill. In fact, the Senate appropriations committee has approved only half of its 12 bills for the year so far.

The $31.7 billion Homeland Security appropriations bill is scheduled for floor debate in the Senate this week, and debate is expected to take at least a full week as Senators prepare a host of amendments to add funding for border, port, and rail security. The bill is already $715 million over the president's requested funding level and $1.5 billion more than the amount enacted for FY 2006. Republican leaders in the Senate hope to keep the focus on military and security spending for the rest of July by bringing the Defense and Military Construction appropriations bills to the floor later this month, following their approval in committee.

While these bills are more likely to be completed before the start of the fiscal year, the outlook for the remaining appropriations bills is far less clear. If the Senate can complete those three defense-related spending bills by the end of July - no small feat - nine bills would still need to be finished in the Senate and then conferenced with the House, and there'd be just one month to do so.

Moreover, those three bills are among the least controversial of the group. The Labor-HHS-Education bill - the only bill yet to be passed by the House - contains a divisive increase to the minimum wage to be phased in over the next two years and has encountered intense scrutiny by members of both chambers to the total amount of funding for the bill. The Transportation-Treasury bill has contentious provisions such as funding for Amtrak and a pending congressional pay raise and usually one of the most benign bills - the Legislative Branch bill, which appropriates funding for Congress - has run into opposition.

Because of the limited time remaining in the legislative session, and conflicts and controversies over funding in many of the appropriations bills, the Senate may decide to

add a continuing resolution to the Defense appropriations bill this month. This unusual step may be necessary to assure the passage of a CR in the divided political environment of an election year. Congress would then need to return after the November election to finish the appropriations bills before the CR runs out.

This CR would, in all likelihood, under-fund government programs by continuing current funding levels without adjusting for inflation. It could also include an across-the-board cut in discretionary spending - a popular device touted as a fiscal control that in reality saves very little money.

Regardless of the tactics used moving forward, the budgeting process of Congress is clearly on the verge of breakdown. With legislators spending so few days in session actually working, it's no wonder they cannot complete in a timely manner their most essential work: that of funding the government through appropriations.

Report Finds IRS Program Could Hamper Free Speech for Organizations

A new OMB Watch report finds fault with the Internal Revenue Service (IRS) program to enforce the ban on partisan activities by charities. The report's most serious findings suggest that the IRS's Political Activities Compliance Initiative (PACI) threatens the constitutional rights of nonprofit organizations and churches to speak out on issues of the day. It also suggests that the IRS exaggerated the extent of noncompliance in an agency report on its enforcement efforts in 2004. Finally, the potential for abuse of the program in order to harass or retaliate against an organization is of concern during the upcoming election season.

The report raises questions and issues about the IRS enforcement initiative. It summarizes the new PACI procedures that apply to the 2006 election season and beyond, as well as the new IRS Fact Sheet 2006-17, which provides guidance on voter mobilization, individual activities by leaders, voter guides, candidate appearances, issue advocacy, business activity, web sites and combined activities.

Because IRS investigations are confidential few details are known about their examinations of political activities. But some organizations under investigation or people that file complaints with the IRS have disclosed information about their specific cases. A special supplement to the report provides details of ten known cases, including the NAACP, gathered from news reports and complaints.

Questions and issues raised include:

Vagueness of the Facts and Circumstances Test and the Reasonable Belief Standard
Charities, educational institutions, and religious organizations are prohibited from participating or intervening in any political campaign on behalf of, or in opposition to,

any candidate for public office. But tax law lacks clear rules defining prohibited intervention in elections, instead considering the "facts and circumstances" of each case.

Is the Political Activities Compliance Initiative a Solution in Search of a Problem?
The answer is far from clear. IRS statements exaggerate the level of noncompliance by charities and religious organizations. The IRS claimed 74 percent of cases investigated involved violations, a figure based only on cases that were not dismissed after two rounds of investigation. A closer look at the IRS data reveals a very different picture. In all, no violation was found in 64 percent of all completed investigations.

Is the IRS Program Effective Enforcement or an Unconstitutional Infringement on Speech?
Several factors, when taken as a whole, raise constitutional concerns around the PACI program:

- the vagueness of the "facts and circumstances" test
- secrecy regarding enforcement action
- IRS statements regarding its intent to prevent repeat violations before an election
- the threat that an organization's tax-exempt status will be revoked
- lack of deadlines for closing cases

Uneven Enforcement and Harassment Issues
A lack of transparency creates confusion and uncertainty about the enforcement process. Section 6103 of the tax code protects the privacy of individual charities and religious organizations. It also has prevented the IRS from adequately informing the public of the agency's interpretation of the law. Absent a bright line test, the most useful information for avoiding noncompliance comes from details of specific cases.

So far what has come to light raises concern about unevenness in how the IRS treats similar fact situations. Also, publicity around the PACI program could lead to a flood of retaliatory and harassment complaints in the 2006 election year, unless the IRS develops standards to screen out such abuses of its procedures.

Sanctions: Should the Law be Changed?
IRS staff has recommended changes in the law that would provide them with more enforcement options. But what sort of legislative modifications are anticipated? No specific proposals have been made public. Congress could devise a bright line test, add intermediate sanctions, such as advisory letters, to the IRS enforcement tool box, or both.

The conclusion and recommendations notes that the IRS's new approach to enforcement could hamper nonpartisan issue advocacy and voter education and mobilization efforts and identifies the lack of a bright line rule defining what is partisan and what is not as a major problem.

Nonprofits File Suit Contesting Ohio's New Voter Registration Requirements

A coalition of organizations and individuals have filed suit to stop new voter registration rules in Ohio, charging they are designed to suppress the registration of minority and economically disadvantaged voters.

The organizations are requesting an injunction to prevent rules established by Ohio Secretary of State Kenneth Blackwell from being implemented. In the complaint, the groups argue that the new rules will be burdensome on volunteers who register voters and may have a chilling effect on the ability of nonprofit organizations, such as Project Vote, Common Cause, and the People for the American Way, and their volunteers to register new voters.

At issue are procedural requirements for the return of the voter application forms and a new interactive training program. Specifically, the organizations charge that the rules require any "compensated worker" to return voter registration forms directly to the Ohio Secretary of State or Board Elections Office. Failure to do so is a felony punishable by six to 18 months in jail.

On June 14, the rules were revised to allow return to the Secretary of State by mail, but forms must still be sent by the person that registered the voter, not an organization sponsoring a voter registration drive. Critics argue that the requirements make it difficult for the third-party group organizing voter registration activities to double-check forms and keep necessary records. Additionally, although the new requirements apply only to compensated workers, the rules do not define "compensation." According to the *Toledo Blade*, groups like the League of Women Voters of Ohio fear that the failure to define "compensation" will discourage volunteer efforts because potential volunteers may think "compensation" could include drinks, t-shirts, or food.

Another of the organization's major concerns is a requirement that voter registration workers complete an individualized online training program. The regulations provide no alternative to completing the training online, making it difficult to train workers in poorer, disadvantaged neighborhoods with little or no access to the Internet.

In the suit, the organizations claim the rule has already begun to hinder their voter registration efforts. According to the *Plain Dealer*, Donita Judge, staff attorney with the Washington-based Advancement Project, argues that, "the effects of the law and rules disproportionately affect voter registration drives in minority communities, where many residents don't have transportation, lack the technological skills to register online and are, in some cases, functionally illiterate."

The rules stem from Ohio House Bill 3, passed by Ohio's state legislature and signed by

Gov. Bob Taft in January, intend to create strict procedures for registering voters. The new rules were upheld in a party-line vote by the state's Joint Committee on Agency Rules Review (JCARR), which, according to Patrick Cramer of Ohio State's Moritz School of Law, cannot alter the proposed rule, but can instead recommend to the General Assembly that it invalidate the rule.

Catholic Group Responds to IRS Complaint By Forming New Group

A Catholic anti-abortion group, Catholic Answers, recently announced it will form a new organization, Catholic Answers Action, after a 2004 complaint filed with the Internal Revenue Service (IRS) claimed its Voter's Guide for Serious Catholics was a partisan intervention in that year's election. The new group is a social welfare organization exempt under 501(c)(4) of the tax code, and is not subject to the ban on partisan activity that applies to charities and religious organizations under section 501(c)(3). It intends to publish a similar 2006 version of its voter guide.

The 2004 complaint was filed by Catholics For a Free Choice (CFFC), citing an August 2004 ad sponsored by Catholic Answers in *USA Today* that urged readers not to consider voting for candidates who were on the wrong side of five 'non-negotiable' issues. The ad also sought tax-deductible contributions to support distribution of the guide. A CFFC press release announcing the complaint noted that Catholic Answers founder Karl Keating also engaged in electioneering by targeting presidential candidate Sen. John Kerry (D-MA) in the group's e-newsletter. Keating is quoted as saying Kerry "flunks the test given in Catholic Answers' Voter's Guide for Serious Catholics: He is wrong on all five 'non-negotiable' issues listed there."

In April Keating posted a letter on Catholic Answers Action's Website announcing the formation of the new group, maintaining his group was "forced to start it" because of the IRS complaint filed by Catholics For a Free Choice. He noted that, "For more than a year her [Frances Kissling, CFFC president] complaint has been wending its way through the IRS, which has been sending us loads of interrogatories to answer."

Although he denied Catholic Answers had violated the ban on partisan activity, he said the group did not want to cope with the time and expense of further IRS complaints that the 2006 guide would likely generate. As a result, CAA was incorporated in January, with the same board of directors as Catholic Answers. However, Keating's letter notes the two groups have separate activities, funding, and accounting and publish separate e-newsletters. The two groups will share office space and staff.

In his letter Keating correctly states that the 501(c)(3) organizations can discuss political principles but cannot endorse or oppose candidates. However, he incorrectly states that the 501(c)(3) cannot support or oppose specific legislation. In asking for donations, he

notes contributions to the new 501(c)(4) are not tax-deductible, but goes on to note that "Starting a new organization gives us two advantages: We won't be hassled with groundless but financially debilitating complaints filed [by] the IRS. We will be able to be more outspoken than we have been."

The Voter's Guide for Serious Catholics for 2006 instructs readers to research candidate positions on five non-negotiable issues (abortion, euthanasia, embryonic stem cell research, human cloning, and "homosexual 'marriage'"), and vote for candidates that support the Catholic Answers Action position. It also claims that "Distribution of this voter's guide does not violate the Internal Revenue Service regulations governing dioceses, parishes and other non-profit organizations." However, 501(c)(3) organizations would be well-advised to consult legal counsel and review the recent IRS Fact Sheet 2006-17, which stresses that voter guides must not focus on a narrow range of issues or be structured to reflect bias. In addition, the IRS notes that 501(c)(3)s' distribution of biased voter guides prepared by other organizations can still amount to a violation of the ban on partisan activity.

Catholics For Free Choice welcomed the announcement of the new group, noting that "reporting violations works." This year it has filed a complaint against Priests for Life. In a press release announcing the complaint, the group says Priests for Life is recruiting volunteers to expressly elect pro-life candidates. According to Frances Kissling, CFFC president, "Priests for Life's current violations and open and flagrant contempt for the IRS [and] the tax-exempt regulations is breathtaking."

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Regulatory Matters

Federal Budget

Nonprofit Issues

Information & Access

Sunset Legislation Faces Vote on the Floor, Advocates Speak Out

The House will vote this week on two "sunset commission" bills, under which unelected commissions would be given the authority to recommend sweeping changes in the federal government and force those changes through Congress.

Committee Mark-Up Makes a Bad Bill Worse

The two bills were rushed through a July 19 hearing and then marked up the next day by the House Government Reform Committee.

The Brady bill, H.R. 3282, was voted out of committee on largely party line votes with Rep. Todd Platts (R-PA) crossing the aisle to oppose the legislation.

Committee Chairman Rep. Tom Davis (R-Va) offered a manager's amendment to the Tiahrt bill, H.R. 5766, expanding the scope of the commission's reviews to include rules and regulations. The amendment also requires the commission to review the constitutional basis of all programs and agencies. This amendment vastly increases the scope of the commission's power and puts individual regulations, not just programs, on the chopping block.

H.R. 5766 is scheduled for a vote on the floor this Thursday, July 27. While the Brady bill is not currently scheduled for a floor vote, there are rumors that the Brady bill could be combined with the Tiahrt bill before reaching the floor.

Growing Legions Oppose Sunsets

Over 350 organizations and thousands of concerned constituents have sent letters to Congress opposing sunset commissions. A broad coalition of both national and state groups joined together to send a letter to Congress opposing sunsets. Environmental, labor, education, healthcare and veterans groups have also sent individual letters opposing sunset commission legislation. (Click here for the latest batch of letters, and check with www.OMBWatch.org/sunset for up-to-the-minute info.)

"The innocent intent of cleaning up some frivolous government agencies/departments could have possible far-reaching unintended consequences," said the American Legion in a letter sent to House Speaker Dennis Hastert (R-IL) opposing sunset commission legislation. "Quite frankly, the idea of growing government (creation of sunset commissions) to reduce government seems like poor public policy. How is a decision made as to whether a sunset commission is accountable, efficient and effective? Is that decision made by yet another sunset commission?"

Next Steps

The current schedule is for the House Rules committee to take up only the Tiahrt bill on July 26 and propose a rule for considering the legislation on the floor on July 27. According to one rumor, the Brady bill text could be put up as an amendment to be voted on when the Tiahrt bill goes the floor. The end result would be the two separate approaches becoming title I and title II of a combined bill.

The Brady bill would require all government programs and agencies to be subject to a commission review at least once every 12 years. If Congress did not expeditiously deal with the commission recommendations, the program or agency would be automatically terminated. Under the Tiahrt bill, every program, agency or regulation would be subject to the possibility of a sunset review. If a review were desired, a commission would be formed. Its recommendations would be fast-tracked through Congress, limiting debate and

opportunities to amend the recommendations.

Bipartisan opposition to sunset commission legislation is growing. Along with champions emerging from all corners of the Democratic caucus, several Republican members are now raising concerns, among them Rep. Sherwood Boehlert (R-NY), who issued a statement today opposing the bills.

Last-Minute Attempt to Add Estate Tax to Pension Reforms Fails

Over the last week, Capitol Hill has been abuzz with speculation that House and Senate GOP leaders were engaging in a last-ditch effort to attach a provision gutting the estate tax to a sensitive and complicated pension reform conference report. The sneaky move failed, however, as Senate Majority Leader Bill First (R-TN) announced today he could not convince a number of key Republicans, particularly Sen. Olympia Snowe (R-ME), to support it. With little time left and far too much to do, it is highly unlikely that the Senate will return to the issue this year. In related news, President Bush has moved to gut IRS estate tax enforcement.

Early this week, Senate and House leaders and conferees to the pensions bill were still trying to negotiate a compromise that would include estate tax "reform," no easy task as all seven Democratic members of the conference committee openly expressed opposition estate tax language being included in the bill. In addition, three Republican members of the conference committee - Snowe, Charles Grassley (R-IA) and Michael Enzi (R-WY) - expressed strong reservations about including an unrelated estate tax provision costing almost $300 billion.

Frist led the desperate effort to pass any reduction in the estate tax. Earlier this year, he convinced House Chairman of the House Ways and Means Committee Bill Thomas (R-CA) to pass a stand-alone "compromise bill" on the estate tax. When Frist could not secure the votes to bring the House bill up on its own, he began to look elsewhere. Realizing the pensions bill will almost certainly be the last tax bill of the 109th Congress, Frist pushed hard to enact one last enormous tax giveaway to the richest Americans.

The move was rejected, however, for the very reason Frist sought to attach it to the pension reform bill: the bill was too important to risk losing consensus., The House and Senate have been negotiating for months to iron out differences in a broad overhaul of laws regulating the way private companies fund their employee pension plans. Even without adding the estate tax issue, the compromise remains tenuous at best. This fragile balance appears to have been a contributing factor to resistance from Republicans on the conference

committee.

If the estate tax language had been inserted and the seven Democrats withheld their signatures from the conference report as expected, all nine Republicans would have needed to endorse the report, in order for it to move to the floor for consideration and final passage. With three Republican Senators repeatedly expressing their reservations, including anything related to the estate tax would have almost certainly proven too difficult.

Many observers saw Snowe as holding the key to the GOP votes on the conference committee. Over the years, Snowe, the senior senator from Maine, has often found herself at the center of resistance to radical tax cut plans, particularly the recently passed capital gains and dividend tax cuts, as well as the total size of the 2003 tax cuts. Once again, she has been able to exert considerable influence against additional tax cuts for the very wealthiest Americans at the expense of working families.

With little time left and far too much to do, it is unlikely that the Senate will return to the issue this year. Yet even as this latest attempt to gut the estate tax failed, some in Congress are vowing to hold a popular package of tax cuts that was supposed to be included in the pensions bill over until September in order to attach the estate tax reform to it and take one more shot before the elections.

Administration Pulls Out All the Stops to Render Estate Tax Meaningless

While it appears that Congress has failed to repeal or slash the estate tax, the Bush administration is shifting tactics and moving to eliminate the need for wealthy citizens to comply with the estate tax. The *New York Times* reported over the weekend that the IRS is planning to eliminate 157 attorneys working in the estate and gift tax division - nearly half of the staff at the IRS who audit tax returns of the country's richest citizens. According to six estate tax attorneys who leaked the plans to the *Times*, the reductions are part of a continuing effort to "shield people with political connections and complex tax-avoidance devices from thorough audits."

The White House decision seems particularly suspect as both the IRS and the Treasury Department have recently reported to Congress that tax cheating and avoidance by high-income Americans is a significant and growing problem. The country had an annual tax gap - which is the difference between the taxes owed by Americans and the taxes collected by the government - for 2005 in excess of $350 billion.

Household Debt: A Growing Challenge for American Families and Federal Policy

Mirroring the federal government's penchant for spending more money than it collects, the American public now has a negative net savings rate. Home prices, medical care, and college tuition are all growing faster than wages, and debt has become increasingly pervasive among American households.

These are facts that have not escaped the attention of American consumers, 82 percent of whom now recognize household debt as a serious problem, according to a recent survey sponsored by the Center for American Progress.

What is perhaps most remarkable about personal debt in America is that, while a large majority of Americans recognize it as a problem, the issue is nowhere near the top of the agenda of national policymakers. This is particularly striking in light of the fact that many proposed solutions enjoy significant bi-partisan support. For instance, the Center for American Progress survey found that both Republicans and Democrats (by more than 80 percent margins) agree that:

- there should be more incentives for people to save money,
- lending companies should provide simple and uncomplicated language that explains their charges and fees,
- more education and counseling should be provided to customers, and
- there should be caps on the rates of interest that credit card companies charge.

The Center for American Progress has launched an effort to draw broader attention, especially among lawmakers, to the issue of household debt. At a one-day conference, *Debt Matters: Raising The Profile Of Household Debt In America*, panel discussions were held to describe the current state of American debt: public attitudes toward it, how payday lenders are harming low-income workers and members of the armed services, and trends and possible solutions to credit card debt.

The range of topics covered by the conference underscores just how far-reaching are the effects of household debt on Americans. Debt hurts low- to moderate-income earners in ways that block their mobility into higher income levels. Debt hurts all (low-, moderate- and even high-income earners) by making it difficult to send children to college and fund retirement accounts. In the case of the former, having fewer college-educated people drags down the economy by limiting productivity and the creation of a highly trained workforce, and, in the case of the latter, a widespread lack of retirement savings could push Social Security into a precarious situation as a larger percentage of retiring Baby Boomers rely on

it as a primary source of income.

For many workers at the bottom of the income scale, payday lending often serves as a necessary bridge between the rising cost of living and stagnant wage growth. Payday lenders recognize this fact and, relying on an uninformed customer base, often take advantage of their clients, charging average annual interest rates upwards of *400 percent*.

Extraordinarily high interest rates are only part of the perniciousness of payday lending. Many payday borrowers become trapped in a cycle of debt as loans from previous weeks roll over into new loans when they cannot payback the original money borrowed. The Center for Responsible Lending has found that 99 percent of payday loans go to repeat borrowers and 91 percent of payday lenders' business comes from borrowers who borrowed more than five times in a year.

Without access to low-cost lending, many low-income workers have little choice but to continuing paying exorbitant fees and interest rates to lenders praying on poor credit histories and limited knowledge of loan terms. For many low-income families, lack of access to low-cost credit has become a major impediment to accumulating wealth and has severely hindered their chances for economic mobility.

But debt is not just a problem for those at the bottom of the economic ladder. For Americans in the middle three quintiles of the income scale, credit card debt has begun affecting more and more families. In recent years, credit card issuers have been enjoying a surge in revenues. Center for American Progress Senior Fellow Robert Gordon and Associate Director for Economic Policy Derek Douglas, in a recent issue of Washington Monthly, wrote: "From 1996 to 2003, the money credit-card companies make from fees has more than quadrupled, to $7.7 billion."

The authors also assert that fine print and complicated language obfuscate the terms of credit agreements, and as a result many Americans are hit with unexpected fees and increased interest rates on loans and credit.

It's not just the cagey practices of credit card companies that are putting the bite on the middle class. Median household income has failed to keep pace with steadily increasing everyday living expenses like housing, health care, energy, and college tuition. Even those holding four-year college degrees are beginning to feel the pinch. *The Los Angeles Times* recently reported that workers with four-year college degrees have seen their wages fail to keep pace with inflation for the first time in over 30 years. In fact, these workers have seen their earnings fall 5.2 percent after adjusting for inflation between 2000 and 2004, according to White House estimates.

Unfortunately, taking out larger loans and going deeper into debt is one strategy that

Americans have used to deal with this dire situation, and the marketplace has responded accordingly. Lenders have in recent years created more ways to lend money (like interest-only mortgages), increased fees charged to consumers, and insistently advertising their products.

Interestingly, household debt and the national debt have some of the same implications, because their repercussions will extend beyond our current fiscal situation into future generations. While fixing one mitigates the other, fixing both would be a gift to the children and grandchildren of Baby Boomers, the post-World War II babies who are set to retire in a few short years. Without adequate retirement savings, this cohort will rely on Social Security as its primary source of income.

Yet it has been Social Security that has been propping up the federal government coffers by paying for current services with its large surpluses. When the extra revenues from Social Security run out and the program begins to call in loans from the federal government to continue funding benefits, cuts elsewhere in the government will be increasingly hard to avoid - particularly to discretionary programs. Having fewer services and supports for the public in the future will force more families to turn to loans and lending establishments, continuing a destructive cycle of debt.

Obviously, change is in order. Lawmakers and other government officials need to begin paying more attention to the staggering levels of debt American families are being forced to endure. This, perhaps even more so than the national debt crisis, is creating challenges for future generations, but it is a problem that is fixable. The first step toward a solution is a commitment to a national conversation about how and why we came to owe so much money to creditors. Only then can we begin to craft comprehensive policy solutions to this growing problem.

Religious Groups Ask IRS to Revisit Audit Procedures

On July 17, 2006 an attorney representing several religious organizations wrote to the IRS requesting that the agency revise its new procedures for initiating audits of religious groups. According to the letter, the process is inconsistent with First Amendment protections codified by Congress in 1984, and was implemented without pubic notice or comment. The letter is the latest in a series of public criticisms of the IRS approach to oversight of religious and charitable organizations, including a recent OMB Watch report.

The letter to the IRS, written by Marcus Owens of Caplin and Drysdale in Washington, D.C., characterized the new procedures as a "clear violation" of Section 7611 of the Internal Revenue Code (IRC), which Congress passed "in order to protect churches' First

Amendment rights."

Section 7611, enacted in 1984, expanded protections for religious organizations from unnecessary IRS audits by strengthening IRS procedural requirements. Section 7611 requires that all determinations to proceed with IRS inquiries into religious organizations be made by appropriate high-level Treasury officials, such as the Secretary of the Treasury or a delegate "no lower than that of a principal Internal Revenue officer for an internal revenue region." According to the conference report from the 1984 legislation, an audit is allowed to proceed only if this high-level official believes the organization may no longer qualify for its tax exemption based on "facts and circumstances recorded in writing."

Owens' letter notes, however, that the IRS has recently informally delegated this authority to a lower level within the agency, maintaining that "the IRS has become overly casual in its interpretation of the statute, setting the stage for exactly the sort of invasive governmental action that Congress feared, and contributing to a recent apparent dramatic increase in the number of church audits." The changes cited by Owens that reflect the failure to ensure the required "appropriate high level official" determination are:

- On May 9, 2006, the IRS formalized the new delegation of authority to lower-level officials in the Internal Revenue Manual (see ILM 200623061 and IRM Sec. 4.76.7.4), stating that determinations regarding audits of religious organizations are to be made by the Director of Exempt Organization Examinations (EO Exams). Owens believes this position is not senior enough, since the Director reports to a position several levels below the IRS Commissioner and has narrow responsibilities, as opposed to the broad policy perspective held by a high-level official.
- In a May 2005 internal memo the Director of EO Exams delegated authority downward by authorizing an "EO Referral Committee" comprised of career civil service employees to make determinations on whether to examine religious and charitable organizations for impermissible partisan activity.
- In October 2004, Rosie Johnson, Director of EO Exams, designated LaPaula Davis, an IRS employee at the manager level, to act as Director of EO Exams solely for the purpose of initiating inquires into religious organizations. Owens notes that "[g]iven the unsystematic and sporadic way the preceding documents were released, there may well have been other delegations that have not been made public."

The letter points out that since 1984 the IRS has changed its internal structure and there are no longer Regional Commissioners. According to Owen, the IRS is thus left with two choices: ensure that a high-level official makes the determination on whether to audit a religious group, or provide for public notice and comment on any proposed change.

The issue is important, he maintains, because the procedures provided for in Section 7611

"ensured that officials in a position to consider the broad policy implications of their actions would make the decision to initiate the inquiry and this requirement is a key component of the set of statutory safeguards that Congress enacted to ensure that churches are protected from overly intrusive IRS review."

The letter concludes by asking the IRS to revisit its policy and ensure that appropriate high-level officials are making determinations regarding inquiries into religious organizations and "reconsider whether a church tax inquiry is warranted in any of the ongoing inquiries and audits."

OPM Drops Problematic CFC Certification on Lobbying Expenses

Under pressure from nonprofit groups, the Office of Personnel Management, the independent federal agency that manages civil service government employment, proposed last month to drop an unclear certification requirement discouraging nonprofits from conducting legally-permissible issue advocacy.

On May 24, the Office of Personnel Management (OPM) issued a proposed rule that would significantly change the "eligibility requirements and public accountability standards" for charities participating in the Combined Federal Campaign (CFC), a fundraising drive conducted every Sept. through Dec. that allows federal employees to donate directly to participating organizations of their choice.

Currently, organizations applying to participate in the CFC are required to certify that "the organization has no expenses connected with lobbying and attempts to influence voting or legislation at the local, State, or Federal level or alternatively, that those expenses would classify the organization as a tax-exempt organization under U.S.C. 501(h)." (5 CFR 950.202(c))

The proposed rule would remove the certification requirement completely. The rule states, "OPM proposes to remove this standard because it is already a requirement for charitable organizations to qualify as a tax-exempt entity under section 501(c)(3) of the Internal Revenue Code and to maintain that status with the IRS. In addition, some applicant organizations have misinterpreted the standard to mean no lobbying is permitted, when in fact, lobbying is permissible if consistent with Internal Revenue Code requirements."

Some nonprofit groups applying to receive donations through the CFC have read the certification requirement as prohibiting nonprofits from engaging in legally permissible lobbying. Many have also misconstrued the requirement as a prohibition on lobbying for

any 501(c)(3) that is not a 501(h) elector. Clarifying this requirement was especially important due to the large number of organizations (22,000 in 2005) participating in the CFC. According to Liz Towne, Director of Advocacy Programs at Alliance for Justice:

In March 2003, we raised our concern that the application language was inaccurate and discouraged advocacy organizations from participating in the CFC Combined Federal Campaign. It is great to see that the CFC has followed through and dropped the confusing, redundant question altogether and we hope this results in more advocacy organizations participating in the program.

Alliance for Justice worked with OPM for over three years to remove the certification requirement.

OPM will accept comments on the proposed rule until Aug. 14

Report Examines Political Coordination of Tax-Exempt Organizations

A new study by the Campaign Finance Institute (CFI) examines the electoral and advocacy roles played by different types of nonprofit organizations, and suggests possible reforms.

In a report released July 19, CFI found that nonprofit organizations often use 501(c)(4), 501(c)(5), and 501(c)(6) entities, as well as 527 organizations and federal political action committees (PAC)s, in an integrated fashion to advance political agendas. CFI conceded that nonprofits are not circumventing the law but noted that these "networks" are wielding a large amount of influence over elected officials. The study also calls for more clarity and enforcement of the "electioneering communications rule" established by the Bipartisan Campaign Reform Act and the Internal Revenue Service's "facts and circumstances" test.

527 Organizations

The report addressed recent proposals to regulate 527 organizations and concerns over the "electioneering communications rule" established by BCRA. Language regulating 527 organizations is currently in H.R. 4975, the House-passed lobby reform bill that is awaiting conference with S. 2349, the Senate version of the bill that does not contain language regulating 527s. The study deals specifically with the question of whether the regulation of 527 organizations would force those activities to be carried out by 501(c)(4-6) organizations. CFI suggests that "most of the groups...had financially strong advocacy organizations that could potentially take over 527 activities without jeopardizing their primary advocacy missions."

In the face of the potential flow of funds from 527 organizations to 501(c)(4-6) organizations, CFI calls for improved disclosure to the IRS, including:

- clarification of the "facts and circumstances test" that the IRS utilizes to determine whether a 501(c)(3) organization has engaged in political advocacy, and
- clarification on the definition of the "political expenditure" disclosure requirement on Form 990, the annual return nonprofits submit to the IRS. The study indicated that the 2002 requirement for 501(c) groups to disclose political spending has been largely ignored by 501(c)(4-6) organizations.

Electioneering Communications Rule

While calling for increased regulation and enforcement, CFI reported positive findings regarding compliance with the electioneering communications rule. According to CFI, "almost all of the 501(c)s we looked at were, in their public statements, able to clearly identify a range of non-express advocacy communications (labeled "voter education", "voter guides", "get-out-the-vote", "issue discussion") including ads as part of their overall election programs". The findings illustrates that, while clearer guidance from the IRS on what distinguishes election advocacy from issue advocacy may be helpful to nonprofit organizations, those that expend large amounts of money are clearly already educated on the regulations.

Some critics have taken issue with the reforms suggested in the report. According to BNA, Fred Wertheimer of Democracy 21, a nonprofit group focused on campaign finance, argued that proposals to rein in 527 organizations are adequate because current law limits the political activities of 501(c)(4-6) groups.

In recent elections, both 501(c)(4-6) entities and 527 organizations have played a role in electoral politics, although neither 501(c)(4-6) nor 527 organizations can engage in express advocacy, such as encouraging voters to vote for or against a particular candidate.

The report examined 12 interest groups that use multiple tax-exempt structures.

Support Grows for Contracts and Grants Disclosure

The financial and information management subcommittee of the Senate Committee on Homeland Security and Governmental Affairs held a July 18 hearing on the Federal Funding Accountability and Transparency Act (S. 2590). Support in the Senate for the bill that would create a free, searchable public database of government contracts and grants has surged in recent weeks, helping propel the issue forward.

Senators from both parties, along with a wide array of conservative and progressive groups, voiced strong support for the bill, which is co-sponsored by Sens. Tom Coburn (R-OK), Barack Obama (D-IL), John McCain (R-AZ), and Tom Carper (D-DE).

"In my view, the reason for such broad support in simple," explained McCain. "People are beginning to realize that the only way to control spending and ensure accountability is to let the American people see exactly how their money is being spent."

Speakers stressed the difficulties of finding current data on federal contracts and grants.

"There are several different databases of federal spending information, but they all work differently, they are all incomplete, and there is no way to see the full picture of government spending," stated Obama. "And if we as Senators can't get this information, you can be sure that the American people know even less."

Cobert said the bill, that moves beyond the minimal requirements under the Freedom of Information Act, would create a "Google for Government Spending." Lauding the bill, he told the hearing that requiring the government to provide information on where taxpayers money is going will reduce government waste and promote accountability and efficiency.

Gary Bass, executive director of OMB Watch, while praising the bill, asserted that "such legislation should be perceived as a first step in a much larger effort to enhance transparency in federal spending."

Bass suggested revisions to the bill that OMB Watch believes would strengthen its ability to inform the public, while stressing that these concerns should not hold up passage of this important bipartisan effort. Bass's recommendations included measures to increase usability for novice users and opportunities for public feedback, and improve the quality of contract data (which is often incomplete and uninformative).

Possibly OMB Watch's most important suggestion was that the bill's requirement to disclose sub-grants be delayed and implemented initially as a smaller pilot project. Because federal grants are so often combined with state resources and then re-granted, the requirement would be next to impossible for grant recipients, and state and local governments to comply with unless new ways of handling intergovernmental fund transfers are developed. Moreover, according to Bass, the federal government should not be passing an unfunded mandate to state and local governments or to smaller nonprofit organizations that receive federal grants.

Eric Brenner, the director of the Maryland Governor's Grants Office, was also troubled by the sub-recipient reporting requirement. Coburn announced several changes to the bill at the hearing, including a delay in implementation of the sub-recipient reporting and

including a study and a pilot project to develop models for implementation. Brenner and Bass both indicated that these changes moved the sub-recipient provisions in the right direction.

Additional support for the bill came from Mark Tapscott, editorial page editor of the Washington Examiner, who testified that the government database would be a valuable source of information to journalists, who would in turn help foster a more participatory democracy.

"I have no doubt there will be many, perhaps hundreds of blogs created specifically to analyze and track federal spending within specific issue areas and industries," stated Tapscott. "The result will be a vastly more well-informed citizenry, a public policy debate informed by more accurate and extensive knowledge of government policies and programs and a more effective targeting of our society's resources."

The Senate Homeland Security and Government Affairs Committee is expected to mark up the Federal Funding Accountability and Transparency Act (S. 2590) later this week, and Committee Chair Susan Collins (R-ME) has agreed to co-sponsor the bill. In fact, new co-sponsors are being added almost daily. The bill has found support in a number of senators rumored to be presidential contenders beyond McCain and Obama. For example, Sens. Hillary Clinton (D-NY), Bill Frist (R-TN) Evan Bayh (D-IN), and George Allen (R-VA) are now among the growing roster of co-sponsors.

The House has already passed a bill (H.R. 5060) co-sponsored by Reps. Roy Blunt (R-MO) and Tom Davis (R-VA), that would provide public access to information about federal financial assistance (loans and grants) but none about federal contracts. Each of the witnesses in last week's Senate hearing, including Coburn, in turn, criticized this approach. Meanwhile, OMB Watch is constructing a database that will provide federal contracts and grants data in a publicly searchable format. The online resource will be available for public use beginning in October of this year.

Specter's Bill Remains a Threat to Civil Liberties

Legislation introduced by Sen. Arlen Specter's (R-PA) that would retroactively legalize the president's NSA wiretapping program will be the focus of a Senate Judiciary Committee hearing scheduled for July 26. The National Security Surveillance Act (S. 2543) would also create a legal framework for future surveillance of American citizens.

With the recent announcement that Specter and the White had reached an agreement on the bill, pundits have charged that the legislation is little more than a thinly veiled

acquiescence to the president's claims of authority to conduct such a program without oversight. Specter spoke out in a July 27 opinion piece in the *Washington Post*, seeking to justify his position on presidential authority and oversight. He begins by declaring:

President Bush's electronic surveillance program has been a festering sore on our body politic since it was publicly disclosed last December. Civil libertarians, myself included, have insisted that the program must be subject to judicial review to ensure compliance with the Fourth Amendment.

In the same piece, however, Specter reverses course, stating that the president's position--that his program is justified by his Article II powers granted by the U.S. Constitution--may be legally defensible. Specter touts his bill as a solution to the legality problem that would "permit a determination of the program's legality" by submitting the program to the Foreign Intelligence Surveillance Court for review and approval.

OMB Watch, as pointed out previously in *The Watcher*, finds the Specter bill to be a disastrous solution to a dangerous problem. According to Specter, "the bill does not accede to the president's claims of inherent presidential power; that is for the courts either to affirm or reject. It merely acknowledges them, to whatever extent they may exist."

By retroactively acknowledging that the president has "the constitutional authority of the executive," however, the bill allows the federal government to wiretap anyone's phone calls or read anyone's emails without judicial approval or oversight. No longer would the government have to obtain a court's approval to eavesdrop on communications.

Moreover, the bill destroys any attempt to challenge surveillance through the federal court system. Not only would the bill retroactively justify the legality of Bush's wiretapping program,, it would immediately shift all pending legal challenges (approximately 20 or so currently winding their way through the system) to the jurisdiction of the Foreign Intelligence Surveillance Act (FISA) court. This would place the cases before a court that is highly deferential to the president's authority, rejecting only 4 of the 20,810 requests for surveillance since its inception in 1979.

EPA's Science Advisory Board Opposes TRI Proposals

The U.S. Environmental Protection Agency's Science Advisory Board (SAB) recently sent a letter to the agency expressing concerns over its plans to reduce information collected under the Toxics Release Inventory (TRI). The SAB maintains that the proposed cuts would "hinder the advances of environmental research used to protect public health and the environment." SBA sent the letter detailing its concerns to EPA Administrator Stephen

Johnson on July 12.

The SAB's Environmental Economics Advisory Committee (EEAC) drafted the letter to protest the cuts because of the importance it believes maintaining comparability and validity in TRI data holds. The EEAC rated "the maintenance of the integrity of TRI data as a high priority for EPA and the research community at large." The letter was co-signed by the chair of the SAB and the chair of the EEAC.

The letter cites several of the proposals' harmful outcomes for the research community, including:

- Making toxic release data incomparable over time and across facilities;
- Impairing researchers' ability to use TRI data to assess spatial health impacts of toxic chemical releases;
- Hindering the identification of epidemiological relationships between releases and health; and
- Limiting the national picture of the effect of toxic chemicals in the environment.

Congress established the SAB in 1978 to advise EPA on technical matters. The SAB, composed of roughly 50 scientists from across the country, among other things, reviews the quality and relevance of the scientific and technical information being used for regulations, and advises the agency on broad scientific matters in science, technology, social and economic issues.

The SAB letter is the latest in a series of protests from lawmakers and government officials. On May 18, the House of Representatives passed an amendment to the FY 2007 Interior appropriations bill that prohibits EPA from spending any money to finalize its proposals. On July 10, two senators placed a hold on Molly O'Neill, the administration's nominee to direct EPA's Office of Environmental Information, which runs the TRI program, in protest of EPA's proposed cuts to the TRI.

In addition, EPA has received more that 122,000 public comments expressing strong opposition to the proposals. Officials and agencies from 23 states have also weighed in with the agency claiming that the TRI proposals would damage the ability of states to track pollution, set environmental priorities, and protect public health and the environment.

Chemical Security Debate Continues in House

The House Homeland Security Committee is scheduled to mark up chemical security legislation later this week. The Chemical Facility Anti-Terrorism Act of 2006 (H.R. 5695), introduced by Rep. Daniel Lungren (R-CA) last month, currently has ten cosponsors.

Critics of the bill, including a number of environmental and public interest groups, charge that it would actually lead to less security for our nation's chemical plants.

According to a letter from 36 environmental, labor and public interest organizations sent to committee members on July 18, H.R. 5695 is deficient because it:

- Does not require the use of safer technologies to eliminate preventable disasters;
- Preempts states and localities from establishing more protective programs;
- Contains no meaningful role for workers in developing security plans;
- Does not cover drinking water facilities that use hazardous chlorine gas; and
- Requires only the high risk plants selected by Department of Homeland Security (DHS) to submit security plans for approval.

The Senate Homeland Security and Governmental Affairs Committee passed chemical security legislation (S. 2145) on July 14. Critics contend that while S. 2145 is far better than the House bill, it also lacks key provisions to ensure that safer technologies are implemented when feasible and some level of public accountability.

Environmentalists and safety advocates have pressed Congress for several years to establish a uniform chemical security program that encourages industrial facilities to move away from using and storing large volumes of hazardous chemicals. Research indicates that in many cases, where safer production methods exist, use of hazardous chemicals pose a wholly unnecessary risk to workers and surrounding neighbors. The EPA estimates more than 100 chemical plants are close enough to major urban centers to each put more than a million people at risk in the event of an accidental or terrorist-related 'worst-case' chemical release.

Sens. Frank Lautenberg (D-NJ) and Barack Obama (D-IL) have proposed The Chemical Security and Safety Act (S. 2486), which would require chemical plants to consider inherently safer technologies to reduce or remove the potential danger to the community. So far, however, the Senate has largely ignored the proposal. The House will have an opportunity to vote on requiring the use of inherently safer technologies in a provision similar to the Lautenberg-Obama bill, which is expected to be offered as an amendment to H.R. 5695.

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Contracts and Grants Disclosure Bill Fast-Tracked

The Senate Committee on Homeland Security and Governmental Affairs unanimously passed the Federal Funding Accountability and Transparency Act (S. 2590) on Aug. 8. The bill would create a searchable website that provides information about all federal spending, including government contracts and grants. Following the quick committee action, Sens. Susan Collins (R-ME) and Joseph Lieberman (D-CT), the commitee's chair and ranking member respectively, jointly requested that the bill be fast-tracked and brought to the Senate floor for a unanimous consent vote. Unfortunately, time ran out for the unanimous consent request to reach the floor before the August recess.

The speed with which S. 2590 has moved in the Senate should come as no surprise given strong bipartisan support for the measure and last month's extremely positive hearing on the

bill. The bill was introduced by Sen. Tom Coburn (R-OK) and Barack Obama (D-IL) but has a growing list of cosponsors, 29 currently, from both sides of the aisle. The effort to bring the bill to the Senate floor under a unanimous consent vote reflects this broad support. Items brought to the floor under unanimous consent can only pass if no senator objects. Clearly, Collins and Lieberman believe that S. 2590 has enough appeal among both conservatives and liberals that not one senator would object.

Collins requested the unanimous consent agreement on Aug. 2 and Lieberman followed suit soon after. It was expected that the Senate would not break for its recess until Aug. 4. The Senate, however, wrapped up on Aug. 3, leaving little time for Senate offices to review the bill and for the bill to still have floor consideration. Even with strong bipartisan support, some fear that a senator might anonymously object to the bill given historically there's been little congressional enthusiasm of public disclosure.

When the Senate returns in September, the bill's fast-track schedule will likely resume, as long as no objections are raised. If the bill is passed under unanimous consent, the Senate's strong bipartisan support for the bill may convince the House to place identical legislation on a fast track for a vote.

Currently, the House has passed a bill (H.R. 5060) that would provide access to information about federal grants but not contracts. The House legislation, co-sponsored by Reps. Roy Blunt (R-MO) and Tom Davis (R-VA), has been strongly criticized as a half measure because of the failure to include online disclosure of federal contracts. Rather than attempt to reconcile the differences between two very different bills in conference, some have speculated that the House may simply take up the Coburn-Obama legislation.

Renewed Call for FOIA Improvement Legislation

Experts testified last month at a subcommittee hearing of the House Government Reform Committee that agencies still have a long way to go toward improving their handling of Freedom of Information Act (FOIA) requests. Their testimony, along with troubling findings from a congressional report on FOIA, may help move reform legislation forward.

The Subcommittee on Government Management of the House Government Reform Committee held a hearing on July 26 on improvements to FOIA processes. Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) testified at the hearing, Implementing FOIA--Does the Bush Administration's Executive Order Improve Processing?, continuing their call for legislation to build on Executive Order 13392, "Improving Agency Disclosure of Information."

The hearing focused on agency improvement plans required by the executive order, which

were released earlier in July. Responding to increasing public scrutiny of FOIA problems, Executive Order 13392 required agencies to develop plans to improve FOIA procedures, reduce backlogs, and increase public access to highly sought-after government information.

Despite the executive order, implementation of FOIA continues to be plagued by a number of problems, according to those who testified. "This month as we mark the 40th anniversary of the Freedom of Information Act, the current ebb tide of public access to government information has been especially severe. After four decades, FOIA--a bulwark of open government--is under a targeted assault," Leahy testified.

Rep. Brad Sherman (D-CA) called attention to a report from OpenTheGovernment.org on the FOIA improvement plans that, according to Sherman, "paints a bleak and very different picture of agency compliance with the executive order." Patrice McDermott, the report's author and director of OpenTheGovernmment.org, confirmed Sherman's observation testifying that "of the 459 possible scores assigned by the reviewers, only 14 were 'good.'"

The hearing was also an occasion for the release of a new Government Accountability Office (GAO) report on FOIA procedures and agency improvement plans.

"Despite processing more requests, agencies have not kept up with the increase in requests being made," according to the report. Increasing backlogs of unprocessed requests are cited as a major problem by the report, which found that "the number of pending requests carried over from year to year has been steadily increasing, rising to about 200,000 in fiscal year 2005--43 percent more than in 2002."

Tonda Rush of the National Newspaper Association testified that the executive order does not go far enough: "It fails to address some of the most pressing problems facing FOIA today, such as the lack of alternatives to litigation to resolve disputes, the lack of incentives to speed processing, and excessive litigation costs caused by unwarranted denials."

Leahy and Sherman made strong cases for FOIA legislation to improve the current law's implementation and to remedy problems beyond the scope of Executive Order 13392. In February 2005, Cornyn and Leahy introduced the Openness Promotes Effectiveness in Our National (OPEN) Government Act of 2005 (S. 394), aimed at strengthening FOIA. Then in March 2005, Cornyn and Leahy introduced a second bill, the Faster FOIA Act of 2005, to establish a commission to study backlog problems and possible improvements of agency procedures. Similar bills, the OPEN Government Act (H.R. 867) and Faster FOIA Act (H.R. 1620), have been offered in the House by Reps. Sherman and Lamar Smith (R-TX).

The hearing and the new GAO report may provide the needed momentum for Congress to take action on FOIA. "No generation can afford to take these protections for granted," stated Leahy, "and it should be the goal of each generation of Americans to hand over to the next

the legacy of a stronger and more vibrant FOIA than the one we inherited."

Safer Chemicals Provision Improves Federal Chemical Security Bill

The House Homeland Security Committee on July 27 passed what is being hailed by public interest groups as a substantially improved chemical security bill, the Chemical Facility Anti-Terrorism Act of 2006 (H.R. 5695). The bill, sponsored by Rep. Daniel Lungren (R-CA), establishes security requirements for our nation's chemical facilities, something that critics charge is long overdue. The original bill, however, had serious flaws, among them failing to require companies to use safer technologies and preempting states and localities from establishing their own security programs.

During the markup of the bill, Reps. Edward Markey (D-MA) and James Langevin (D-RI) successfully added amendments to the bill which will:

- Require high-risk facilities to consider switching to safer chemicals and process, and give the Department of Homeland Security the authority to require these facilities implement safer alternatives if it's feasible and not cost-prohibitive; and
- Allow states to set more stringent chemical security requirements, so long as these requirements do not "frustrate the federal purpose."

Public interest groups have praised the amendments. "We applaud the Committee for recognizing that guards and fences alone do not guarantee that Americans are protected because the deadly chemicals remain behind those fences," U.S. PIRG staff attorney Alex Fidis told reporters. "Switching to safer technologies removes the bull's-eye on chemical plants that terrorist could exploit to inflict mass casualties."

When Congress reconvenes in September, the House Energy and Commerce Committee, which also has jurisdiction over the legislation, will review and markup H.R. 5695. The Markey-Langevin amendments are likely to receive particular attention there. Committee members may strengthen the bill further, leave the current provisions or strip them out entirely.

The Senate is also expected to pick up where it left off on chemical security after the congressional recess. On July 14, the Senate Homeland Security and Governmental Affairs Committee unanimously passed chemical security legislation, S. 2145, that lacks the stronger provisions that were added as amendments to the House bill.

The Senate bill, however, has reportedly been bogged down because of a variety of objections from more than a dozen senators. In a letter to the objecting senators, Homeland Security

and Government Affairs Committee Chairwoman Susan Collins (R-ME) urged her colleagues to allow the bill to reach the Senate floor and settle any differences over the legislation there.

Bush Nominates Anti-Regulatory Zealot to Head Regulatory Policy

The White House has nominated Susan Dudley, an anti-regulatory extremist from the industry-funded Mercatus Center, to an obscure but powerful office where she would have the power to gut the federal government's very ability to protect the public.

Dudley would become the administrator of the Office of Information and Regulatory Affairs, an office in the White House Office of Management and Budget with enormous authority over environmental, health, and safety regulations.

Dudley would replace John Graham, who left the office in February to become dean of the RAND Graduate School. During Graham's time in office, regulatory agencies ranging from the Occupational Health and Safety Administration (OSHA) to the Food and Drug Administration have seen their policies weakened and their ability to develop new safety and health standards diminished.

Nominating Dudley to this office is a signal that the White House is not interested in reversing course. Through numerous comments on regulations and articles on regulatory policy, Dudley has displayed hostility to environmental, health and safety protections. She has opposed important health and safety standards such as limiting arsenic in drinking water and installing advanced air bag technology in automobiles.

In her own words:

- **On Davis-Bacon:** "The prevailing wage requirement does not offer net benefits to society, but rather reflects a transfer from low-skilled and low-wage workers to skilled and union workers . . . . There is no economic justification for a federal role in defining construction practices and determining wages, as required by the Davis-Bacon Act."
- **On OSHA regulation generally:** "In the case of OSHA regulation, empirical analysis has not found strong evidence that OSHA regulations have had a substantial impact on worker health and safety . . . . OSHA's regulations are costly for the economy. According to recent estimates, OSHA regulations contribute nearly one-half of the total direct cost of workplace regulations--around $41 billion per year in 2000. MSHA regulations cost another $7.4 billion. It is unclear whether these costs produce commensurate benefits. Econometric studies have generally failed to find evidence that OSHA regulations have had a significant impact on job safety."

- **On arsenic in the drinking water:** The Clinton standards were "an unwelcome distraction from the task of protecting the water supply. . . . While [EPA] should share information about arsenic levels and hazards, it should not impose its judgment, based on national average costs and benefits, on individual communities as to how best to invest in their own public health."
- **On food safety:** "Unscientific fears, fanned by activists and short-sighted government policies, have led to a regulatory framework that singles out genetically modified crops for greater scrutiny and even prohibition. . . . Policymakers regulating agricultural biotechnology face pressure from well-organized activists to constrain the new technology. Large biotech companies do not speak out aggressively against unscientific policies, either because they don't dare offend the regulators on whom their livelihood depends, or because regulations give them a competitive advantage."
- **Again on GM crops:** "In spite of hundreds of thousands of field tests as well as peer-reviewed research papers, no evidence indicates the presence of any unique environmental or health risks from the products of gene-splicing."
- **On environmental right to know:** "Informing the public about hazards in their community is an intuitively desirable social goal. . . . However, this does not argue that any information on chemical releases is desirable. . . .[I]t is important to recognize that information is costly to produce, and depending on how it is communicated and received, may confuse, rather than inform. Even if we determine that information on the release of certain chemicals has a net social value, we cannot assume that more frequently reported information, or information on a broader range of chemicals would be more valuable. Only when the social costs of information are weighed against the social benefits can a determination be made regarding what and how much information is optimal."
- **On investor right to know:** "Concerned that investors are not receiving the information they need regarding the tax consequences of investing in mutual funds, the SEC required mutual funds to report standardized after-tax returns along with the standardized pre-tax returns they already report. . . . The SEC's only stated criterion in developing the rule is that the information be deemed 'helpful' to investors in making investment decisions. But the SEC has no way of identifying information that meets this standard except by observing what information is brought forth by the private sector. It has not identified any market failure that would warrant regulatory action."
- **On privacy of consumer financial information:** "The implicit premise of the rule is that individuals and firms cannot come to a mutually satisfactory agreement as far as privacy is concerned without resort to government assistance. Indeed, if individuals truly value their privacy, and firms desire to maximally satisfy their customers, then a meeting of the minds ought to be achievable without resort to compulsory regulations."
- **On improved air bag standards:** "NHTSA estimates that air bags have reduced fatalities in frontal crashes by about 30 percent. Moreover, judging from vehicle

manufacturers' pre-regulation actions and ongoing advertising, which lists dual air bags as a positive attribute in new vehicles, consumers appear to prefer vehicles equipped with air bags. These facts, however, are not sufficient to justify federal regulation requiring air bags. If air bags protect lives, and consumers demand them, it is reasonable to assume that automobile manufacturers would have installed air bags in the absence of federal requirements to do so."

- **On fuel economy:** "Worst rule of 2003: The National Highway Traffic Safety Administration corporate average fuel economy (CAFE) standards for light trucks. NHTSA continues to force vehicle manufacturers to achieve higher miles per gallon than the market would offer, or consumers would choose, in the absence of the regulation. Absurdly, its economic model shows large net benefits to consumers even if markets are assumed to operate perfectly, i.e., without counting any externalities. We know this must be false, because any regulatory constraint that forces consumers away from their preferred choices must have negative net benefits (i.e., make Americans worse off)."

If Dudley is confirmed, she will have the opportunity to weaken the regulations she has spent her career criticizing, a prospect that could be devastating for the individuals who rely on the federal government to meet national needs, like providing safe drinking water, responding to global warming, or keeping workers safe on the job.

Sunset Legislation Delayed Until September

In a sign that public pressure from concerned citizens works, the two sunset commission bills in the House scheduled for floor votes the week before August recess were both delayed until September.

First, early in the week, the most radical of the two House bills, Rep. Kevin Brady's H.R. 3282, was pulled from the House's voting schedule. A vote was still scheduled for the other, Rep. Todd Tiahrt's H.R. 5766.

Because of provisions in the bill that thoughtful lawmakers on either side of the aisle could never agree to (such as putting Social Security and environmental, health, and safety regulations on the chopping block) and vocal opposition from citizens and public interest groups, Congress pulled the bills from the schedule at the last minute, delaying the votes until the fall.

Both Brady and Tiahrt vow to bring their bills back to the floor when Congress returns from its August recess, but both bills will likely continue to face the hurdle of garnering the support of House appropriators. House Appropriations Committee Chair Jerry Lewis (R-CA), as well as many members on the appropriations committee, have expressed strong

reservations about sunset legislation. They fear independent commissions could supplant the authority of Congress, including its responsibilities surrounding the appropriations process.

Continuing to take action and spread the word will ensure that Congress does not believe the pressure is off.

While members are back in their districts for the August recess, their constituents can also use the time to demand answers about the threat of sunset commission legislation.

FEC Releases Proposed Exemption for Grassroots Lobbying Broadcasts

The Federal Election Commission is set to vote soon on a grassroots lobbying exemption to the Bipartisan Campaign Reform Act's election-season ban on broadcast communications that discuss a federal candidate.

On Aug. 3, the Federal Election Commission (FEC) released a proposal to allow corporations and unions to fund advertisements 60 days before a general election or 30 days before a primary, on either television or the radio, discussing a federal candidate's position on an issue.

Specifically, the advertisement must:

- Be directed at the lawmaker in his capacity as an incumbent officeholder, not a candidate;
- Discuss a public policy issue currently under consideration;
- Urge either the officeholder or the general public to take a specific position on an issue, and in the case of the general public, urge them to contact the officeholder.

However, the advertisement cannot:

- Discuss the officeholder's character or fitness for office;
- Reference any political party or election; or
- Promote, support, attack or oppose any candidate for federal office.

The creation of the interim final rule was spurred by a petition for rulemaking filed by the AFL-CIO, Alliance for Justice, the U.S. Chamber of Commerce, the National Education Association and OMB Watch. The interim final rule, to be voted on Aug. 29, will be in effect through Sept. 2007. The FEC will take comments on the interim final rule until Sept. 30, 2006.

Background

The Bipartisan Campaign Reform Act (BCRA) forbids unions and corporations, including nonprofits, from funding TV and radio messages mentioning federal candidates that are aired 60 days before a general election or 30 days before a primary; however, BCRA allowed the FEC latitude in creating necessary exemptions.

In 2003 the FEC approved an exemption for 501(c)(3) organizations from the "electioneering communications" rule, because 501(c)(3) organizations are prohibited from electioneering under the Internal Revenue Code. The FEC, however, was ordered by a federal court to reconsider the exemption and later voted to drop the exemption. If the interim final rule is not approved, the restrictions will apply to all advertising aired during the blackout period of the 2006 U.S. congressional election cycle.

GAO Finds More Grantee Input. Standardization Needed in Grants Streamlining

A new report by the Government Accountability Office found that, while some progress has been made in the federal government's effort to simplify and streamline grant-making procedures, there is still room for improvement. Consequently, federal grantees may be continuing to divert resources from program objectives to comply with burdensome administrative requirements.

In a report released July 28, the Government Accountability Office (GAO) identified three areas that have not been adequately addressed as the federal government continues to streamline its grants process. In interviews with 17 grantees, GAO found that federal grantees still face an excessive administrative burden due to a continued lack of standardization, inadequate communication, and technical problems with Grants.gov, the website where grantees can find and apply for grants.

Key issues identified by GAO include:

Lack of Standardization Across Agencies

According to the report, grantees find that many federal grant-making agencies still use different application, payment, and reporting systems. Grantees must submit forms at times by mail or Grants.gov, and at others by an online federal agency system. Additionally, agencies have not yet standardized definitions and formats for grant documents across all agencies.

Many grantees also advocated "develop[ing] uniform reporting requirements, formats,

guidelines and submission frequencies." Progress and financial reports due dates are often varied, and the information required for various grants can be vastly different.

Technical Problems with Grants.gov

A law enacted in 1999, P.L. 106-107, requires a common system that grantees can use to apply for, manage, and report on federal financial assistance. However, under the current Grants.gov application, grantees cannot manage or report on grants across multiple agencies. There is a stalled initiative currently within OMB to create this common system, but had grantees "been consulted about their priority of needs, greater emphasis may have been placed on implementing this initiative," according to the report.

Inadequate Communication Between Grantors, Grantees and OMB

GAO found that there has been a continued lack of communication between OMB and grantees that has "limited [grantees'] ability to use and understand new technology" implemented through Grants.gov. Some grantees had not even heard of Grants.gov, and others expressed concern about the lack of training they received on the grants management system. Again, the report finds "some of these issues may have been resolved more quickly if communication with grantees had been greater."

GAO made two recommendations to further the grants streamlining process:

- OMB should ensure that grantees opinions are obtained as new technologies and policies are being created. Without ongoing grantee input, the enacted reforms are less likely to meet the needs of the grantees and achieve the purposes of P.L. 106-107.
- Congress should reauthorize P.L. 106-107 beyond its Nov. 2007 sunset date, because, as GAO concluded, "it appears that without additional oversight, the law's goals are not likely to be met in the short term."

Congress originally passed Public Law 106-107, the Federal Financial Assistance Management Improvement Act, in 1999 out of concern that administrative requirements imposed on federal grantees were overly burdensome. The legislation requires all 26 federal grant-making agencies to streamline administrative requirements for grantees and involve grantees in developing and implementing goals. It also requires the Office of Management and Budget to create a common application for all grants, currently called Grants.gov.

Senate Defeats Estate Tax Giveaway...Yet Again

The Senate voted last week to reject a tax and wage package dubbed the "trifecta" that would have slashed the estate tax permanently, increased the minimum wage modestly, and

extended a broad set of tax breaks. The bill, passed by the House last month, also contained a number of "sweeteners" to entice targeted senators to vote for the bill.

"What I will do over the next month [is] assess where America is," Frist said. "And what I would very much like to do or to have happen is ... pressure from the American people. If I felt that, I would use that procedural option in bringing these back."

The trifecta package cleared the House on July 29 on a 230-180 vote. It provided for:

- An increase in the estate tax exemption to $5 million ($10 million for a couple) from the current $2 million level, and a cut in the tax rate to 15 percent for the bulk of estates from today's 46 percent. These changes were to be phased in by 2015 and had different tax rates for estates valued above and below $25 million (see table below for proposed changes);
- A nominal increase in the minimum wage by $2.10 - the first such increase in almost a decade - but about half that amount in real terms when you adjust for inflation and a functional decrease in states where tips are counted against employers' wage.
- A tax break extension package including the research and development tax credit, the state sales tax deduction, the college tuition deduction, and the welfare-to-work credit.

Estate Tax Changes Proposed in H.R. 5970

		Taxable Rate	
Year	**Amount Exempted from Taxation**	**Estates under $25 million**	**Estates $25 million or larger (adjusted for inflation to the nearest $100,000 starting in 2016)**
2010	$3,750,000	Cap Gains (15%)	40%
2011	$4,000,000	Cap Gains (20%)	38%
2012	$4,250,000	Cap Gains (20%)	36%
2013	$4,500,000	Cap Gains (20%)	34%
2014	$4,750,000	Cap Gains (20%)	32%
2015 or thereafter	$5,000,000 (adjusted for inflation to the nearest $100,000 starting in 2016)	Cap Gains (20%)	30%

The bill also had a number of tax provisions inserted in order to entice selected senators to

vote for the trifecta. For example, a provision aimed at Sen. Maria Cantwell (D-WA), who held her ground and voted against the motion, would allow timber operators to claim a 60 percent deduction for "qualified gains" from timber sales before 2008. She didn't bite. West Virginia senators were thrown a $3.9 billion bone for cleaning up abandoned coal mines, a sweetener that may have been a factor in Sen. Robert Byrd's (D-WV) vote to proceed with the bill.

A $60 million provision was aimed at Sen. Daniel Akaka (D-HI) that would have restored a pre-1993 tax break allowing business-travel deductions for spouses that would help his state's tourism-dependent economy. The provision would end Jan. 1, 2008, and was not enough to sway Akaka. The bill included language Sen. Mark Pryor (D-AR) supported on rural development bonds that would help his state, but Pryor still did not vote to proceed with the bill.

Frist opened floor debate on the trifecta insisting, if not threatening, that this would be the Senate's last opportunity, perhaps assuming that a majority supporting each of the parts translated into a majority supporting the whole.

But in the end, the estate tax provision, which would have eliminated about 75 percent of estate tax revenues, amounting to $750 billion including interest costs in the first decade of full implementation, proved too costly to bear for Democrats and moderate Republicans.

Pryor resisted the addition of rural development bonds key to his state in the bill, saying that "the estate tax package before the Senate goes far beyond what out nation can afford." Republican George Voinovich of Ohio said the trifecta "would be incredibly irresponsible when we must fund the war, secure the homeland and when we know the tidal wave of entitlements are coming due. The numbers just don't add up."

In the end, four Democrats voted for the motion to proceed to debate on the bill: Byrd as well as Sens. Blanche Lincoln (D-AR), Ben Nelson (D-NE), Bill Nelson (D-FL). Two Republicans, Sens. Lincoln Chafee (R-RI) and George Voinovich (R-OH), voted against the motion to proceed. Sen. Max Baucus (D-MT), who would have likely voted for the motion to proceed, was away attending a funeral; Sen. Joseph Lieberman (D-CT), also absent from the vote, would have likely voted against the motion to proceed.

GOP outrage at the defeat of the trifecta was well-expressed by Sen. Kay Bailey Hutchison (R-TX): "We are turning our back [sic] on the middle-class and poor people in this country who depend on the minimum wage and death-tax relief."

Minority Leader Harry M. Reid (D-NV), citing the fact that, under the bill, "8,100 of the wealthy and well-off hit the jackpot, while millions of working families get $800 billion in [national] debt," managed to hold on to the votes of 38 Democrats, despite at times intense

lobbying by Frist. Reid was also quick to point out that estate tax repeal will not benefit the middle-class, but rather the richest of the rich in this county.

The Republicans gambled and lost on the all-inclusive bill, and have jeopardized the fate of the popular tax extenders that they could easily have passed as a standalone. Reid tried to attach the extenders to another bill before the Senate left for recess but was rebuffed by Frist. Reid has stated his intention to continue pushing for the tax extenders' passage.

Meanwhile, what will happen next with the provision for back-door repeal of the estate tax also remains to be seen. Frist has rejected calls to bring the "extenders" portion of the trifecta to the Senate floor in a standalone bill, saying "I don't see it unless we do these three." Given Frist's unwavering commitment to gutting the estate tax, the Senate could quite possibly vote yet again on an estate tax measure when Congress reconvenes in September. However, supporters of the estate tax in the Senate have held the line despite having some "vulnerable" members of their ranks tempted by targeted inducements in the bill. So it seems unlikely that any of these targeted senators would change his or her vote should Frist raise the issue again in September.

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Nonprofit Issues

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As Elections Near, New Complaints of Partisan Activity Filed Against Religious Groups

New complaints filed with the Internal Revenue Service (IRS) accuse churches in Missouri and Texas of participating in partisan political activities that are prohibited under the tax code. Meanwhile, Focus on Family announced a new voter mobilization drive aimed at evangelical churches which will likely result in IRS complaints before the November elections. Both developments highlight the continued confusion and ambiguity that have plagued IRS policy on voter education and mobilization activities by nonprofits.

Missouri Catholic Conference and Voter Education on Stem Cell Research

On July 25, the *Kansas City Star* reported that a complaint had been filed with the IRS on the previous month against the Missouri Catholic Conference (MCC), alleging it engaged in prohibited partisan electioneering. The complaint claims that MCC sent more than 50 letters to candidates for the state legislature threatening negative publicity as a result of accepting campaign contributions from Supporters of Health Research and Treatments (SHRT), a group that supports medical research including stem cell research. At issue is a state constitutional amendment pending in the legislature, which would ban human cloning but also ban state and local government from discouraging stem cell research allowed under federal law. MCC opposes

the amendment, and obtained information on SHRT contributions from the Missouri Ethics Commission.

One such letter, sent to Rep. Jim Guest (R-King City), copied in the complaint, which was filed by Washington, D.C. attorney Marcus Owens. The letter points out that Guest had received $300 from SHRT, and explains that MCC "is committed to informing Missouri voters about campaign contributions promoting human cloning and embryonic stem cell research, and will report to Missouri voters regarding candidates who choose to associate themselves with this and similar organizations that promote such unethical practices. Therefore, if you have received but returned such a contribution or contributions, the MCC would like to report this fact to Missouri voters." The letter goes on to ask for documentation proving return of the SHRT donation. Guest, who has not returned the money, told *The New York Times*, "I'm not sure if extortion is the right word, but they basically threatened me if I didn't return the money, and that's certainly stepping across the line."

MCC has demonstrated its intention of following through and publicizing information about candidates that take money from SHRT. The complaint includes copies of two MCC publications listing, in a negative context, legislators and candidates that received such contributions. For example, the March 10, 2006 issue of the St. Louis Review Online, the weekly newspaper of the St. Louis Archdiocese, lists the SHRT contribution recipients and reminds readers that, "The Church has condemned embryonic stem-cell research as immoral..."

According to Owens' complaint to the IRS, the MCC's letter "is a crude attempt at intimidation, designed to threaten political candidates into submission by using church resources.". Owens also points out that MCC, as a Catholic organization, has access to information from the General Counsel of the U.S. Conference of Catholic Bishops that provides clear guidelines on what is and is not partisan activity. As a result, Owens maintains MCC's actions are a "knowing and willful attempt by the MCC to manipulate political candidates and engage in prohibited campaign intervention by disseminating favorable and unfavorable statements about candidates." Owens asks the IRS to therefore "take immediate action," including conducting a church tax inquiry under IRS rules and seeking an injunction in federal court that would prevent further violations.

The case deals with both permissible lobbying and advocacy on the state constitutional amendment and apparently impermissible attacks on legislators and candidates in their capacity as candidates not decision makers. It is difficult to predict what the IRS will do with this complaint, and unless MCC releases information about any IRS action privacy laws will keep the results confidential. Catholic Online, a prominent Catholic news site, however, reported on Aug. 21 that the IRS has apparently decided to take no action against the Archdiocese of St. Louis over statements made by Archbishop Raymond Burke's before the 2004 election. The Archbishop told Catholic voters to support pro-life candidates and oppose pro-choice candidates, prompting Catholics for Free Choice to file a complaint. In sharp contrast is the IRS action against All Saints Episcopal Church of Pasadena, California. (See Supplement B: Publicly Disclosed Cases from OMB Watch's recent report on the IRS's Political Activities Compliance Initiative.)

Texas Congregation Seeks Return of Contribution to GOP

Americans United for Separation of Church and State (AU) issued a press release on July 19 announcing it has filed a complaint at the IRS against Calvary Temple Church in Kerrville,

Texas, because of contributions the church made to the Republican Party totaling $1,500 between 2003 and 2005. A few days later Calvary Temple pastor Del Way told the *Kerrville Daily Times* the contribution was for advertising as part of a golf tournament and was not intended to endorse a political party. According to Way, the church has written to the Republican Party asking it to return the funds. AU discovered the payment in records at the Texas Ethics Commission. The Republican Party has not yet announced its decision regarding return of the funds, saying it had used the money for administrative purposes. However, such use would be a violation of IRS rules.

Focus on Family Voter Drive Targets Evangelical Churches

On Aug. 15, Focus on Family issued a statement announcing an eight-state initiative to increase turnout among evangelical voters. Dubbed iVoteValues.org, the project will focus on Maryland, Michigan, Minnesota, Montana, Pennsylvania, Ohio, New Jersey and Tennessee. According to the statement, Focus on Family is "recruiting key evangelical churches" and "church coordinators" to conduct a wide variety of voter registration and mobilization activities. A response from AU Executive Director Rev. Barry Lynn said Focus on Family leader James Dobson has "made it abundantly clear that electing Republicans is an integral part of his agenda, and he doesn't mind risking the tax exemption of churches in the process. Dobson wants to be a major political boss, and this is his way to get there."

With Hearing Possible on Extremist Nominee for Regulatory Czar, Opponents Gear Up for Fight

While a vote on Susan Dudley's nomination to be the new White House regulatory czar has yet to be scheduled, it is rumored that the GOP majority on the Homeland Security and Government Affairs Committee will try to push a vote through in September.

If confirmed, Dudley would oversee and have the ability to curtail the important health, safety and environmental regulations she has spent much of her career opposing.

Susan Dudley's nomination to head the Office of Information and Regulatory Affairs (OIRA) within the White House's Office of Management and Budget will likely face strong opposition from public interest, labor and environmental groups. Dudley has challenged regulation of industry in a number of areas and has publicly presented extremist positions on issues that will come before her as head of OIRA. Environmentalists have already begun to paint a picture of her as a danger to environmental and health concerns.

In response to the controversial nomination, OMB Watch has launched an online information and action center, Dudley Watch, to track the latest developments and provide analysis of Dudley's regulatory record. Visitors can find links to Dudley's scholarly work, analysis of Dudley's opinions on important regulatory developments and background on the Mercatus Center, the industry-funded think tank where Dudley served was head of regulatory policy from 2003 until her nomination this year.

Susan Dudley was nominated by the president in July to head OIRA, an office in the White House with broad power over federal regulatory policy, yet Dudley spent her time at the

Mercatus Center opposing health, safety and environmental regulations. She has opposed lowering the threshold for arsenic in drinking water and closing loopholes in the Davis Bacon Act, which requires employers to pay locally prevailing wages and benefits on public works projects. Dudley has utilized cost-benefit analysis as a weapon to undermine or kill regulations that industry opposes. She even claims that cost-benefit studies demonstrate that OSHA regulations--many of which are widely recognized as protecting the lives and safety of countless - have not had a "substantial impact."

Dudley applies the same logic to the public's right to know about toxic chemicals. According to her public interest comments, while it may be an "intuitively desirable social goal" to provide information to the public, it costs money and may even "confuse, rather than inform" the public. The costs must be outweighed by the social goal, explains Dudley, and even when this is the case it does not suggest that more information available to the public is in order.

Were Dudley to be confirmed as the next regulatory czar, she would likely review an EPA proposal that would undermine the Toxics Release Inventory, the premier right-to-know program about chemical information.

Dudley's championing of industry at times comes across as frighteningly naive. Arguing against regulation requiring air bags in vehicles, which have clearly been shown to save the lives of drivers and passages, she writes that, "if air bags save lives and consumers demand them," then the auto industry would have installed them without federal regulations.

In addition to her pro-industry work at the Mercatus Center, Dudley also once worked for OIRA, reviewing environmental regulations, and was widely criticized by environmental groups for her decisions there.

Dudley Materials Reappear on Mercatus Website

Earlier this month, OMB Watch reported that articles authored by the nominee to replace John Graham as the head of the Office of Information and Regulatory Affairs (OIRA), Susan Dudley, were no longer available on the website of the Mercatus Center, the industry-backed think tank where Dudley was previously employed. Now, all the missing articles have mysteriously returned to the website and several previously unavailable articles by Dudley have also been posted there.

Aware that Dudley was the likely to receive the OIRA nomination, OMB Watch began researching Dudley's record as head of regulatory policy for the Mercatus Center months before the nomination was announced. In the weeks before Dudley's nomination was announced, Mercatus overhauled its website, and many of the most controversial of Dudley's articles were no longer listed in her bibliography.

On Aug. 8, OMB Watch listed the missing documents in the *The Watcher*, which included comments by Dudley opposing Davis-Bacon and an op-ed claiming that releasing information under the Toxic Release Inventory (TRI) would help terrorists. By Thursday, Aug. 10, the articles were back on Mercatus's website, including some articles never before listed. Recently added articles include an op-ed for the *National Review*, cautioning against increasing regulation after September 11th, and articles criticizing air quality standards for ground-level ozone.

Recently Added Dudley Scholarship | Previously Missing Dudley Scholarship

Recently added Dudley scholarship

(July 1, 2006)

Defining What to Regulate: Silica & the Problem of Regulatory Categorization (June 1, 2006)

Moderating Regulatory Growth: An Analysis of the U.S. Budget for Fiscal years 2006 and 2007 (May 11, 2006)

Mercatus Reports: The Bush Administration Regulatory Record | Wine Wars: Uncorking E-Commerce? (January 1, 2005)

It is Time to Reevaluate the Toxic Release Inventory (January 1, 2005)

Susan Dudley Participates in White House's Conference on the Economy (December 15, 2004)

Mercatus Reports: Mercury | VOIP | Regulatory Budget | Commentary: Modernizing National Equity Markets (September 1, 2004)

Mercatus Reports: Financial Privacy Notices | FTC E-Commerce Studies | A Regulated Day in the Life (July 1, 2004)

Finding Nemo's Worth (August 1, 2003)

Written Testimony on the "TRI Lead Rule: Costs, Compliance, and Science" submitted to the House Subcommittee on Regulatory Reform and Oversight (June 13, 2002)

"I Love Government" - Regulation, Post 9/11 (March 26, 2002)

Mercatus Reports: Ozone Quality Standards | Tanker Vessel Monitoring Devices | Non-Road Vehicle Emissions | Trans-Fatty Acids Labeling | Automated External Defibrillators | Bush's Rejuvenated OIRA (December 1, 2001)

President Expands Oversight of Federal Agency Rulemaking (November 16, 2001)

Mercatus Reports: Arsenic in Drinking Water Systems | Appliance Standards for Air Conditioners and Heat Pumps | Heavy-Duty Truck Emissions | Toxic Release Inventory, Lead and Lead Compounds | Roadless Areas | Clothes Washer Efficiency | Medical Privacy |

Reversing Midnight Regulations (March 1, 2001)

Consumers Reject US Spin Cycle On Washing Machines (January 4, 2001)

WILLY-NILLY REGULATIONS: Climate of haste hurts consumers (January 2, 2001)

OSHA's Ergonomics Program Standard and Musculoskeletal Disorders: An Introduction (January 1, 2001)

The Benefits and Costs of OSHA's Proposed Ergonomics Program Standard (January 1, 2001)

Fuel and Your Money (September 1, 2000)

EPA's Proposed Expansion of Noncompliance Benefit Estimates (January 1, 2000)

EPA Speeds Ahead with Ill-Conceived Vehicle and Gasoline Standards (December 20, 1999)

Proposed Workplace Rules Could Put US Firms In A Cast (November 29, 1999)

Overstressing Business: OSHA and Ergonomics (October 1, 1999)

The EPA Relies on Faulty Market Incentives (September 1, 1998)

EPA's National Ambient Air Quality Standard for Ozone May be Hazardous to Your Health (March 1, 1998)

Economic Impact Analyses (January 1, 1998)

The Human Costs of EPA Standards (June 9, 1997)

Testimony on the Risk Assessment underlying EPA's Proposed Ambient Air Quality Standard for Ozone before the Senate Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety (April 24, 1997)

Previously missing Dudley scholarship

Mercatus Reports: Urban Empowerment Zones | GSE Reform | Regulators' Growing Budget (September 1, 2005)

It's Not Just the Spending (August 29, 2005)

Mercatus Reports: Green Sturgeon | Intercarrier Compensation | Canadian "Smart Regulation" (July 1, 2005)

Mercatus Reports: Regulation Z | Cooling Water Intake | ESA Permit Revocation | Commentary: What's Next for Telecom? (April 15, 2005)

Book Review: States of Fear (April 15, 2005)

Regulator's Budget Continues To Rise: An Analysis of the U.S. Budget For Fiscal years 2004-2005 (July 16, 2004)

Testimony on Small Business Competitiveness before the House Subcommittee on Regulatory Reform and Oversight (May 20, 2004)

Testimony on Regulatory Accounting before the House Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs (February 25, 2004)

The Hidden Tax of Regulation (January 5, 2004)

The Price is Right (November 24, 2003)

Figures Full of Air (October 18, 2003)

Regulatory Spending Soars: An Analysis of the U.S. Budget for Fiscal years 2003 and 2004 (July 22, 2003)

EPA Dodges a Rule (June 15, 2003)

Mercatus Reports: Information Disseminated by Federal Agencies | Water Quality Trading Policy | Costs and Benefits of Federal Regulations | Fannie Mac and Freddie Mac Governance | FDA First Amendment Issues | Pollution from Non-Road Diesel Engines | The Coming Shift in Regulation (October 1, 2002)

Testimony on Regulatory Accounting before the House Subommittee on Energy Policy, Natural Resources, and Regulatory Affairs (March 12, 2002)

Terrorist Right-to-Know? (November 1, 2001)

Office of Management and Budget's 2001 Draft Report to Congress on the Costs and Benefits of Federal Regulations (August 14, 2001)

Let OSHA take lead in ergonomics reform: Flexible policy can protect workers, but legislative bickering threatens progress (July 21, 2001)

How Not to Improve Public Health (January 11, 2001)

Testimony on the Effect of the Army Corps of Engineers' Approach to Wetlands Protection on Overall Social Welfare (October 6, 2000)

Something Wicked This Way Comes (July 27, 2000)

DOL's Proposal Governing Helpers on Davis-Bacon Act Projects (June 8, 1999)

Strange Happenings at the IRS Could Affect Enforcement

This fall, the Internal Revenue Service will likely make two changes to its tax enforcement efforts that defy logical explanation. IRS Commissioner Mark Everson will soon go forward with plans to cut nearly half its staff of estate tax auditors and to create a program that would allow private companies to pursue taxpayers who owe back taxes.

"Slashing the number of estate tax auditors and outsourcing collection of outstanding taxes," explains Adam Hughes, OMB Watch budget policy director, "would move the IRS in the opposition direction they should be moving toward a more robust and resourced agency that can provide both customer service to taxpayers and strong enforcement of tax law."

Estate Tax Auditor Layoffs

The IRS is planning to offer voluntary retirement to 157 of its 345 estate tax attorneys. Everson claims that since higher exemption levels in the estate tax will produce fewer filings, fewer auditors are necessary, and the savings generated by the lay-offs could be reallocated to more productive departments. The cuts are in spite of the fact that the IRS itself has said estate tax lawyers are the most productive of its employees, bringing over $2,200 in revenue for every hour worked. What's more, six years ago the IRS found that 85 percent of estate tax returns shortchanged the government.

Everson's claims did little to assuage congressional Democrats, who sent multiple letters to the IRS chief protesting the proposal. A letter from Sen. Chris Dodd (D-CT) asked Everson for a detailed justification of the job cuts, as well as a quantitative description of the impact the proposed cuts will have on enforcement, both before and after 2010. A separate letter from members of the House of Representatives asked that Everson delay the proposed layoffs until Congress has had the opportunity to review them.

Even if the IRS agrees to delay the decision, which is unlikely, Congress may not have enough time this year to thoroughly evaluate Everson's plan. The early retirement proposals will be offered in October, and Congress will be in session a very short time and will have a mountain of work to do prior to the November election.

Privatizing Tax Collection

In addition to weakening the review of estate tax returns, the IRS is set to go forward with plans to privatize some aspects of collection of back taxes. The IRS will let three private agencies collect back taxes from about 12,500 taxpayers who owe less than $25,000 each. The program is projected to raise $1.4 billion over the next 10 years, with $330 million of that going to collection agencies — a whopping *23.5 percent* administrative fee.

For less than that fee, the IRS could hire staff who would bring in about eight times as much revenue as the private collection agencies are projected to, according to former IRS commissioner Charles Rossotti. In testimony before the House of Representatives, Everson freely admitted that hiring more staff is far more efficient than privatization. But inadequate appropriations for the IRS, he claims, have made it impossible to hire new staff.

The privatization program also raises concerns about abuse and fraud. Private companies may be subject to less federal regulation and will seek to maximize profits rather than deliver quality customer service, increasing the chance that they may extort taxpayers or misuse funds. It's also

possible fraudulent schemes involving people posing as collection agencies will emerge threatening to cheat and steal from taxpayers. The IRS has taken some precautionary measures to prevent unauthorized people from posing as private collection agencies, but whether those measures are sufficient remains to be seen.

Efforts are already underway to end the privatization program. Rep. Steve Rothman (D-NJ) successfully lead the charge against this policy in the House, attaching an amendment to block the IRS from spending money implementing the outsourcing program to the FY 2007 Treasury-Transportation appropriations bill. While the Senate has not passed its version of the appropriations bill, if the Rothman amendment makes it into the final version, the IRS will find it very difficult, if not impossible, to run the program.

Regardless of whether the private collection program is put in place, the total revenues expected will make only a small dent in the "tax gap," the difference between what is owed in taxes and what is paid. The "tax gap" is currently estimated at $345 billion annually, which is $90 billion more than this year's current deficit projection.

While outsourcing tax collection to private companies is inefficient, the IRS has certainly not helped, and likely exacerbated, the tax gap in recent years by decreasing its audit rates . The "face-to-face" IRS audit rate has declined 80 percent over the past 20 years - from 1.19 percent in 1984 to 0.15 percent in 2004 - and IRS examinations of business income-tax returns have dropped 66 percent since 1997.

Despite Short-Term Gains, CBO Forecasts Grim Long-Term Fiscal Outlook

On Aug. 17, The Congressional Budget Office (CBO) released the annual summer update to its Budget and Economic Outlook report. In it, CBO lowers its estimate of the Fiscal Year 2006 budget deficit by 30 percent from its March analysis and now projects the year-end deficit at $260 billion. The rosy news, however, did little to assuage analysts' concerns over fiscal challenges looming on the horizon.

CBO's Deficit Projections *(in billions)*	
March 2006 Estimate	$372
August 2006 Adjustments	
Higher Than Expected Revenues	($99)
Lower Than Expected Spending	($13)
New Adjusted Deficit Projection	$260

CBO's lowered deficit projection is not a result of changes in policy or legislation controlled by Congress but instead reflects a re-calculation of deficits under improved economic conditions. As a result, CBO still warns the long-term outlook for the federal government, unchanged from earlier this year, is still disturbingly bleak and will require changes in current and expected future policy in order to improve.

The projected deficit of $260 billion would be $58 billion lower than the deficit the government had in FY2005 ($318 billion) and is approximately $30 billion lower than last month's Office of Management and Budget (OMB) figures.

The CBO update cites unexpected gains in tax receipts from individual and corporate income taxes as the main reason the projections improved. Most of these new revenues come from corporate and capital gains taxes, which are generally income sources for the well-off. The CBO analysis shows non-withheld individual income tax revenues are projected to rise 20 percent and corporate income tax receipts by 22 percent in 2006. Tax receipts from the middle and working class, though, will rise far less - just 7 percent — in 2006. These latest data projections continue to underscore the widening income and wealth gap in America.

Overall government spending was $13 billion lower than CBO projected earlier this year.

Also helping the short-term improvement was lower than anticipated spending on Medicare and Medicaid.

The estimates of spending on the nation's health care programs and future defense spending projections are the two main reasons for the discrepancy in deficits for FY 2006 between the CBO report and the OMB estimates from July. CBO projects about $10 billion less in Medicare and Medicaid spending, and $10 billion less in defense spending this fiscal year.

Despite the lower deficits expected at year's end, a dark long-term outlook continues to loom, with extending President Bush's tax cuts beyond 2010 and accounting for war and other hidden costs costing an additional $1.75 trillion in debt over the next 10 years and causing an expansion of annual deficits by about $250 billion from 2011 through 2016.

In addition, the CBO baseline projections do not include widely anticipated changes to the Alternative Minimum Tax (AMT), expected to cost the government an additional $1 trillion over the next 10 years. The AMT was originally intended to prevent rich individuals from using excessive deductions to avoid paying income taxes, but increasingly is pinching upper-middle class families because the tax was not indexed for inflation.

The CBO report underscored the enormous price associated with carrying such huge deficits year after year in its section describing interest on the national debt. Interest payments on the debt jumped by 19.7 percent, to $220 billion, in 2006, making it the fastest growing section of federal government spending. That total is more than what is being spent on the entire Medicaid program ($181 billion) or on the "combined total for all federal income-support programs: unemployment compensation, food stamps, child nutrition programs and the earned-income tax credit," according to analysis by *The New York Times*. The interest on the debt will accelerate over the next decade, rising to $333 billion in 2016, according to CBO projections, thereby putting increased pressure on the discretionary budget and likely crowding out key budget items.

Table 1-4.

CBO's Baseline Projections of Mandatory Spending

(Outlays, in billions of dollars)

	Actual 2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Tot 200 20
Social Security	519	549	582	612	643	679	716	759	806	856	911	970	3,:
Medicare[a]	333	372	446	475	512	549	605	613	682	742	808	909	2,!
Medicaid	182	181	195	213	232	249	269	290	312	337	363	392	1,:
Income Support													
Supplemental Security Income	38	37	36	41	43	44	50	44	49	51	53	59	:
Earned income and child tax credits	49	52	53	54	55	54	54	37	37	37	38	38	:
Unemployment compensation	33	31	32	35	39	42	44	46	48	50	52	55	:
Food Stamps	33	35	35	35	36	37	37	38	39	40	41	42	:
Family support[b]	24	24	24	24	24	24	24	24	24	24	25	25	:
Child nutrition	13	14	14	15	16	16	17	18	18	19	20	21	
Foster care	6	7	7	7	7	8	8	8	8	9	9	9	
Subtotal	196	200	202	212	219	225	234	215	225	231	237	248	1,!

Excerpt from Table 1-4 of CBO's Budget and Economic Outlook: An Update. Pg. 12.

Acting CBO Director Donald B. Marron, who is serving out the unfinished term of former CBO chief Douglas Holtz-Eakin, focused on the more positive short-term news following the report's release, noting that the 2006 deficit would come in at around 2 percent of the American economy, comparing favorably with deficits over the last 40 years that have averaged about 2.3 percent:

> "[T]he message I would send is that we've gone from a period in which the fiscal deficits we were running in this country were large and not sustainable if they had persisted, to a situation in which, at least now and for next year, for several years going forward, deficits appear to be in a range that they're sustainable."

Marron's comments did not sit well with the ranking members of the House and Senate Budget Committee: Rep. Spratt (R-SC) and Sen. Kent Conrad (D-ND). Conrad and Spratt fired back immediately, saying the comments were "completely and totally irresponsible," and could disqualify him from being considered for the job.

While Marron is technically correct in his statements, he glosses over long-term projections in which deficits rise above the 2 percent of GDP level again and rapidly-rising interest on the debt crowds out other important spending priorities.

New Official Secrets Law?: Case Threatens Open Government and Freedom of Press

On Aug. 9, a federal district court ruled that use of the Espionage Act to prosecute private citizens for receiving and transmitting national security information is constitutional. The

decision to extend the Espionage Act to non-governmental employees has sweeping implications for open government and freedom of speech and the press, and raises the prospect of the U.S. adopting an Official Secrets Act similar to that of the UK.

The case involves Steven Rosen and Keith Weissman of the American Israel Public Affairs Committee (AIPAC) who received classified information from Lawrence Franklin, a Department of Defense (DOD) employee. According to the indictment, Rosen and Weissman received what they knew was classified information and relayed that information to a *Washington Post* employee, a foreign policy analyst at a think tank, and an official of the Israeli government.

Franklin received a 10-year sentence for violating the Espionage Act and "willfully" communicating national defense information "to any person not entitled to receive it." Federal prosecutors recently indicted Rosen and Weissman for receiving and transmitting national defense information which they were not authorized to receive. This is the first time the Espionage Act has been used to prosecute non-government employees, who did not intent to harming the government, and could open the door to the prosecution of journalists and others who at times may receive and transmit sensitive information.

Rosen and Weissman sought a dismissal, arguing that the case violated the Fifth Amendment's due process clause and the First Amendment's protection of free speech. Judge T.S. Ellis dismissed the request and allowed the case the go forward. Ellis rejected the defense's claim that the Espionage Act violated the due process requirement because it is unconstitutionally vague, and, in his ruling, specified requirements that must be met for a non-government employee to be guilty of disclosing sensitive national security information.

First, the prosecutor has to show that the information is related to national defense by proving that:

1. "the information relates to the national defense, intelligence gathering or foreign policy;"
2. "the information is closely held by the government, in that it does not exist in the public domain"; and
3. "the information is such that its disclosure could cause injury to the nation's security."

Second, the prosecutor has to show that the information was transmitted to someone not entitled to receive it by proving that:

1. "a validly promulgated executive branch regulation or order restricted the disclosure of information to a certain set of identifiable people,"; and
2. "the defendant delivered the information to a person outside this set."

Third, the government has prove that "the person alleged to have violated these provisions knew the nature of the information, knew that the person with whom they were communicating was not entitled to the information, and knew that such communication was illegal."

Lastly, the government must prove that "the defendant had reason to believe that the disclosure of the information could harm the United States or aid a foreign nation."

In response to the claim that the Espionage Act violates freedom of speech, Ellis commented that the case, "exposes the tension between government transparency so essential to a

democratic society and the government's equally compelling need to protect from disclosure information that could be used by those who wish this nation harm."

The court found that the statute's narrowly crafted protection against the disclosure of national security information which can harm the United States, ". . . is [a] reasonable, and therefore constitutional exercise of its power."

The ruling has potentially severe implications for the freedom of the press and national security whistleblowers. As noted by Stephen Aftergood of the Federation of American Scientists, the reporting of the Abu Ghraib prisons would likely be found to fit the above requirements. The Abu Ghraib reports were based on classified national security information and the short-term consequences of the transmittal of such information to those not authorized to receive it harmed the interests of the United States. "And yet the disclosure also served an important national purpose in prompting a public debate over U.S. policy on prisoner detention and interrogation," states Aftergood.

The Espionage Act has roundly been criticized as poorly drafted, and Ellis, near the end of his opinion, makes the rare remark "that the time is ripe for Congress to engage in a thorough review and revision of [the Espionage Act] to ensure that [it] reflect[s] . . . contemporary views about the appropriate balance between our nation's security and our citizens' ability to engage in public debate about the United States' conduct in the society of nations."

In the meantime, the Justice Department may exploit the current imbalance to prosecute journalists who disclose national security programs, like the National Security Agency's domestic spying efforts and interrogation tactics of the U.S. military and Central Intelligence Agency. The threat of prosecution may chill the exercise of free speech and thereby harm the national dialogue on vital national security issues.

In the recent past, covert efforts have been undertaken to impose an Official Secrets Act to protect national security information. For example, in 2000, Congress quietly attached such a provision to an intelligence authorization bill that was never the subject of public hearings. President Bill Clinton felt the provision was too extreme and vetoed the bill in order to kill the secrecy provision. Congress is now considering legislation to achieve the same objective.

As Justice Potter Stewart noted in the Pentagon papers case (and Judge Ellis quoted), "In the absence of the government checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry -- in an informed and critical public opinion which alone can here protect the values of democratic government."

Open Government Rising Issue for 2006 Elections

With November--and its many state, local and midterm Congressional elections--just around the corner, candidates are promising citizens a more open government in exchange for their vote. Access advocates believe that recently revelations about government secrecy (such the National Security Administration's covert warrantless spying program) and Washington corruption scandals have boosted public support for more democratic and less secretive

government at the national, state and local levels, and campaigns are picking up on it.

At the federal level, the Democratic National Party (DNC) included open government among its recently released principles, Democratic Vision. First among six broad platforms in the DNC vision statement was "honest leadership and open government." By raising the prominence of the issue, the DNC appears to be counting on open government to appeal to voters across the country and help candidates win elections. This hard stance allows the Democrats to build off of several recent political scandals involving Republicans, including Jack Abramoff's funneling of dirty money to countless campaign coffers, the conviction of Rep. Randall "Duke" Cunningham (R-CA), and accusations that Rep. Tom DeLay (R-TX) took advantage of inadequate fundraising laws.

Open government has also risen to a platform issue for candidates running for state offices. Typical of this trend, South Dakota House candidate Pam Hemmingsen (D-Dist. 32) spent several days earlier this month knocking on doors in her district promising citizens more access to government information. Hemmingsen told the *Rapid City Journal*, "What I want to do is just connect with voters of all parties on the common-ground issues of education, healthcare and open government."

The *Rapid City Journal* recently editorialized that "[t]oo often in South Dakota, politicians and government employees close the door to public access to information and participation in meetings. The state Legislature continues to operate as if public scrutiny spells death for democracy instead of the opposite." In apparent response to such concerns, Hemmingsen has promised if elected to introduce legislation that "opens governmental meetings and records to the public." Improved access to government information even finds fervent support from candidates running for local offices. Berkeley, California, mayoral candidate *Zelda Bronstein*, one of three challengers of current mayor, Tom Bates, is stressing her concerns about public information access. In campaign material, Bronstein criticizes the Bates administration for making too many important decisions in secret, including those involving lawsuits and major transportation and development projects. Bronstein's campaign promises include an open government agenda to "[p]ass a Strong Sunshine Ordinance that gives citizens legal access to information about local government and how decisions are made in City Hall, and the right to sue the city if they think the law has been violated by city officials."

These are just a handful of the thousands of campaigns that are gearing up for election season this fall. How important an issue government openness will be in November's elections remains to be seen. But, with high profile cases of government secrecy and official corruption continuing to make headlines, it is likely that more and more campaigns will take on open government as a campaign platform.

Federal Court Finds NSA Eavesdropping Program Unconstitutional

In a ruling last week, the U.S. Court for the Eastern District of Michigan found the National Security Agency's (NSA) warrantless domestic spying program to be in violation of the First and Fourth Amendments and the separation of powers. The decision came on a case filed by the American Civil Liberties Union (ACLU) challenging the legality of the NSA program by arguing

that the rights of several journalists and academics had been violated.

Judge Anna Diggs Taylor ruled that the NSA program violates the First Amendment, because of its restricting effect on communications between U.S. citizens and people in Middle Eastern countries. Many of the communications of those represented by the ACLU were with individuals from the Middle East, and they have reason to believe that they were subject to the NSA program. The represented journalists and academics reported the inability to continue these communications due to the chilling effect of the program.

Taylor also found the program to be in violation of the Fourth Amendment, because Internet and telephone communications were seized without a warrant or court approval, violating the protection against unreasonable searches and seizures. Finally, Taylor found that the program exceeds the powers of Article II of the Constitution, which spells out presidential powers, and violates the separation of powers between the executive and legislative branches.

Much of the ruling focuses on dismissing the Department of Justice's (DOJ) claims of state secrets privilege and lack of standing. DOJ argued that the state secrets privilege applied because information necessary for debating the program's legality cannot be disclosed, lest the nation's security be at risk. The court accepted this state secrets argument in dismissing the plaintiff's challenge of the NSA's data-mining program, which reportedly collects thousands of domestic calling numbers but not the contents of calls. However, Taylor found the state secrets claim in respect to the Terrorist Surveillance program (TSP), which monitors the content of communications, to be "disingenuous and without merit."

The decision was a huge blow to the administration's argument that the president has inherent constitutional authority to conduct a domestic surveillance program in the name of fighting terrorism. The opinion directly contradicts such claims by arguing that, "There are no hereditary Kings in America and no powers not created by the Constitution. So all 'inherent powers' must derive from the Constitution."

Taylor's opinion quickly received strong criticism by not only the President and the Republican National Committee but also from many legal scholars and newspapers. President Bush predicted that an appeals court would overturn the decision, stating that "[t]hose who herald this decision simply do not understand the nature of the world in which we live."

Many legal scholars agreed with the court's eventual findings on the illegality of the program, but disagreed with Taylor's reasoning. Yale Law School professor Jack Balkin stated, "Although the court reaches the right result--that the program is illegal, much of the opinion is disappointing." Balkin goes on to note that, "because the court's opinion, quite frankly, has so many holes in it, it is . . . clear to me that the plaintiffs will have to relitigate the entire matter before the circuit court, and possibly the Supreme Court."

The *Washington Post* stated that the NSA program "exists on ever-more uncertain legal grounds," but that "as a piece of judicial work--that is, a guide to what the law requires and how it either restrains or permits the NSA's program--her opinion will not be helpful."

The decision was immediately appealed by DOJ and that appeal will likely soon be heard by the Sixth Circuit. Meanwhile, over 30 cases challenging various aspects of NSA's TSP and data-mining program continue to make their way through the judicial system.

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Five Years Since 9/11: More Secrecy, Less Security

Monday marked the fifth anniversary of the Sept. 11 terrorist attacks, yet the government's efforts to secure the nation against another terrorist attack have been minimal, leaving the country's chemical plants, ports, and other installations dangerously unsecured while increasing secrecy and intrusion into civil liberties.

Domestic Spying

In late 2005, *The New York Times* revealed that President Bush has been secretly authorizing the National Security Agency (NSA) to eavesdrop on domestic phone calls and emails without a wiretapping warrant since soon after 9/11. The NSA program has been faulted not only for its legal basis bur for its apparent lack of efficacy. According to FBI sources interviewed by the *Washington Post*, all of the thousands of international calls by Americans that were subject to NSA eavesdropping turned out to be investigative

dead ends.

After the White House fiercely resisted Congress's attempts to implement even minimal oversight over the wiretapping program, Sen. Arlen Specter (R-PA), an avid critic of the program, caved to pressure and accepted watered-down legislation that would legalize the president's NSA wiretapping program retroactively. The National Security Surveillance Act (S. 3876) would also create a legal framework for future surveillance of American citizens. By retroactively acknowledging that the president has "the constitutional authority of the executive," the bill allows the federal government to wiretap anyone's phone calls or read anyone's emails without judicial approval or oversight.

A federal court recently ruled the NSA spying program unconstitutional. The U.S. Court for the Eastern District of Michigan found the program to be in violation of the First and Fourth Amendments and the separation of powers. The decision came on a case filed by the American Civil Liberties Union challenging the legality of the NSA program by arguing that the rights of several journalists and academics had been violated.

Chemical Security

Even as the administration spies without oversight on its citizens, five years after 9/11, Congress has failed to pass legislation mandating security standards for thousands of chemical facilities across the country. The House and Senate have spent most of 2006 in gridlock on legislation to authorize the Department of Homeland (DHS) to establish reporting requirements and verify the security of chemical facilities.

The Senate Homeland Security and Governmental Affairs Committee passed Chemical Facility Anti-Terrorism Act of 2006 (S. 2145) in July 2006 that fails to require facilities to consider safer technologies or publicly report failed inspections. The bill has reportedly been bogged down because of various objections from more than a dozen senators. In a letter to the objecting senators, Homeland Security and Government Affairs Committee Chairwoman Susan Collins (R-ME) urged her colleagues to allow the bill to reach the Senate floor and settle any differences over the legislation there.

Later in July, the House Homeland Security Committee passed Chemical Facility Anti-Terrorism Act of 2006 (H.R. 5695), which is hailed by public interest groups as substantially better than the Senate version. The bill, sponsored by Rep. Daniel Lungren (R-CA), establishes security requirements for our nation's chemical facilities, and was amended in committee to include requirements that companies, when feasible, use safer technologies and provisions allowing states and localities to establish their own stronger security programs.

The House is expected to finish its business this year, but with many competing objectives and a contentious bill, it is uncertain when the Senate will vote on the bill. That in five years Congress has failed to pass a substantial chemical security law should come as little surprise considering the strong opposition to any regulation from the chemical industry.

Sensitive But Unclassified

In March of 2002, White House Chief of Staff Andrew Card issued a memo ordering agencies to "safeguard" information that is "sensitive but unclassified." This catch-all broadly includes, in each agency's judgment, "information that could be misused to harm the security of our nation and the safety of our people."

A provision codifying the "sensitive but unclassified" category was then slipped into the Homeland Security Act of 2002, drawing little attention and no debate. Specifically, the act instructs the executive branch to "identify" and "safeguard" "homeland security information that is sensitive but unclassified" (often called Sensitive Homeland Security Information (SHSI), which includes any information about terrorist threats, potential vulnerabilities, and disaster response. This even applies to information that has previously been disclosed--particularly disturbing to those who fear it could lead to the withdrawal of vast amounts of information.

Four years later, no government-wide policies or procedures exist to guide agencies through deciding what information should be withheld from the public due to its "sensitive but unclassified" nature. Federal agencies are also without uniform rules governing who makes such decisions and how such information is then handled. As a result, there are over 50 different SBU designations used by the federal government and rampant confusion at the federal, state and local levels. In a GAO report issued this year, first responders, for instance, "reported that the multiplicity of designations and definitions not only causes confusion but leads to an alternating feast or famine of information."

Reclassificaiton and Overclassification

On Feb. 21, Matthew M. Aid of the National Security Archive disclosed the scope of a multiple-agency reclassification program. The reclassification program appears to be a backlash to a 1995 executive order issued by President Clinton that required government agencies to declassify all historical records that were 25 years or older, with national security exceptions. Under the new program, government agencies removed declassified documents from the shelves of the National Archives and considered them for reclassification. Many of the documents were publicly available--some were even published by the State Department and for sale at Amazon.com--leading historians and national security experts to question the validity of their reclassification.

Over 55,000 pages of documents were reclassified. Most of these documents are from the Central Intelligence Agency (CIA), Defense Department, Defense Intelligence Agency, Department of Justice (DOJ), and State Department, often including non-sensitive information and sometimes dating back to World War II. It was not until 2006 that the public, Congress and even some high-level members of the National Archives were even aware of the massive scope of the reclassification effort. Unlike similar efforts, Congress had not authorized the intelligence agencies to undertake the program, nor had there been an executive order, or any funds appropriated for this expensive effort with a price tag estimated to be in the seven digits.

In March 2006, the National Archives issued a moratorium and a formal review. An audit conducted by the National Archives estimated that more than 8,500 of the 25,000 records (nearly one-third) removed from the public shelves of the Archives should not have been removed. Lifting the formal moratorium on the reclassification program, the National Archives plans to issue and encourage the implementation of standardized procedures "to ensure that re-review and withdrawal actions are rare and that collaboration between agencies and National Archives with respect to determining the appropriateness of such action in the first place always occurs with provisions for challenge and appeal."

State Secrets

Based on the 1953 Supreme Court ruling in *Reynolds v. United States*, the state secrets privilege allows the executive branch to declare certain materials or topics exempt from disclosure or review. The Bush administration has used this privilege almost half the number of times it was invoked in the entire period between 1953 and 2001, when the combined use of 8 presidents -- Eisenhower, Kennedy, Nixon, Ford, Carter, Reagan, the first Bush and Clinton -- amounted to 55 claims of state secrets.

As reported by *The New York Times*, the administration recently used the state secrets privilege to compel the courts to dismiss a lawsuit brought by a German man who had been held in Afghanistan for five months after being mistaken for a suspected terrorist with the same name. The Justice Department has also claimed state secrets privilege when it asked the courts to throw out three lawsuits against the National Security Agency's warrantless domestic spying program. Additionally, the state secrets privilege was used to shut down a lawsuit by national security whistleblower Sibel Edmonds, an ex-translator for the Federal Bureau of Investigation, who was fired after accusing coworkers of security breaches and intentionally slow work performance.

In each of these cases, the Department of Justice has used the state secrets privilege to shut down cases against the federal government, claiming that any discussion of the lawsuit's accusations would endanger national security. With a growing array of challenges to the government's handling of terror suspects and warrantless domestic wiretapping, target cases for this tactic are in far from short supply.

Result: More Secret But Not More Secure

Shortly after the 9/11 terrorist attacks, OMB Watch raised concerns that the government might impinge on important democratic principles such as government transparency and civil liberties. We argued that increased secrecy would not only make us less safe, it would undermine our values of an open, democratic society - and allow terrorists a significant victory. Today we are even more troubled. Many basic liberties have been eroded, but are we any safer?

Until our chemical plants, ports, and other installations are secured, until the public has evidence that dangers in our communities are removed, and until oversight is strengthened to provide checks on a largely unaccountable executive branch, we have much to do. As Justice Louis Brandeis said in 1933, "Publicity is justly commended as a

remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." We would argue that Brandeis' quote applies equally in an age of terrorism.

Government Receives Poor Grades on Secrecy

Government secrecy continues to expand across a broad array of agencies and actions, according to a new report from OpenTheGovernment.org. The Secrecy Report Card 2006 is the third of its kind produced annually, reviewing numerous indicators to identify trends in public access to information.

Featuring prominently in this year's report card are a number of troubling signs of growing government secrecy:

- In 2005, the Foreign Intelligence Surveillance Court approved *all* 2,072 requests for secret surveillance orders made by U.S. intelligence agencies, rejecting none.
- In 2005, "black" programs accounted for 17 percent of the Defense Department acquisition budget of $315.5 billion. Classified acquisition funding has nearly doubled in real terms since FY 1995, when funding for these programs reached its post-Cold War low.
- President George W. Bush has issued 132 signing statements challenging over 810 provisions of federal laws. In the 211 years of our nation's history preceding 2000, presidents issued fewer than 600 signing statements that took issue with the bills they signed.
- For every one dollar the government spent on declassifying documents, the government spent $134 maintaining the secrets already on the books. To put this number in context, from 1997-2001, the government spent less than $25 per year keeping secrets for every dollar spent declassifying them.

In a statement accompanying the report, Patrice McDermott, director of OpenTheGovernment.org and co-author of the report explained, "Every administration wants to control information about its policies and practices but the current administration has restricted access to information about our government and its policies at unprecedented levels. The result has been the suppression of discussions about our country's direction and its security. How can the public or even Congress make informed decisions under such circumstances? The movement away from public accountability must be reversed."

Several bills currently making their way through Congress counteract this trend toward secrecy, fostering transparency and accountability. For example, language inserted in HR 5441, the 2007 Department of Homeland Security Appropriations bill, would curtail the growth of "sensitive security information," a type of "sensitive but unclassified" information (SBU). SBU designations are used to keep unclassified information hidden from the public. The Secrecy Report Card 2006 identifies 50 SBU designations, but acknowledges the existence of more than 60 designations.

Other legislation highlighted by the report card includes the "Federal Funding

Accountability and Transparency Act," (HR 5060, S 2590) legislation to require the administration to establish an online, searchable database for grants and contracts, which was agreed to by the Senate late last week and is expected to pass in the House this week.

Another bill, H. Res 688, would require the House to make the text of legislation and conference reports publicly available online for 72 hours before it is voted on.

Openness allows citizens and lawmakers to make informed decisions and in this way helps ensure a fully functioning democracy. As the report states, "Openness is not only a keystone value of our democracy, more practically it helps root out abuse of power, bad decisions or embarrassing facts that may put lives at risk."

OpenTheGovernment.org is a coalition of journalists, consumer and good government groups, environmentalists, library groups, labor and others united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles. OpenTheGovernment.org is co-chaired by OMB Watch's executive director Gary Bass.

DHS Fails to Protect Critical Infrastructure

On Sept. 1, the Department of Homeland Security (DHS) issued a final rule for procedures for handling information about critical infrastructure. The rule amends the interim rule issued in February 2004, for which OMB Watch submitted comments. Unfortunately, DHS ignored OMB Watch's suggested modifications, and the final rule opens the door to misuse by the private sector, allowing companies to restrict public access to information that is vital to protecting public health and safety.

"Critical infrastructure information, does need certain disclosure restrictions," explains Sean Moulton, OMB Watch's director of federal information policy, "but, DHS has implemented a series of procedures which will lead to unnecessary secrecy and greater agency confusion."

The Critical Infrastructure Information Act (CIIA) of 2002 (passed as a subtitle in the Homeland Security Act of 2002) requires DHS to create and implement procedures for the collection and protection of critical infrastructure information. Critical infrastructure information includes data on vulnerabilities and other vital information relating to our nation's communications, transportation, manufacturing, energy and other critical industries. According to government figures, the private sector owns more than 70 percent of the country's critical infrastructure. The act attempts to protect this information by encouraging the private sector to voluntarily submit such information and by preventing its public disclosure and use.

There are a number of problems with CIIA which DHS could have minimized in the final rule. For instance, the Act stipulates that once declared to be critical infrastructure information, company information cannot be used in civil court proceedings, even if the information clearly demonstrates that a company or individual is in violation of state or

federal law or is liable for an accident or disaster. Moreover, once designated as critical infrastructure information, documents are immune from disclosure under the Freedom of Information Act (FOIA) and cannot be used by agencies for regulatory enforcement purposes. Hence, companies voluntarily submitting critical infrastructure information to DHS that might be incriminating are shielded from public scrutiny, government oversight, and court actions. The final rule by DHS compounds the original act's overly broad provisions with poor rulemaking language that provides coverage for bad actors who endanger our nation's security instead of strengthening our nation's security by protecting sensitive information.

DHS's final rule contains a number of additional shortcomings which may lead to increased secrecy on vital public right-to-know issues and greater bureaucracy and agency confusion:

Increased Secrecy and Coverage

The final rule allows for the Program Manager of the Protected Critical Infrastructure Information (PCII) program "to designate certain types of infrastructure information as presumptively valid PCII in order to accelerate the validation process." In order to speed up the certification process, the agency will not review each individual piece of information in these categories and will instead automatically grant protection. Additionally, companies will be permitted to submit large documents that contain some PCII without having to selectively remove such information from the document and otherwise allow its public release and use.

The final rule also states that information once designated as PCII "will not thereafter lose its protected status except under a very narrow set of circumstances." The final rule removed the requirement that information lose its protected status if the information can be publicly accessed through legal means. It also removed the requirement that information lose its protected status if DHS establishes requirements for submission of the information.

There is also no requirement for reevaluation of PCII status. Once information is given protected status, even if someone makes a FOIA request of such information 10 or 20 years later, there is no requirement that the information's status be reviewed. This could lead to the over-protection of important, non-threatening information. Essentially, under this rule, once information is accepted as PCII, it is highly unlikely that the information's protected status will ever be changed.

Agency Interference and Poor Information Management

The final rule fails to establish proper information handling requirements to avoid agency confusion and regulatory interference. For instance, the rule allows for indirect submissions of PCII through agencies other than DHS. Additionally, the original act included a clause that prevented any information required under other federal laws or regulations from being submitted and protected as PCII. The final rule, though, limits this provision to only DHS requirements for information. The poor drafting of these two provisions alone mean that, even if the Environmental Protection Agency, for instance,

requires companies to submit information on toxic pollution, a company could claim the information is PCII and could prevent the EPA from sharing or using the information, should DHS accept the claim. This could have severe implications for the operations of other government agencies.

The final rule also does not establish a deadline for reviewing PCII submissions. Establishing such deadlines is a basic principle of information management and its omission could have detrimental implications. After information is submitted as PCII but before DHS has a chance to review it, the information is automatically treated as PCII until the program manager determines differently. If DHS encounters a backlog of submissions, years could pass before information is reviewed, and massive amounts of information may be unjustifiably restricted from public access.

States Group Resolved Against EPA's Plans to Cut Toxics Reporting

On Aug. 29 the Environmental Council of the States (ECOS) passed a resolution urging the Environmental Protection Agency (EPA) to withdraw its proposals to reduce reporting under the Toxic Release Inventory (TRI). The resolution, by a national association of state and territorial environmental agency leaders, underscores the fact that states are firmly opposed to the EPA's plans to cut the national pollution reporting program.

Late last year, EPA announced three significant changes it planned for TRI reporting, in order to reduce paperwork for companies. Since EPA's announcement, opposition to the plans has continued to mount from almost every direction. The EPA has received more than 122,000 comments from the public, nearly every one opposing the plans. Agencies and officials from more than 23 states submitted formal comments to EPA opposing the plans. The House of Representatives passed an amendment to one of its spending bills to prevent the EPA from spending money to finalize the proposals. The EPA's own Science Advisory Board sent a letter with unsolicited advice on the issue, expressing concern that the TRI changes would "hinder the advances of environmental research used to protect public health and the environment."

ECOS members passed the resolution at their 2006 annual conference in Portland, Oregon. The resolution lists 14 reasons for the organization's position, including the House amendment and the numerous comments from state agencies and officials opposing the proposals. Generally, the resolution seems most concerned that the EPA's proposals would harm an important, effective tool for reducing toxic pollution without actually reducing any reporting burden on companies.

Interestingly, the administration's nominee to direct EPA's Office of Environmental Information, which runs the TRI program, Molly O'Neill, currently works at ECOS as Executive Coordinator for the Exchange Network Leadership Council (ENLC) and the Network Operations Board. During her nomination hearing, O'Neill sidestepped several questions on the proposed TRI changes, refusing to take a position either supporting or opposing the plans. Recently, two senators placed a hold on O'Neill's nomination until

EPA withdraws the proposed TRI cuts.

Getting Congress to Punch the Clock

Following Congress's failure to pass meaningful lobby reform, the Sunlight Network has launched a two-month grassroots campaign to increase transparency about the actions and activities of our elected representatives. The Punch Clock Campaign offers rewards to the public for persuading lawmakers to post their daily schedules on the internet.

Under the campaign, Sunlight is offering over $680,000 in "good-will bounties" to encourage citizens to ask for lawmakers' commitment to this transparency effort. Groups and individuals can receive $1,000 for each member of Congress, and $250 for each candidate, that they convince to sign the "Punch Clock Agreement."

The agreement simply states:

I believe citizens have a right to know what their Member of Congress does every day.

Starting with the next Congress, I promise to publish my daily official work schedule on the Internet within 24 hours of the end of every work day. I will include all matters relating to my role as a Member of Congress. I will include all meetings with constituents, other Members, and lobbyists, listed by name. (In rare cases I will withhold the names of constituents whose privacy must be protected.) I will also include all fundraising events. Events will be listed whether Congress is in session or not, and whether I am in Washington, traveling, or in my district.

The Sunlight website provides downloadable agreement/pledge sheets, a database and map tool to find lawmakers and candidates, their responses to requests, and related materials.

Earmark My Word: Boehner Promises House Action This Week

Last Thursday, House Majority Leader John Boehner (R-OH) announced the House will take up legislation as soon as this week to overhaul the process allowing individual lawmakers to slip funding for special projects into large appropriations bills.

Earlier this year, Congress seemed sure to address the enormously embarrassing loopholes riddling the nation's lobbying laws and Congress' own lax ethics rules in the aftermath of the Jack Abramoff scandal and the resignation of disgraced former Rep. Randy "Duke" Cunningham (R-CA).

"Earmarks" -- lines of funding legislation in appropriations bills that members of Congress designate for specific projects for their districts -- became a dirty word in Washington over the winter, evoking visions of a $250 million "bridge to nowhere,"

questionable projects bearing the name of a congressional sponsor, and a seamy cash-for-favors culture.

Initial action on lobbying overhaul legislation occurred fairly quickly this year. The Senate acted first, passing the Lobbying Transparency and Accountability Act of 2006 (S 2349,) on March 29, with the House passing its bill (HR 4975) on May 3. In addition to addressing earmarks, the bills would have clamped down on gifts from lobbyists and required ethics training and more frequent reports by lobbyists on their activities. But after these bills passed both chambers and the Abramoff outcry had quieted, they languished in conference all summer long.

Until late last week, Boehner had sounded notably cagey about the possibility of earmark reform. Yet with Congress nearing the end of its session and elections fast approaching, the unfinished business of lobby reform suddenly looks like a poster child for this do-nothing Congress. Boehner has now reversed course and is now floating a resolution to address earmarks.

Boehner's proposal would establish a new point of order against consideration of a committee report or conference agreement on spending or tax legislation unless earmark sponsors are listed in the report.

This proposal only covers a tiny fraction of the scope of the original reform bills. The change would only apply to committee-reported bills, not new legislative vehicles such as those that carried the pension and "trifecta" measures before the August recess. And, technically, Boehner's proposal would not be a law, but merely a change in the House rules, automatically expiring at the end of the current Congress. Some Republican may be banking, however, that even this small change may be enough to take to voters as proof of their reform bona fides come November.

Boehner's office has said he will take all necessary action to make this a sustained rule and practice in the House. But House appropriators have issued loud protests. In particular, Appropriations Committee Chairman Jerry Lewis (R-CA) warns that he will oppose any earmarks provision that applies only to the appropriations bills that go through his committee and not to tax and authorizing bills,.

Boehner and other GOP leaders have made efforts to broaden the definition of earmarks to the appropriators' satisfaction but it is unclear if the changes will be broad enough to garner Lewis' support.

Another outstanding issue in the House regarding how broadly earmarks are defined was outlined well in an article published by Citizens for Tax Justice:

> House leaders want the rules to treat tax break proposals as earmarks, or as "targeted tax provisions" only if they benefit just one person. As of [September 8], House appropriators are reportedly opposed to this plan because they think it lets the House Ways and Means Committee (which writes the tax proposals) off the hook too easily. But their definition of a "targeted tax provision" that should be considered an earmark is also laughably loose. They reportedly would include any

> tax break that benefits fewer than a hundred people. So a tax break that benefits only the richest fraction of one percent could never be considered an 'earmark' because it benefits more than a hundred people.

Having gone as far as promising floor action on the earmarks measure this week, Boehner and the House GOP now risk considerable embarrassment should efforts to reach a compromise with Lewis and other appropriators fail. Though limited in both scope and tenure, the House earmarks measure nevertheless would stand as a notable step toward increasing transparency in the budget process.

Trifecta Bill May Resurface in Senate This Month

The fate of the "trifecta" bill and middle-class tax cuts remains uncertain, as GOP leaders send mixed signals about their intentions and the GOP ranks appear restless.

In late July, the House passed a so-called "trifecta" package (H.R. 5970) that would roll back estate taxes, increase the minimum wage, and extend several business and other tax credits. Solely because of the inclusion of the estate tax cut, the package failed in the Senate, falling three votes short of the 60 necessary to end debate.

Unfortunately, the GOP leadership has refused to design a strategic alternative to the trifecta bill. Many members of the business community have been vocal in calling for action on the highly-popular tax credit extensions ("extenders") - even recently publicly questioning the Republican strategy to attach those provisions to the estate tax. By any measure, this is "must-pass" legislation and will cause corporate and small business losses if not renewed by the end of the year. But it was lashed to the mast of the estate-tax, a poison-pill for any Senate bill, no matter how broadly supported.

House Majority Leader John A. Boehner (R-OH) and Senate Majority Leader Bill Frist (R-TN) have painted themselves into a rhetorical corner, insisting repeatedly that the trifecta is an all-or-nothing proposition.

Boehner was emphatic last week about staying the course with the trifecta bill at a press conference, stating, "Will we break it up? Absolutely not. Do I need to spell it? Absolutely not. That bill is the bill and will be the bill and if anybody wants any part of the bill they get to vote for all of it or none of it."

Likewise, Frist has not yet backed off his pronouncements in August that members will not have the opportunity to vote separately on the elements of the trifecta. He is considering the idea of sweetening the minimum wage provision by fixing the penalty on workers in states that do not count tips as wages. He has also suggested he might add some middle-class taxes cuts to the trifecta package. Frist has ruled nothing out, saying all options are still on the table.

Still, Frist is getting some tacit push-back from Republican colleagues who are seeking to break the logjam.

Sen. Charles Grassley (R-IA), who complained bitterly about the extenders he championed sinking along with the trifecta, is now talking about pushing off any vote on the extenders until a post-election lame-duck session of Congress. Sen. Jon Kyl (R-AZ) told reporters last week that the package remains three votes shy of the 60-vote threshold needed for passage and he doubts the bill could be altered to attract three more supporters.

Democrats remain almost entirely united in opposition to the trifecta bill because of the estate tax provision, which they say will bankrupt federal coffers by giving unnecessary tax breaks to the wealthiest Americans.

Without question, GOP rank-and-file pressure on leadership to relent and allow a separate vote on the extenders and minimum wage prior to the Nov. 7 election is building, as members in tight races are desperate to deliver legislative accomplishments.

If Frist and his cohorts do not bring the trifecta to the floor or refuse to break it up into three bills, other options may be available. The trifecta notwithstanding, Frist and the House Republican leadership have been murmuring about extending largely middle-class tax cuts, specifically the 2001 child tax credit expansion and the reduction of the "marriage penalty." Finding themselves in a desperate struggle to maintain control of both houses of Congress, Republicans might seek to garner key middle-class votes by making these provisions permanent.

Spending Transparency Bill Passes Senate, House Approval Imminent

After a month of secret holds, back-room maneuvering, stall tactics and butting of heads, the Senate quietly passed the Federal Funding Accountability and Transparency Act (S. 2590) on Thursday, Sept. 7 by unanimous consent. The bill will dramatically increase government accountability and public access to federal spending data, by creating a free, public, searchable website of all federal spending, including government contracts and grants. The House is expected to amend the bill slightly before passing it this week.

After amassing an impressive group of cosponsors including both the Senate Majority and Minority leaders, the bill was unanimously approved by the Homeland Security and Government Affairs Committee in late July. It was widely expected the bill would pass the Senate quickly before the chamber broke for its summer recess in August, especially after Sens. Susan Collins (R-ME) and Joseph Lieberman (D-CT), the committee's chair and ranking member respectively, jointly requested the bill be fast-tracked and brought to the Senate floor for a quick vote.

Yet the bill ran into some unexpected resistance when two Senators placed anonymous holds on the legislation, preventing it from passing quickly. The irony of a "secret hold" being used to stop a bill promoting transparency and disclosure of government information was not lost on supporters of the legislation nor the media.

Blogs from across the political spectrum including Porkbusters and TPMMuckraker,

public interest and watchdog groups teamed up to launch an effort to expose the mystery senator or senators. New of the effort spread quickly through the blogosphere and activists and regular citizens called senators' offices *en masse* to ask them to publicly disavow having placed the hold. Eventually this effort uncovered two senators who placed holds: Ted Stevens (R-AK) and Robert Byrd (D-WV). Once exposed, Byrd relinquished his hold - saying he had had sufficient time to review the bill and no longer objected.

Stevens hold remained for a time, however, as he repeatedly claimed he was concerned that the legislation would be too costly and that it would create excessive bureaucracy. A number of Capitol Hill insiders, however, have speculated that the hold was placed as a personal pay-back against Coburn for holds he had placed in 2005 on legislation Stevens cosponsored. Nevertheless, the obstacle was eventually removed after increased public pressure on Sen. Majority Leader Frist led him to bring the bill for a vote despite the hold.

Shortly after the Senate approved S. 2590, an agreement was reached with cosponsors of a weaker House version, which passed earlier this year, to bring up the Senate version for a House vote before adjournment. The weaker House bill only included required public access to information on grants and other kinds of federal assistance spending, omitting all federal contracts.

The House will take up S. 2590 this week on the suspension calendar - a procedure for non-controversial legislation. It is expected to pass by a wide margin. Since it will be slightly modified from the Senate version, the bill passed by the House will quickly be passed by the Senate once again and then sent to the president for his signature.

While the enactment of this bill is certainly a victory for transparency and access to information for the American people, it does not guarantee the online database will be easy to use and accessible for novice users and analysts alike. In order to make sure the government implements S. 2590 appropriately and adequately, OMB Watch will launch a similar database in early October. The new website, FedSpending.org, will allow users to search and download current government spending data in an easily accessible format for free.

Congress Squanders Year As Appropriations Remain Unfinished

With the beginning of the new fiscal year less than three weeks away, not one of this year's appropriations bills has been signed into law. The Senate shoulders most of the blame for the standstill, having now passed just two of its 12 appropriations bills. Because there is so little time left, Congress will have to finish up its appropriations work in a lame-duck session after the November election.

Last week, the Senate passed its version of the Department of Defense spending bill, only the second appropriations bill it passed this session, the first being the Department of Homeland Security spending bill. Clearly, Senate leadership has not considered

appropriations bills a priority this session. Instead of appropriations bills, the GOP leadership has brought up the estate tax roll-back on three distinct occasions, as well as attempted to pass two unpopular constitutional amendments. None of these measures passed, while 10 must-pass appropriations bills have received no consideration.

The appropriations process this year seemed doomed from the start as the Senate did not schedule enough time in session to finish all its appropriations bills. When it adjourns in October, the Senate will have spent 125 days on the job, the lowest count in at least the last 20 years.

The House, on the other hand, has passed every appropriations bill except for a divisive Labor-Health and Human Services (Labor-HHS) bill. The Labor-HHS package was amended in committee to include a raise in the minimum wage that many House conservatives have objected to. Further, House Republicans do not agree on the bill's proper funding totals or funding for some specific programs, with moderate Republicans asking for amendments that would add billions to the Health and Human Services budget. Moderates have also protested the House Appropriations Committee's Labor-HHS proposal that would zero out funding for 56 individual programs.

Despite the time needed to iron out good-faith compromises on these issues, House leaders will most likely wait until the last minute before adjournment to take up the Labor-HHS bill making good compromises next to impossible. And with so little work done this far into the budget cycle, Congress will have to hold a lame-duck session after the November election to complete all appropriations bills.

In order to avoid a government shut down, Congress will have to pass "continuing resolutions" that temporarily fund federal programs until appropriations bills have been signed into law. This year, all the unfinished appropriations bills will most likely be combined into one large "omnibus" bill. This will allow for far less oversight and scrutiny of specific funding levels and will likely lead to program terminations and cutbacks to funding levels that ordinarily would not pass Congress.

For a second straight year, Congress has done a shameful job of fulfilling its most basic duty: appropriating federal resources to keep essential government programs funded.

Senate Finance Committee Looks at Executive Compensation Excesses

A Sept. 8 Senate Finance Committee hearing demonstrated that a 1993 tax code reform has failed to curb the growth of extravagant CEO compensation packages. In fact, the reform created loopholes that have opened the door for outrageous salaries and bonuses, and unscrupulous behavior by company executives and boards of directors.

Senate Finance Committee Chairman Chuck Grassley (R-IA) vehemently denounced the loopholes in the tax code created by the 1993 reforms.

Prior to the hearing, Grassley told the *Wall Street Journal* that the original purpose of

the 1993 law was to "make sure that there wasn't a great deviation between what executives got paid and what people further down the ladder" got paid.

"It really hasn't worked at all," Grassley said, explaining why he had called for the hearing. "I want to know what went wrong and how we can fix it."

Echoing Grassley's remarks, Christopher Cox, Chairman of the Securities and Exchange Commission, testified at the hearing that "as a Member of Congress at the time, I well remember that the stated purpose was to control the rate of growth in CEO pay. With complete hindsight, we can now all agree that this purpose was not achieved. Indeed, this tax law change deserves pride of place in the Museum of Unintended Consequences."

The 1993 reforms applied to Section 162(m) of the tax code. Under 162(m), publicly traded corporations can deduct no more than $1 million in base pay for each of their five highest paid executives. More compensation of top executives can be deducted only if it is tied to job performance.

Despite the 1993 reform, executive pay continues to grow much faster than average worker's earnings, with much of it being deducted as "performance-based" pay. According to a recent report from United for a Fair Economy, the average executive made 40 times as much as a worker in 1980, but by 2005 made more than *400 times* as much as a worker.

Part of this increase was fueled by section 162(m). Under the provisions of the reform, the nature of compensation for executives changes. Base salaries now take up only a minor portion of CEO compensation packages, while alternative types of compensation that qualify as "performance-based" pay, such as stock options, are increasingly common.

Not only did 162(m) fail to achieve its intended purpose, but it also made executive compensation more difficult to monitor. Harvard Law School Professor Lucien Bebchuk, who testified at the hearing, estimates that abuse of the performance-based provisions of 162(m) has cost the Treasury at least $20 billion. The IRS has launched a "Corporate Executive Compliance" initiative in response, hoping to improve the accuracy of reporting of executive compensation.

Witnesses at the hearing also discussed how 162(m) contributed to an up tick in stock options fraud. Stock options are automatically considered "performance-based" and have become a popular way of providing deductible executive compensation. Companies can "backdate," or choose the date from which the options would be issued, to change the value of the stock option. Stock backdating is not necessarily illegal, but it can make it easier for companies to hide the true extent of an executive's pay. Many companies that used backdating are now being investigated by the SEC for issuing fraudulent disclosures of executive pay, as well as possibly violating accounting rules.

Cox told the hearing that the SEC is ready to make new rules that would cut down on fraudulent disclosures, and Grassley expressed his intention to move forward on

additional reform proposals, though he did not explicitly say what actions he would take.

Criticism of Draft Risk Assessment Bulletin May Delay Implementation

InsideEPA, a Washington trade publication, reports that criticism from federal agency officials could prevent the Office of Management and Budget from finalizing a bulletin on risk assessments.

On Jan. 9, 2006, the OMB released a draft bulletin governing how agencies perform risk assessments. If enacted, the new standards would create a one-size-fits-all standard, requiring more information and analysis before agencies could act to protect the public.

The Environmental Protection Agency and other federal agencies have been vocal in criticizing OMB's draft bulletin. Now, according to InsideEPA, industry officials are worried this criticism could delay OMB's ability to finalize the bulletin.

EPA Calls Bulletin Burdensome

In comments to the National Academies of Science (NAS), which is charged with peer reviewing the draft bulletin, EPA noted that OMB's bulletin would burden the agency with new analytical requirements and would require the use of assumptions that fail to adequately protect vulnerable populations, according to InsideEPA.

As OMB Watch noted in its comments on the bulletin, the draft bulletin requires that agencies consider expected risks and, therefore, conflicts with laws governing clean air, drinking water and pesticides, which explicitly require EPA to consider the harms imposed on the most susceptible populations, like children or the elderly.

"Discussion of the notion of expected risk, (not a specifically defined term, to our knowledge) in a risk assessment usually involves a particular exposure distribution and relies on a series of judgments about whom we expect to be exposed," according to the EPA comments obtained by InsideEPA.

Department of Labor and Other Agencies Raise Concerns

The Department of Labor (DOL) also commented that the risk assessment bulletin "could add significant time" to risk assessments by the Occupational Safety and Health Administration (OSHA) without improving the usefulness of the assessments, according to the BNA Daily Report for Executives. DOL pointed out that the broad scope of the document could require OSHA and MSHA to perform risk assessments on "non-regulatory informational products" including guidelines for employers and employees to avoid workplace hazards. The Center for Disease Control raised similar concerns.

The draft bulletin could also undermine the scientific integrity of OSHA's risk analysis, DOL said:

To make its determinations of the significance of the risk, OSHA relies on analyses of scientific and statistical information and data that describe the nature of the hazard associated with employee exposures in the workplace, and derive[s] estimates of lifetime risk assuming that employees are exposed to the hazard over their working life (usually taken to be 45 years).

The DOL comments went on to say that OMB's bulletin would require "all plausible assumptions and models be quantitatively evaluated," when possible. According to DOL, this standard could potentially have negative impacts on OSHA's evaluation of risk. "OSHA would prefer that the bulletin make clear that quantitative evaluation of risk be based on those assumptions and models that are clearly consistent with supporting scientific evidence, for example, regarding a chemical agent's mode of action," the comments stated.

The Consumer Product Safety Commission, the Food and Drug Administration, the Department of Transportation, and the Fish and Wildlife Service also raised concerns about the scope of the risk assessment guidelines. As FDA put it in comments, "risk assessment is a tool for addressing public health problems and should be scaled to fit the public health problem at hand." The level of scrutiny required under OMB's bulletin may not always be appropriate.

Risk Assessment Bulletin Puts the Public at Risk

As OMB Watch pointed out in comments submitted to OMB last month, if enacted, the risk assessment bulletin would so burden risk assessment and other risk-related determinations that agencies would wind up paralyzed, unable to establish a case for protecting the public.

Broad scope would drown agencies in analysis. The bulletin uses a definition of "risk assessment" that sweeps in a much broader universe of agency information than has ever been contemplated by any standard, widely accepted definition. In fact, the definition of risk assessment is so broad that it would include a large number of activities that would never normally be considered risk assessments, including heat and hurricane advisories from the National Weather Service and food preparation notifications provided by the Department of Agriculture.

"Expected" risk estimates ignores harms to most vulnerable populations. The bulletin also requires agencies to not only investigate how a particular harm would impact the most vulnerable individuals but also to determine the "expected" risk. The bulletin requires risk ranges, central estimates and efforts to downplay worst-case scenarios, and population-wide risk estimates, even though many risk management decisions require point estimates of risks to individuals in worst-case scenarios. These approaches are in some cases contradictory to the risk assessment approaches outlined in law. For instance, the Resource Conservation and Recovery Act specifically require that EPA consider the individuals most highly exposed to harm when setting standards.

In fact, preliminary analysis conducted by Reps. Bart Gordon (D-TN), John Dingell (D-MI), Henry Waxman (D-CA) and James Oberstar (D-MN) found that "the analytical

approach mandated in [the bulletin] represents a significant departure from approaches contained in the many statutes governing health, safety, and the environment, and from statutory direction to federal agencies to protect human health, safety, and the environment." The representatives determined that the bulletin conflicts with statutory mandates including separation of cost-benefit analysis and risk analysis, and noted that Congress has traditionally guided agencies individually in their risk assessment practices.

Agencies must act in fact of uncertainty. OMB's approach to risk assessment demands that agencies identify all potential sources of harm when conducting risk assessments. In many cases, this would be an incredibly time-consuming task that would delay agency actions to prevent harm to the public, as adverse effects could be attributed to myriad different sources. The proposed bulletin would deprive agencies of the discretion to determine the best approach to risk assessments given the particular circumstances involved, such as the urgency for agency action. But the subject matter in risk assessments also varies widely between agencies, and what is the best approach to risk assessments for one agency may not be the best approach for another.

A free pass to industry. In contrast to the extensive requirements for agency risk assessment activities, the proposed bulletin gives a free pass to assessments used in characterizing risk on product labels if the label is required to be approved by a federal agency. This is despite the fact that such risk assessments are among the most in need of guidelines to ensure quality and objectivity. In many cases, the risk assessments used by agencies in approving labeling for a product are conducted or sponsored by the manufacturer of the product. Manufacturers clearly have an incentive to downplay the harm associated with their product, and a number of studies reveal bias in manufacturer assessments. This giveaway to manufacturers undermines the purpose and objectivity of the proposed bulletin.

Report Finds Dudley Unfit to Serve

Public Citizen and OMB Watch released a report today on Susan Dudley, the nominee to become the new regulatory czar within the Bush administration, concluding that she is unfit for Senate confirmation.

The report, *The Cost is Too High: How Susan Dudley Threatens Public Protections*, presents a case for rejecting Dudley as the next regulatory czar, whose official title is Administrator of the Office of Information and Regulatory Affairs (OIRA) within the White House Office of Management and Budget.

As OIRA administrator, Dudley would have an enormous range of powers, including:

-
- overseeing nearly all governmental regulations published by agencies,
- reviewing every agency action that would collect information from 10 or more people,
- setting policy that govern information dissemination by the agencies, and

- coordinating statistical policy.

OIRA not only checks for duplication in regulatory and information practices, its stated purpose, but can alter the content of agency actions. OIRA was created through the Paperwork Reduction Act of 1980. The act does not grant OIRA any regulatory review authority. Instead, this authority was granted to OIRA initially through Executive Order 12291, issued by President Reagan within the first month of taking office. Thus, from the day it opened its door, OIRA was largely a regulatory review agency running roughshod over the agencies to promote the policies and priorities of the president. It has changed little over the years.

In a statement accompanying the report, Joan Claybrook, president of Public Citizen, said that Dudley was "unfit" to be administrator of OIRA. She described Dudley's opposition to federal regulations to require air bags in automobiles as one example of her radically free-market ideas.

Margaret Seminario, Director of Safety and Health at the AFL-CIO, made the case that Dudley has a strong bias against regulation, a very dangerous position when it comes to protecting the lives of workers. Seminario added that Dudley's emphasis on cost-benefit analysis and the near determinative role that such economic analyses would have in Dudley's decisions run counter to various laws, such as the Occupational Safety and Health Act which places the safety of workers above cost-benefit decisions.

According to Robert Shull, the report's primary author--who recently left OMB Watch to lead Public Citizen's auto safety and regulatory policy division--**Dudley**:

- **Has rarely met a rule that she likes.** Dudley's "market failure" test would make it impossible for agencies to justify public health, safety, civil rights, environmental, or other public interest protections.
- **Has a radical agenda for gutting federal regulations.** She supports regulatory sunsets which would put agencies on a treadmill of having to revisit rulemakings that have previously been done, whether it deals with child consumer protections or broader health protections. She also supports regulatory budgets, a concept promoted since the Reagan administration, but opposed by Congress and the public.
- **Is too cozy with industry.** She has been the head of the industry-funded Mercatus Center, heavily influenced by major corporate interests. Even Dudley's conservative colleagues think she is a bit out there. According to the Public Citizen/OMB Watch report, the managing editor of a Cato Institute publication said, "The material that they send to us, they try to tone down. Cato is more of a public policy research organization. We may be a little more academic than they are."

It is unclear when hearings on the Dudley nomination will take place. Sen. Joe Lieberman (D-CT), the ranking Democrat on the Homeland Security and Governmental Affairs Committee, sent out a press release calling for "stringent scrutiny" of Dudley. The chair of the committee, Sen. Susan Collins (R-ME), has not indicated a hearing date.

IRS Drops Case Against NAACP

On Aug. 31 the National Association for the Advancement of Colored People (NAACP) announced that, after an investigation lasting nearly two years, the Internal Revenue Service (IRS) found the group did not violate the ban on partisan electioneering in 2004. The group will thus retain its tax-exempt status. The case raised questions about the right of charities and religious organizations to criticize elected officials' policies, the role of partisan politics in IRS investigations, and the legality of the new IRS enforcement program. The results of this case should reassure nonprofits of their right to speak out on the issues of the day.

The NAACP announced the IRS action at an Aug. 31 press conference. NAACP Board Chair Julian Bond, whose 2004 convention speech criticizing Bush policies was the focus of the investigation, told reporters at the event, "We'll continue to speak truth to power."

NAACP President and CEO Bruce S. Gordon, told reporters, "Tax-exempt organizations should feel free to critique and challenge governmental policies under the First Amendment without fear of IRS intervention." He said the investigation was a cloud that hung over the group's activities, diverting resources from its principal mission of fighting racial discrimination. Bond added, "It has never been a crime or violation for American citizens to criticize government policies and it is not a crime or a violation to do so now."

The NAACP criticized the IRS for taking nearly two years to complete the investigation, conducted under a "fast-track" process the IRS established in 2004 and continues to use in 2006. The IRS letter informing the NAACP of its decision claims the investigation was delayed because the NAACP had not complied with an administrative summons asking for documentation about the 2004 convention. (The NAACP had refused to comply with the summons, claiming its timing violated IRS rules.) The IRS letter states the agency was able to complete its investigation by watching a video of Bond's speech, noting that the "video footage allowed the Service to gain information regarding the context in which Mr. Bond's speech was made. That additional information, when added to the information that the Service had previously been able to gather, indicated that political intervention did not occur."

Bond, however, called the IRS's justification for its delay "dishonest and disingenuous," noting that the video and full text of the speech had been available on the NAACP website throughout the investigation and that no new evidence had emerged.

Some have accused the IRS of playing partisan politics by opening the investigation one month before the 2004 election. Although the IRS letter to the NAACP said the investigation was launched "as a result of information received from the general public," the NAACP obtained documents from its IRS file that show several Republican members of Congress requested the probe. The NAACP used Freedom of Information Act requests to obtain over 1,500 pages of documents in the IRS files. These documents show complaints against the NAACP to the IRS were made by several members of Congress, including Sens. Lamar Alexander (R-TN) and Susan Collins (R-ME); then-Senator Strom Thurmond (R-SC); Reps. JoAnn Davis (R-VA.) and Larry Combest (R-TX); and then-

Reps. Robert Ehrlich (R-MD) and Joe Scarborough (R-FL).

Ehrlich, who is currently governor of Maryland, said his request was only a constituent service because he was following up on a complaint from Richard Hug. According to the *Baltimore Sun*, Hug is Ehrlich's chief campaign fundraiser. The IRS denies the charge, saying its decisions are made "without regard to political considerations."

The case has raised questions about the legality of the IRS's new procedures for enforcing the ban on campaign intervention by charities and religious organizations. Prior to the 2004 election cycle investigations into possible violations did not begin until after a 501(c)(3) organization filed its annual information return (Form 990). The new procedures allow the IRS to initiate investigations before the Form 990 is filed, in order to prevent repeat violations.

The Political Activities Compliance Program (PACI) would have been contested in court if the IRS had not closed its investigation of the NAACP when it did. In January the NAACP moved to force resolution of the case by paying the excise tax it would have owed if the IRS found it had violated the ban on partisan activity. The excise tax rate is 10 percent of the cost of a prohibited communication. The organization then filed for a refund, giving the IRS six months to act before the NAACP would be entitled to go to court for a review of its claim.

The IRS may not have avoided a court battle by acting just before the end of the six-month deadline. NAACP officials are still seeking further disclosure of relevant IRS files under the Freedom of Information Act, some of which the IRS has withheld.

FEC Deadlocks on Grassroots Lobbying Broadcast Exemption

On Aug. 29 the Federal Election Commission (FEC) voted down a proposed interim rule that would have exempted grassroots lobbying broadcasts from a federal rule banning ads that mention an incumbent before an election. The vote on the grassroots exemption failed on a 3-3 party-line vote, with Democrats rejecting all proposals. (A majority of the six FEC commissioners, of which three are appointed by each major political party, must approve any action undertaken by the commission.) So the 60-day blackout period applies to this election season, and nonprofit groups cannot lobby members of Congress up for reelection through broadcast ads.

The grassroots exemption proposal was sponsored by FEC Commissioner Hans A. von Spakovsky, a Republican. It was released on Aug. 3 and was supported by his Republican colleagues. It would have allowed nonprofits, corporations and unions to fund grassroots lobbying advertisements 60 days before a general election or 30 days before a primary, on either television or the radio if the following conditions were met.

The broadcast *must*:

- Be directed at the lawmaker in his capacity as an incumbent officeholder, not a

candidate;
- Discuss a public policy issue currently under consideration;
- Urge either the officeholder or the general public to take a specific position on an issue, and in the case of the general public, urge them to contact the officeholder.

But the broadcast *could not*:

- Discuss the officeholder's character or fitness for office;
- Reference any political party or election; or
- Promote, support, attack or oppose any candidate for federal office.

The proposed interim final rule was spurred by a February 2006 petition for rulemaking filed by the AFL-CIO, Alliance for Justice, the U.S. Chamber of Commerce, the National Education Association and OMB Watch. It would have been effective through Sept. 2007, at which point the FEC would have considered a final rule.

During FEC discussions of the possible exemption, Commissioner Ellen Weintraub, a Democrat, objected to the proposal because a full rulemaking process had not taken place. However, the three Democrats then voted to block such a process and also blocked a motion authorizing the FEC's attorneys to prepare draft rules for discussion, claiming they want to wait for guidance from the courts.

The Notice of Disposition of Petition for Rulemaking, which lays out the FEC's decision, states the FEC "may consider a rulemaking on this subject in the future." This is unlikely, however, to occur before two cases challenging application of the rule to specific situations are resolved by the courts. For more information about those cases see Grassroots Lobbying Issue Hits FEC and the Courts (*OMB Watcher* Apr. 18, 2006) and Federal Court Rejects Challenge to Limitations on Grassroots Broadcasts (*OMB Watcher* May 16, 2006).

Nonprofits Mobilize to Fight Voter Suppression

A growing body of state laws and regulations governing voter registration and the voting process create barriers to voting that discriminate against minorities, new citizens and the elderly. Nonprofits are challenging these new voter suppression tactics, including filing several lawsuits. These voter drives build off efforts that support election reform programs mandated by the Help America Vote Act of 2002, and these developments illustrate just how important nonprofit organizations are as vehicles of civic participation.

Recently federal courts have struck down state rules limiting the ability of nonprofits to register voters in Florida and Ohio. In Florida the League of Women Voters, the AFL-CIO, and American Federation of State and Municipal Employees were forced to stop registering voters until the court blocked enforcement of a new state rule. The rule mandated that nonprofits turn in voter registration cards within 10 days or pay stiff penalties for late submission. Groups were engaged in statewide voter registration drives

and said the law created a logistical impossibility.

In Ohio, Project Vote, People for the American Way Foundation, and Common Cause Ohio successfully challenged a law that would have required all voting registrars (including nonprofit volunteers) to complete an online training course and to submit the registrations personally instead of through the nonprofit sponsor, or face criminal penalties. A similar proposed rule in New Jersey requiring forms to be turned in within five days of registration is being challenged by the Brennan Center for Justice.

New, stringent voter identification requirements are also being challenged. In Ohio the Brennan Center has filed suit on behalf of naturalized citizens challenging a law that allows poll workers to request that voters produce documentation proving their U.S. citizenship. The law does not apply to citizens born in the United States.

In Washington the Association of Community Organizations for Reform Now (ACORN), Service Employees International Union, Washington Citizens Action, and the Washington Association of Churches won a case challenging a state law that would have kept citizens from voting if their identification information did not match government databases exactly. This would have kept otherwise eligible voters off of voter rolls if there had been even a minor typographical error. However, in Missouri a state judge recently sided with the state on a similar issue, even while acknowledging the potential high cost of compliance with the law by several voters.

In Congress, a bill (H.R. 4844) would require all citizens that want to register to vote to show proof of citizenship. It is possible the bill could come up for a floor vote in the House of Representatives during the week of Sept.18. This action follows up on an effort by a group of Republican lawmakers to hold up the passage of the landmark Voting Rights Act Reauthorization this summer. It was eventually passed, but not before an attempt to limit its scope and protections was made.

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The Watcher
September 26, 2006 Vol. 7, No. 19

IN THIS ISSUE

Letter from Gary Bass: OMB Watch Launches FedSpending.org to Shed Light on Government Spending

Dear OMB Watcher:

On Oct. 10, OMB Watch will open a window through which any American can see just how our federal government spends. With generous support from the Sunlight Foundation, we have created a new searchable website, FedSpending.org, that will let the public see who is getting federal contracts and other financial assistance, and how much is being spent on government programs and in specific states and congressional districts. FedSpending.org is unprecedented - and long overdue.

At OMB Watch, we've always believed that transparency and disclosure, in regard to

both government information and government decision-making, are essential to a functional democracy. An engaged and informed citizenry is the most important ingredient of a healthy democracy. For citizens to participate in the political and policy process, they need accurate and timely information about the government they are asked to judge. Elected officials, political appointees, and others who are operating the levers of power also need to know that their actions and decisions are tracked and evaluated. Such a record of accountability can create greater efficiency and effectiveness in our government's operations as it pursues our national priorities.

We believe FedSpending.org, by helping shed light on federal spending, will also contribute to a more vibrant democracy. You will be able to access information about federal contracts, grants, insurance, loans, and direct payments. You will be able to search by recipient name or by congressional district, for example. You will be able to obtain information about the size of specific contracts and grants, when they started, and where the service they provide was to be performed. You will be able to see whether or not a contract was competitively awarded and which contractors get the largest share of our nation's contract dollars. And this is just the tip of iceberg.

Because the data is so easy to access and because of its sheer volume and breadth, this database will be an invaluable resource to anyone interested in knowing how the federal government allocates funds and to whom those funds are awarded. It is a powerful tool for journalists and nonprofit leaders, for students and community groups, for conservatives and liberals and everyone in between.

In fact, the service that FedSpending.org provides is so important that Congress has passed, with overwhelming bipartisan support, a bill that will create a similar database to be administered by the federal government. And today President Bush signed that bill, the Federal Funding Accountability and Transparency Act (S. 2590), into law. The law mandates that the Office of Management and Budget (OMB) create and maintain a searchable database, not unlike FedSpending.org. The OMB-managed database will not be available, however, until Jan. 1, 2008. FedSpending.org, on the other hand, will be online in about two weeks and, we hope, will serve as a baseline for OMB's version.

We invite you to visit FedSpending.org on Oct. 10 and thereafter to explore our newest effort to expand government transparency and strengthen accountability. We rushed to get this site online before the upcoming national elections because we believe citizens have the right to take stock of their representatives' spending priorities before casting their vote.

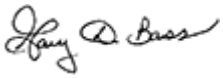
FedSpending.org is a work in progress. Visit the site, look around, and let us know how to improve it. There is much to be improved upon, we know. Some of our challenges have been the result of our tight timetable and others come from limitations in the data. Our hope is, with increased public use of the data, our government will feel a sense of urgency to improve the quality of its information on spending.

Nonetheless, we are committed to refining and improving this important tool. For example, in 2007 we will explore linking this data with other information about the role of money in politics. We also plan to add an interactive map that displays where federal

funding goes overlaid with U.S Census data to help to further put spending in perspective.

When you or I buy something at the store, we get a receipt. FedSpending.org is the first time you and I will get a receipt on government spending. Let's all take a look at that receipt and see just what kind of deal we're getting.

Yours truly,



Gary D. Bass
Executive Director

Budget Failures: Cutting to the Core

Republicans in Congress, in order to avoid a backlash from core supporters this November, are on a path to make harmful budget cuts under the cover of a "continuing resolution" and a post-election "lame-duck" session. Only two of 12 appropriations bills - the Department of Homeland Security and Department of Defense spending bills - are even close to passage, and both should receive hefty allotments that will crowd out spending in the remaining appropriations bills.

In a joint-chamber conference last week, legislators hammered out a compromise between the House and Senate versions of the Defense appropriations bill. The $447.4 billion spending package is $5 billion above the Senate's version - $5 billion that, under this year's tight budget cap will have to be made up for in cuts in other areas.

Programs in the Labor-Health and Human Services (Labor-HHS) appropriations bill will likely feel the brunt of these cutbacks. Neither the House nor the Senate has passed a Labor-HHS spending bill, but a version passed by the House Appropriations Committee gives us some idea what to expect. It would eliminate funding for 56 individual programs, including important assistance to students, children, and community organizations.

Earlier this year, Congress vowed against these cuts when both the Senate and the House added billions to the allotment for Labor-HHS programs in the Congressional Budget Resolution. Moreover, these cuts could have been avoided altogether had Congress waited for a supplemental appropriations bill to provide the extra $5 billion in defense funding. A supplemental bill would not have required being offset by slashing other program budgets.

Avoiding making hard decisions about budget priorities by using supplemental appropriations bills is not a particularly responsible budgeting practice, but neither is forcing Congress to vote on program cuts after an election in a lame-duck session. None of the remaining 10 appropriations bills will be passed before the election, and this failure will make all-but-inevitable budget cuts go largely unseen by the voting public on

election day. The end result is Congress will make unpopular cuts to important programs by removing the opportunity for the public to hold them accountable.

What makes this deplorable situation even worse is that it could easily have been avoided. Congress could have spent more days actually working this year. The Senate leadership could also have made appropriations bills a legislative priority. Instead, GOP leaders chose to focus what little time they had on polarizing, election-year legislation to score points with the GOP base (e.g. flag burning and anti-gay marriage amendments) while the core work of Congress went unfinished.

Meanwhile, the start of the new fiscal year is only *five* days away, and without a stop-gap funding measure, most federal programs will run out of money on Oct. 1. To avoid a shutdown, Congress must then pass a continuing resolution (CR) before it adjourns. The CR will fund federal programs until Congress can finish its appropriations work - most likely in late November.

The level at which this CR would fund programs is still up for debate. One proposal would fund all programs at the lowest of three levels: either the FY 07 funding level passed by the House or that passed by the Senate, or the FY06 (current) funding level. Any of those options could produce short-term cuts for important domestic programs. A similar CR substantially cut programs last year. Congress could also include an across-the-board cut to all programs covered under the CR as they did last year.

Congress has fulfilled few of its fundamental fiscal obligations this session. It has chosen instead to wait until it is politically convenient to do what it otherwise could not -- slash investments and resources many Americans count on.

Another Estate Tax Vote Unlikely During This Congress

With Congress now in its final week before adjourning for the midterm elections, the death knell may finally be sounding for the "trifecta" package (H.R. 5970), a bill lumping together popular tax credit extensions, a permanent reduction in the estate tax, and an increase in the minimum wage.

The trifecta passed the House in late July, but it failed in the Senate, falling three votes short of the 60 necessary to end debate, entirely on account of the estate tax provision.

Two weeks ago, Senate Majority Leader Bill Frist (R-TN) asked four of his colleagues -- Finance Committee Chair Charles Grassley (R-IA), Budget Committee Chair Judd Gregg (R-NH), and Sens. Jon Kyl (R-AZ) and Trent Lott (R-MS) to find ways to sweeten the package for Democrats and move the proposal forward.

But the group came up with no such recommendations, and all acknowledge that the trifecta package is dead, at least until after Congress reconvenes on Nov. 14 in a post-election lame-duck session.

Lott, for his part, floated the idea of adding language opening up the Outer Continental Shelf to oil and natural gas development. The idea was that this provision would make it hard for Sen. Mary Landrieu (D-LA), who voted against the trifecta, to oppose the package a second time. But this idea did not take and, in any case, would still have left the measure two votes short.

Similar gambits were tried before the Senate's August vote -- such as tax breaks for the lumber industry aimed at Sens. Maria Cantwell (D-WA) and Patty Murray (D-WA) -- but in the face of these and subsequent efforts, the Democrats remained remarkably united in their opposition to repeal of or significance cuts to the estate tax

Over the past month, there has been a rising chorus, led by Grassley and Senate Finance Committee Ranking Member Max Baucus (D-MT) to sever from the bill the popular tax extenders -- including such elemental tax breaks as the research and development tax credit, and the deductions for college tuition and state sales taxes -- and allow a stand-alone vote on the full extenders package.

Grassley has been disappointed twice this year, when Frist removed the extenders first from the $70 billion tax reconciliation measure (PL 109-222) passed in May and then from the pension overhaul bill (PL 109-280) passed in July, after having been promised by Frist that they would be included in these measures.

And in the last two weeks, Frist batted away three bids by Baucus to bring the extenders to the Senate floor as a stand-alone bill.

Frist is unlikely to abandon what he considers the legislative leverage of the extenders, which represent a perfect vehicle for him to continue to push for a drastic reduction to the estate tax because they carry such universal appeal.

This recalcitrance, however, may prove harmful to GOP candidates in close races this year, bristling under the yoke of the "Do-Nothing" Congress label. Grassley couched his last-ditch appeal last week to get a separate vote on the extenders in starkly electoral terms.

I think that people up in '06 ought to be concerned about the extenders, because it's pretty easy to make a 30-second commercial about Republicans not delivering on tax exemption for college tuition, tax deduction for teachers' supplies, and R&D, Grassley told CongressDailyAM.

Some congressional GOP candidates are hinting that they agree with Grassley and hope that Frist will relent.

"If the trifecta's out, we need to see the extenders move," Rep. Kevin Brady (R-TX) said in September 22nd's CongressDailyAM. Texas is one of eight that relies on the state sales tax for its revenue and therefore would particularly benefit from an extension of the state sales tax deduction.

Reportedly, there have been staff-level discussions about moving the extenders

separately among some GOP Senators up for re-election this year -- including Mike DeWine (R-OH), Olympia J. Snowe (R-ME), and Kay Bailey Hutchison (R-TX) -- who may side with Grassley this week.

However, even the electoral appeals of his colleagues may not be enough to change Frist's mind. He may continue to hold out hope of keeping the trifecta intact until after the midterm elections and passing an estate tax cut gift-wrapped in the extenders package.

Terrorism Task Force Raids Muslim Charity, Making Ramadan Giving Problematic

On Sept.18, federal agents raided the office of a Michigan-based Muslim charity. Agents from the Joint Terrorism Task Force (JTTF) seized files, cabinets, computers, and copied documents from the headquarters of Life for Relief and Development, a humanitarian relief organization. The group, founded in 1992, has been active in sending aid to Iraq, Jordan, Pakistan, Dubai, Syria, Sierra Leone, and Israel and is one of the largest American Muslim aid groups. Organization officials are cooperating with the investigation, which federal agents claim is not related to terrorism, but to tax issues, despite the raid being coordinated by a terrorism task force.

The federal agents searched five locations, including the group's headquarters, its accountant's offices, the homes of board member Muhahid Al-Fayadh and executive officer Khalil Jassemm, and the home of fundraiser Shakir Abdul-Kaf Hamoodi in Columbia, MO. In addition, searches were carried out at the Dearborn, MI home of Muthanna Al-Hanooti, a former employee of Life for Relief and Development who founded another group; Focus on American & Arab Interests and Relations, a lobbying and consulting group focused on American-Iraqi relations.

Federal agents told counsel for Life for Relief that the investigation, run out of the Justice Department in Washington, is related to tax issues, not terrorism. According to *The Detroit News*, the warrants were obtained from federal courts and sealed, but an FBI agent said it is a criminal investigation. Investigators are apparently concerned that the group's aid to Iraq violated U.S. sanctions before 2003. According to the *Columbia Daily Tribune*, a charity spokesperson maintains that the aid was sent with authorization under a special license from the U.S. Department of the Treasury, allowing them to legally send money to Jordan, where food and medicine were purchased and then shipped to Iraq. The director of public affairs for the Treasury Department agreed that licenses allowing groups to deliver food were issued, but said "the federal Trade Secrets Act barred her from saying which organizations had those licenses."

Life for Relief and Development was founded by Iraqi American professionals after the first Gulf War and has earned a solid reputation. According to its website www.lifeusa.org, the organization is a member of the well regarded American Council for Voluntary International Action (InterAction) and, in its 15 years of operation, has provided over $50 million dollars in humanitarian assistance to some 13 million

beneficiaries worldwide. Its efforts include orphan programs, medical assistance and drinking water infrastructure and schools in Iraq. The group also helped to fund a 2002 trip to Baghdad by three members of Congress opposed to the war.

The timing of the investigation is troublesome. The holy month of Ramadan began on Sept. 23, and during this time donations are typically at their highest because of *zakat*, a practice of giving to good causes that is a religious requirement for Muslims. The organization worries that donors will hesitate to make any financial contributions because of the investigation. In a statement, Life for Relief & Development has emphasized that the investigation has nothing to do with terrorism and that the organization continues to operate.

The investigation raises serious questions about the motives of federal authorities. In addition to its timing at the start of Ramadan, why the investigation required the use of the terrorism task force to conduct searches is unclear. Statements by the FBI that the searches are related to tax issues are not consistent with raids by JTTF. However, JTTF's presence is consistent with a pattern of government spying on anti-war groups by JTTF personnel, which has been well documented by the ACLU. Speculation that a retaliatory motive exists is further reinforced by the search carried out at the residence of war critic Shakir Hammodi, an active, well-known member of the Muslim community in Columbia, MO. There, on Sept. 20, almost 100 religious leaders, peace activists, and community members came together to condemn the FBI investigation and support Hamoodi.

An editorial in the *Columbia Daily Tribune* noted that local Muslims were told "the Friday before Monday's raid that any large contributor to a suspect agency might be questioned" and further observes, "Where the government crosses the line is when agents have staged high-profile raids and then leave the suspects twisting in the wind."

While it has only been reported on in Michigan and Missouri, the investigation has national implications. The outcome of the FBI investigation, the group's ability to deliver aid during the investigation, the impact on donations and its reputation all remain unclear. What is certain, though, is that the situation will contribute to the overall state of apprehension between Muslim charities and the federal government.

Bipartisan Effort Supports E-Filing of Senate Campaign Contributions

The Senate Campaign Disclosure Parity Act (S.1508), which has yet to be reported out of committee, would require U.S. Senate candidates to file their federal campaign finance reports electronically, just like House and presidential candidates do, and many critics say it's high time. Currently, Senate candidates report on paper and then those pages of contributors are entered manually by the Federal Election Commission (FEC), a time consuming process that denies the public the right to know who is contributing to a Senator's election campaigns when it matters most -- before the election.

The FEC requires federal candidates to file quarterly reports two weeks after the close of

the quarter. These reports contain information on total campaign contributions, as well as the amount given by individuals and political committees. Expenditures are also reported.

According to the FEC schedule, the next reports are due on Oct. 15. While campaign expenditure reports of House and presidential candidates are available on the Internet within 24 hours of being filed with the FEC, the Senate reports will not be available until *well* after the election. Reports for the period between Oct. 1 - Dec. 31 are not due until Jan. 15, 2007.

Jeffrey H. Birnbaum summed up the issue nicely in his *Washington Post* column: "In one of the most controversial quirks in election law, candidates for Senate are not required to file their campaign-finance reports electronically. That means voters can't effectively find out how much and from whom their would-be senators have collected money until long after the election -- too late for them to act."

A bipartisan group of senators introduced S.1508 in July 2005. In an effort to advance the bill four senators, including Russell Feingold (D-WI), Thad Cochran (R-MS), John McCain (R-AZ) and Richard Durbin (D-IL), sent a letter to colleagues asking for their support of the bill. If passed, it will apply to reports filed after the date of enactment.

The blogging community and public interest groups such as the Campaign Finance Institute have recently taken up the question of why Senate candidates enjoy such an exception. Among recent supporters of Senate electronic filing are DailyKos, The Huffington Post, and Sunlight Foundation.

The issue could gain prominence with the November election quickly approaching and citizens increasingly calling for measures to ensure they are able to make informed voting decisions. Unfortunately, as the time Congress is in session dwindles, the bill becomes less and less likely to move forward this year.

IRS Investigations of Political Activity Heat Up

As the election season gets underway, public attention has increasingly turned to the speech rights of charities and religious groups. Leaders of All Saints Episcopal Church, the Pasadena, CA church under investigation for alleged partisanship in 2004, announced they unanimously voted to refuse to comply with IRS requests, setting the stage for a legal battle that could significantly impact the rights of 501(c)(3) organizations. Two members of Congress wrote the IRS questioning its enforcement program and citing the All Saints case. Another case - Operation Rescue West - illustrates the consequences of egregious violations. And church-state separation advocates announced a mailing to 100,000 congregations warning against partisan activities.

All Saints Church refuses IRS document request

The IRS initiated an audit of All Saints Church following anti-war remarks delivered before the 2004 general election during a church sermon, which envisioned what Jesus would say to both candidates about the issues of peace, and poverty among others. In June 2005, the IRS notified All Saints of the inquiry, citing a Nov. 1, 2004 *Los Angeles Times* story that characterized the sermon as a "searing indictment of the Bush administration's policies in Iraq." Following a Sept. 2005 conference call between the IRS and church representatives, the IRS offered a deal: if the church would admit wrongdoing and agree not to allow similar sermons in the future, the IRS would not pursue the case further. All Saints rejected the offer.

In an October 2005 follow-up letter, the IRS told All Saints that the agency would be sending an information request in the near future. Nothing was heard until July 2006, when the IRS sent an informal request to the church. In response, an attorney for All Saints, Marcus Owens, replied to the IRS request by contending that questions in the informal request were too broad and would require voluminous research, proving to be unduly burdensome. He also affirmed All Saints' right to challenge the procedure used by the IRS in conducting the audit. Church officials felt the second request was also unduly intrusive and requested an official summons. Among the requested details in the summons are minutes of church meeting from 2004, an accounting of all expenditures associated with the sermon, various copies of church policy and planning documents, and any audio/visual documentation of the sermon in question.

On Sept. 15 Owens told reporters, "These substantive and procedural problems are crucial in the All Saints case because of the sweeping First Amendment implications of the government's examination. The recent unilateral reversal of the IRS position in the NAACP case raises a serious question as to whether the IRS has any legal basis for continuing its review of All Saints."

In comments made to his congregation (subscription required) on Sept. 17, the current leader of All Saints, the Rev. Ed Bacon, was very clear about why the church feels it must contest the IRS action, saying, "Neutrality, silence and indifference are not an option for us. We must express our conscience in word and deed or we will lose our soul in addition to losing our way. If the IRS is successful in chilling the voices in American pulpits and houses of worship, religion in America will lose all relevance and moral authority."

Members of Congress Write IRS About the PACI Program

On Sept. 18 two members of Congress expressed their concern about the chilling impact of the IRS's Political Activity Compliance Initiative (PACI) program in a letter to Treasury Secretary Henry Paulson and IRS Commissioner Mark Everson. Reps. Adam Schiff (D-CA) and Walter Jones (R-NC) argue that the program threatens nonprofits' First Amendment rights to discuss matters of public policy. The letter cites All Saints Church, which is located in Schiff's district, and the NAACP as examples of tax-exempt organizations that took a position on a public policy issue and paid for it with an IRS investigation. The congressmen contend that the IRS "facts and circumstances" test for determining whether an act is improper political intervention is "far too vague to ensure that not-for-profits understand their limitations on speech."

The letter also cites a recent OMB Watch report that showed the "IRS exaggerated the extent of non-compliance" in its February report on the PACI program. The members of Congress demanded a response to this inconsistency and hinted at the possibility of legislation if the response is not adequate.

Operation Rescue West Loses 501(c)(3) status

On Sept. 11 the IRS revoked the tax-exempt status of an anti-abortion group, Operation Rescue West. Although the IRS did not give a reason for the action when it announced the revocation, Catholics for Free Choice issued a statement that it had filed a complaint against Operation Rescue 2004 after it published an ad that "promised tax deductions for contributions to help defeat the Democratic Presidential candidate, John Kerry." Operation Rescue West officials were unfazed by the revocation. The group's outreach coordinator told reporters, "We have reorganized as simply Operation Rescue...Losing our tax exemption doesn't have much of an effect on us, one way or the other."

Americans United for Separation of Church and State Sends Letters

Americans United for Separation of Church and State (AU) has announced a plan to inform churches about the federal tax law prohibition on partisan intervention in elections. Citing IRS commissioner Mark Everson, the group explained in a press release that most of the nonprofits being investigated for non-compliance are churches. The AU effort takes aim at groups such as Focus on the Family in recruiting religious congregations for election activities, with AU director the Rev. Barry Lynn calling such recruitment "a religious Tammany Hall." AU notes that partisan political groups' involvement with religious organizations creates a direct danger to their tax-exempt status. The campaign is set to deliver letters to 117,000 places of worship spread across 8 battleground states in the upcoming election.

Secretive Biodefense Legislation Moves Forward

The House and Senate are nearing a vote on legislation to authorize a new federal agency, the Biomedical Advanced Research and Development Agency (BARDA), within the Department of Health and Human Services (HHS). The agency would oversee "advanced research and development" of countermeasures to bioterrorism threats, epidemics, and pandemics, and would have broad authority to exempt information from public disclosure under the Freedom of Information Act (FOIA).

Sponsored by Sens. Richard Burr (R-NC) and Edward Kennedy (D-MA), the Pandemic and All-Hazards Preparedness Act (S. 3678) would create BARDA to facilitate partnerships between industry and academia to meet public health and national security needs. The legislation would also empower BARDA to contract with academic institutions and pharmaceutical companies.

To carry out this mission, the bill's supporters argue, information collected and used by BARDA needs protection from public disclosure. According to Burr's staff, secrecy

provisions help the government avoid disclosing what the U.S. cannot protect itself against and how existing bioterrorism and epidemic countermeasures could be defeated. The bill thus specifies particular types of information that would be exempted from FOIA.

This approach is in almost direct contrast to the conclusions of the National Research Council (NRC), which reviewed biochemical research and bioterrorism safeguards in a recent report, entitled Globalization, Biosecurity, and the Future of the Life Sciences. The NRC concluded that an open and free exchange of scientific research and ideas is an essential component of effective program to protect the country from a biochemical attack or accident.

The legislation requires the Secretary of HHS to withhold from disclosure under FOIA "specific technical data or scientific information that is created or obtained during the countermeasure and product advanced research and development funded by the Secretary that reveal vulnerabilities of existing medical or public health defenses." The Secretary would have to review decisions to withhold every 5 years.

Another provision of S. 3678 exempts all anti-trust related information from FOIA and declares decisions to restrict access to such information not judicially reviewable. Moreover, the FOIA exemption does not appear to be limited to information generated by BARDA but may include any and all information at HHS.

In order to provide access to important health and safety information and to ensure adequate oversight of government collaborations with the pharmaceutical industry, S. 3678 needs revision:

- The requirement that the Secretary of HHS withhold certain sensitive information should be revised to permit the Secretary to release certain publicly valuable information.
- The FOIA exemption provision should include a provision that excludes information which is already publicly accessible.
- The FOIA exemption should be limited to BARDA and BARDA-related projects and should not permit the interpretation that it covers the entire HHS.
- The review period for restricted information should be reduced from every 5 years to every 2 years.
- Requests for protected information should trigger such reviews of the restriction.
- The anti-trust FOIA exemption should be removed entirely.

Such modifications will ensure that sensitive information is protected while providing access to information critical to harnessing the enormous resource represented by the scientific, research, and public health communities in the fight against disease and bioterrorism.

Introduced by Reps. Anna Eshoo (D-CA) and Mike Rogers (R-MI), the Biodefense and Pandemic Vaccine and Drug Development Act of 2006 (H.R. 5533) is the companion bill to S. 3678 in the House. It contains identical language exempting specific technical data or scientific information from release under FOIA and establishing five-year mandatory

reviews. It does not contain the anti-trust FOIA exclusion, however. Both versions have passed out of committee and may be considered on their respective floors this week.

Pending EPA Library Closures Spark Protest, Controversy

The U.S. Environmental Protection Agency (EPA) continues to move forward with plans to shut down agency libraries despite protests from EPA scientists and enforcement staff. According to a leaked EPA FY 2007 Library Plan, regional libraries in Chicago, Dallas and Kansas City, as well as the EPA headquarters library in Washington, will be closed by Sept. 30 and as many as 80,000 documents not electronically available will be boxed for digitizing.

The plan, obtained by Public Employees for Environmental Responsibility (PEER), indicates that EPA is prematurely implementing President Bush's proposed budget cut of 80 percent for the agency's library system. Though the House of Representatives has passed the budget cut in its version of the Interior-EPA spending bill, the Senate has yet to take up the proposal. EPA's funding will likely be part of a continuing resolution to keep the many federal agencies whose appropriations bills have yet to be approved functioning after the fiscal year ends on Oct. 1.

An internal memo from EPA's Office of Enforcement and Compliance (OECA) also released by PEER, detailed how the library closures will dilute the agency's enforcement efforts. According to the memo, "If OECA is involved in a civil or criminal litigation and the judge asks for documentation, we can currently rely upon a library to locate the information and have it produced to a court in a timely manner. Under the cuts called for in the plan, timeliness for such services is not addressed."

EPA's Assistant Administrator Marcus Peacock addressed criticisms of the planned closures in an Aug. 22 Letter to the Editor of YubaNet.com. Peacock writes that "EPA is providing comprehensive access to agency documents and materials through EPA's public Web site." Peacock also claims "[r]etrieving materials will not only be more efficient [after the library closures] but also is easier to locate by using the agency's online collection and reference services."

An EPA employee responded to Peacock, anonymously out of fear of agency retaliation presumably, with an Aug. 29 Op-Ed also at YubaNet.com. The employee stated that, while Peacock claims documents will be available via the agency's website, "what he does not say ... and what has repeatedly been raised by EPA scientists across the country ... is that there is no line item in EPA's budget to pay for the digitization of all of these reports." According to the anonymous EPA employee, agency scientists continue to be frustrated because EPA leadership refuses to answer the basic questions of how much digitizing the library collection will cost, how long it will take, and whether the FY 2007 budget will fund the digitization.

One thing is clear: with the closure of EPA libraries comes less access to important health and safety data -- available nowhere else -- to the detriment of the public and the

public servants who work to hold industry accountable to environmental law and regulation.

Chemical Insecurity

Last night, the Homeland Security Appropriations Conference Committee struck a deal to attach chemical security language to the FY 2007 DHS spending bill. The language, agreed upon by Rep. Peter King (R-NY) and Sen. Susan Collins (R-ME) last week, is a retreat from stronger, bipartisan bills pending in both houses and, according to environmental groups, "turns a blind eye to removing thousands of people from harm's way with off-the-shelf technologies." News of the agreement quickly met with strong criticism from members of Congress and public interest groups.

On Sept. 22, House Democrats on both the Energy and Commerce and Homeland Security committees sent a letter to House leaders and appropriators, urging them to reject the King-Collins proposal, which they called "inadequate chemical security measures promoted by the chemical industry." According to Rep. Edward Markey (D-MA), an author of the letter, "[k]ey homeland security protections against chemical disasters are being swept aside in favor of a rider drafted in consultation with industry."

Recently, the House Homeland Security Committee approved a strong bipartisan chemical security bill (H.R. 5695) that includes provisions that would require high-risk facilities to implement safer technologies when feasible, and ensure that states are not pre-empted from adopting stronger chemical security protections. The Senate Homeland Security and Governmental Affairs Committee had also passed chemical security legislation, (S. 2145), which was weaker than the bipartisan House bill, but far stronger than the King-Collins agreement.

Public interest and environmental organizations, including OMB Watch, have also called for chemical security legislation to make information available to the public so that communities can understand and minimize the risks they face. This call for disclosure has faced strong opposition from the chemical industry. The King-Collins agreement appears to have taken a cue from industry, ensuring "vulnerability assessments, site security plan, and other security related information shall be given protections from public disclosure" and thus ensuring the agreement will provide little, if any, public accountability.

In a Sept. 22 statement, Greenpeace outlined ten reasons why the King-Collins chemical security proposal fails to protect communities. Among them were the fact that the plan specifically exempts approximately 3,000 drinking water and waste water facilities, keeps DHS from requiring safer technologies, and fails to preserve state and local government's authority to set stronger security standards than the federal government (such as those currently in place in New Jersey).

The process by which the King-Collins proposal side-stepped open negotiations has received criticism equal to that leveled at the agreement's content. A Sept. 25 *New York*

Times editorial noted, "The Senate and the House spent many months carefully developing bipartisan chemical plant security bills." But instead of building on these efforts and seeing them through, *The Times* complains, "whatever gets done about chemical plant security will apparently be decided behind closed doors."

The House-Senate Conference Committee is expected to vote later this week on the Homeland Security appropriations bill. In the meantime, chemical security supporters continue to adamantly call on appropriators to oppose industry-supported loopholes (like the King-Collins agreement) that negate the purpose of meaningful chemical security legislation -- such as H.R. 5695 - namely, to secure the tens of thousands of hazardous U.S. facilities and to protect communities nationwide.

NSA Bills Head to a Vote

High on Congress' agenda this week is legislation to authorize the National Security Agency's (NSA) Terrorist Surveillance Program (TSP). In the Senate, Judiciary Committee Chair Arlen Specter (R-PA) brokered a hollow compromise with moderate Republicans on the National Security Surveillance Act (S. 2453), increasing the likelihood of its passage. In the House, Rep. Heather Wilson's (R-NM) Electronic Surveillance Modernization Act (H.R. 5825) passed out of committee and is likely to see a floor vote this week. Both bills would legalize the warrantless surveillance program and provide exceptions to the judicial approval required by the Fourth Amendment and the Foreign Intelligence Surveillance Act (FISA).

The Hollow Compromise

Sens. Larry Craig (R-ID), John Sununu (R-NH) and Lisa Murkowski (R-AK), previously opposed to the Specter bill, recently announced three changes to S. 2453 that compelled their support.

First, the Specter bill allows for an entire surveillance program to receive a blanket order for surveillance. The compromise revises program-wide orders to incorporate a requirement for individual approvals. This means that after the Foreign Intelligence Surveillance Court (FISC) issues a program warrant for an entire surveillance program, additional approval would be needed from FISC after a "person of interest" has been identified to ensure that the surveillance is in conformity with the Fourth Amendment.

Second, Specter's bill allows for warrantless surveillance of "agents of a foreign power" for one year if the target of the surveillance is not a U.S. person (i.e. a U.S. citizen or legal permanent resident). The compromise revises the language to state that warrantless surveillance of an agent of a foreign power must not include communications of American citizens.

Third, language has been removed from Specter's bill that stated that the president has the power to wiretap at his own discretion under the constitutional power of the executive branch. According to the *Washington Post*, the White House is pleased with

the three modifications.

While addressing some of the criticisms raised about Specter's bill, the revisions fail to ensure that TSP and other surveillance programs operate within the confines of the Fourth Amendment. The biggest loophole that the compromise fails to close is the redefining of electronic surveillance to permit what ordinary Americans would consider to surveillance.

Specter and Wilson Bills Redefine Electronic Surveillance

The Specter and Wilson bills offer the guise of increased oversight of domestic and international surveillance but, in fact, drastically reduce such oversight by restricting the protections embodied in the Fourth Amendment. The bills provide mechanisms for the FISA Court to review TSP, but at the same time, permit the program's continuation without judicial approval.

Though the language of the Specter and Wilson bills differ in some respects, they contain identical language on the most troubling provision of both bills. The House and Senate bills would restrict the definition of electronic surveillance to exclude TSP, thereby opening the door for untargeted warrantless domestic surveillance. According to the Specter and Wilson language, FISC would oversee surveillance programs that *target* people inside the U.S. who have a reasonable expectation of privacy. However, TSP targets people overseas, even though the communications of many innocent Americans may be collected in the process. Hence, FISA would not govern TSP, and the president would not have to receive judicial approval to wiretap these communications.

Moreover, the limited definition of electronic surveillance would allow programs to go far beyond TSP. First, the definition permits warrantless collection of communications between U.S. citizens and people overseas who have no connections with terrorism. Second, it would, presumably, authorize any *untargeted* warrantless program collecting a vast array of the domestic communications of innocent U.S. citizens.

House and Senate Versions Move

The Specter and Wilson bills recently passed out of committees on partisan votes and are expected to be voted on by the entire Senate and House, respectively, this week. It is yet unclear which vehicle will be used to present the Specter language. There are currently three possibilities. First, there is Specter's S. 2453. Second, Senate majority leader Bill Frist (R-TN) recently introduced the Specter language as the Terrorist Surveillance Act (S. 2931). Finally, Frist combined the Specter bill with revised military commission legislation and introduced it as the Terrorist Tracking, Identification and Prosecution Act of 2006 (S. 3929). Also uncertain is what will happen if the Senate passes the Specter bill and the House passes the Wilson bill, since there is limited time for negotiations between the two chambers.

If Senate Democrats are still opposed to the compromise language, they could attempt to block the Specter bill. On a conference call before the compromise was announced, Sen. Harry Reid (D-NV) told bloggers that the Specter bill was not going anywhere, hinting

that a filibuster may be used. In a surprising turn sure to add another fold in the NSA surveillance saga, the Specter-Feinstein legislation (S. 3001) passed out of committee on a bipartisan vote Sept. 13 and would contradict Specter's other bill, the National Security Surveillance Act, by reasserting that FISA and the Fourth Amendment and the issuance of individualized court orders are the exclusive means for electronic surveillance of U.S. persons.

OPEN Government Act Clears Senate Committee Hurdle

The Senate Judiciary Committee on Sept. 21 approved the Openness Promotes Effectiveness in our National (OPEN) Government Act (S. 394), a promising development for open government advocates. The bill, sponsored by Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT), would remove hurdles to obtaining information from federal agencies under the Freedom of Information Act (FOIA).

The legislation addresses loopholes that allow federal agencies to delay releasing information to the public under FOIA. Government agencies seeking to withhold information under FOIA have in the past employed charged exorbitant fees, denied fee waivers, and thrown up a number of other bureaucratic obstacles. The OPEN Government Act will, among other things, allow the public to recoup legal costs from the federal government for improperly withheld documents, establish a tracking system for requests, and create a system to mediate disputes between those requesting information and federal agencies.

A House counterpart, H.R. 867, was introduced by Rep. Lamar Smith (R-Texas) and referred to the House Government Reform committee in February 2005. The Government Reform Committee is not expected to act on the measure before the end of this session.

In March 2005, another bill sponsored by Cornyn and Leahy, the Faster FOIA Act of 2005 (S. 589), which would appoint a commission to study backlog problems and possible improvements of agency procedures, was reported favorably out of committee. Then in December 2005, President Bush issued Executive Order 13392 that required agencies to develop FOIA improvement plans to reduce backlogs and increase public access to highly sought-after government information. Access advocates have argued that the executive order is unworkable without new resources for the agencies to help speed up FOIA processing.

Even though both Cornyn-Leahy bills on FOIA have passed out of committee in the Senate, it remains highly unlikely, in the limited time left before Congress breaks for elections, that either bill will make it to the Senate floor or out of committee in the House.. Hopefully, the progress made by the bills in the Senate means that action on these bills will be faster in future sessions of Congress.

GAO Fails to Adequately Assess the Data Quality Act

The Government Accountability Office (GAO) recently issued a report on how well major federal agencies are implementing and overseeing compliance with the Data Quality Act (DQA). The report is an excellent overview of DQA's use, but it fails to make recommendations necessary to improving the management of DQA impacts on the federal government, in particular to minimizing its potential abuse.

The Data Quality Act (DQA), also known as the Information Quality Act (IQA), is a two-paragraph provision that slipped through Congress without debate in late 2000. Since then it has amassed a mountain of controversy, pitting industry against the public interest. The act allows private parties to challenge the government's use of information and has been used with particular frequency by industry to challenge health and environmental regulations.

The report, the full title of which is the unwieldy *Information Quality Act: Expanded Oversight and Clearer Guidance by the Office of Management and Budget Could Improve Agencies' Implementation of the Act*, was the culmination of a year-long review of DQA by GAO at the request of Reps. Henry Waxman (D-CA) and Bart Gordon (D-TN). The report recommended that OMB:

1. work with DHS to implement DQA guidelines;
2. identify other agencies without DQA guidelines and work with them to implement such guidelines; and
3. clarify its guidance to agencies on improving access to DQA information online.

According to the report, DHS is the only agency that has not issued DQA guidelines. GAO also found problems associated with accessing information on DQA guidelines at other agencies. The report noted that "none of the agencies we visited had information about the actual workload, the number of staff days, or other costs, with one exception" The one exception was the Department of Labor, which had only one cost item tracked--a $170,000 contract to monitor the status of DQA requests.

Waxman and Gordon requested the GAO investigation in order to determine the effectiveness of DQA and how great a regulatory burden it creates, so it is surprising that GAO did not address either of these issues, nor did the report make recommendations to improve shortcomings in these areas. Without management procedures to monitor costs associated with the DQA process, it will be impossible for GAO, OMB, Congress or the federal agencies to determine the effectiveness of DQA guidelines.

The DQA process has been widely misused by industry to slow regulatory action and remove or revise important public health and environmental information from government websites. For instance, the National Toxicology Program at the National Institutes of Health has received numerous challenges of its Report on Carcinogens, which lists over 1,700 potentially carcinogenic chemicals.

Many such challenges are widely recognized as frivolous, and each increases regulatory

burden such that the effectiveness of government programs is harmed. Without outlining mechanisms to assess the effects of DQA, the report fails in its assignment to detect such problems and determine if DQA guidelines need to be revised to curtail the potential abuse of DQA.

E. Coli Outbreak Is Reason to Better Protect Food Supply

Though federal agencies responded relatively quickly to the recent outbreak of E.Coli in bagged spinach, the case highlights the need to ensure the safety of the nation's food supply and to have adequate tracking systems in place to do so.

Fortunately, food safety inspectors are close to discovering the exact source of the contaminated spinach. In the meantime, though, at least 171 people have become ill from the outbreak, one person has died, and 27 cases of kidney failure have been reported.

Recall Problems Might Still Arise

While federal agencies have worked diligently to locate the source of the contamination, FDA has yet to recall any of the bagged spinach products believed to be the source of the contamination. According to a 2004 GAO report, FDA and USDA often face problems getting contaminated food products off the shelves:

"USDA and FDA do not know how promptly and completely the recalling companies and their distributors and other customers are carrying out recalls, and neither agency is using its data systems to effectively track and manage its recall programs. For these and other reasons, most recalled food is not recovered and therefore may be consumed."

GAO found that agencies that oversee other consumer products, such as toys or automobiles, have mechanisms for recalling faulty products that are unavailable to USDA and FDA in dealing with food supply problems. "For example, by law, companies must promptly notify the Consumer Product Safety Commission after learning that a product may pose an unreasonable risk of serious injury or death, or face penalties of up to $1.65 million," according to the report. Companies making food face no penalties for delaying or failing to disclose contamination.

A Fragmented Food Safety System

Federal agencies investigating the matter believe that animal manure may have contaminated the spinach, causing the outbreak of E.Coli. Twenty-five states have reported outbreaks. Both the cause and the rapid spread of the bacteria bring to light dangerous loopholes in the current food safety system.

The Food and Drug Administration (FDA) and the Department of Agriculture (USDA) share responsibility (along with several other federal agencies) for food inspection and safety. As GAO reports and congressional hearings have pointed out, this arrangement often allows food inspection to fall through the cracks. As GAO pointed out in a letter to

Jo Ann Davis (R-VA) following a hearing on food safety, "for consumers as well as for GAO, it is at times difficult to determine which agency is responsible for ensuring the safety of a particular food product. For example, the Department of Agriculture (USDA) might be responsible for inspecting a particular food item, but once that item is used in a processed food product, it might be regulated by the Food and Drug Administration (FDA). Arbitrary jurisdictional lines of authority can make the current food safety inspection system difficult to assess and, more importantly, unresponsive to the needs of the public."

Congress has attempted to streamline food safety inspection by placing responsibility for it in a single federal agency. The Safe Food Act (S. 729/H.R. 1517), introduced in April 2005 by Sen. Dick Durbin (D-IL) and Rep. Rosa DeLauro (D-CT) in their respective chambers, would create the Food Safety Administration to oversee all food safety issues.

Food Labeling Bill Would Eliminate Food Safety Protections

While S.729 has yet to make headway, another food safety bill the Uniformity in Food Labeling Act of 2006 (H.R. 4167) has been making its way through Congress. It was approved by the House in March, and the Senate held a hearing on its companion bill (S. 3128) in July. Despite its innocuous name, the bill would actually preempt and weaken food safety laws in individual states without creating any new protections.

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IN THIS ISSUE

OMB Watch Launches FedSpending.org

For the first time, itemized information on the more than $12 trillion disbursed by the federal government between FY 2000 and FY 2005 is now available to the public on a user-friendly, searchable Web site. FedSpending.org, a project of OMB Watch launched Oct. 10, provides citizens with a detailed look at how the government sets national priorities and allocates federal resources.

FedSpending.org allows users to search and aggregate contract and grant information in a number of ways: by individual recipient, by agency, by congressional district and by state, and allows citizens to see exactly where their tax dollars are being spent. There is data going back to FY 2000 so that comparisons over time can be made.

With the click of a mouse, visitors to FedSpending.org can learn that:

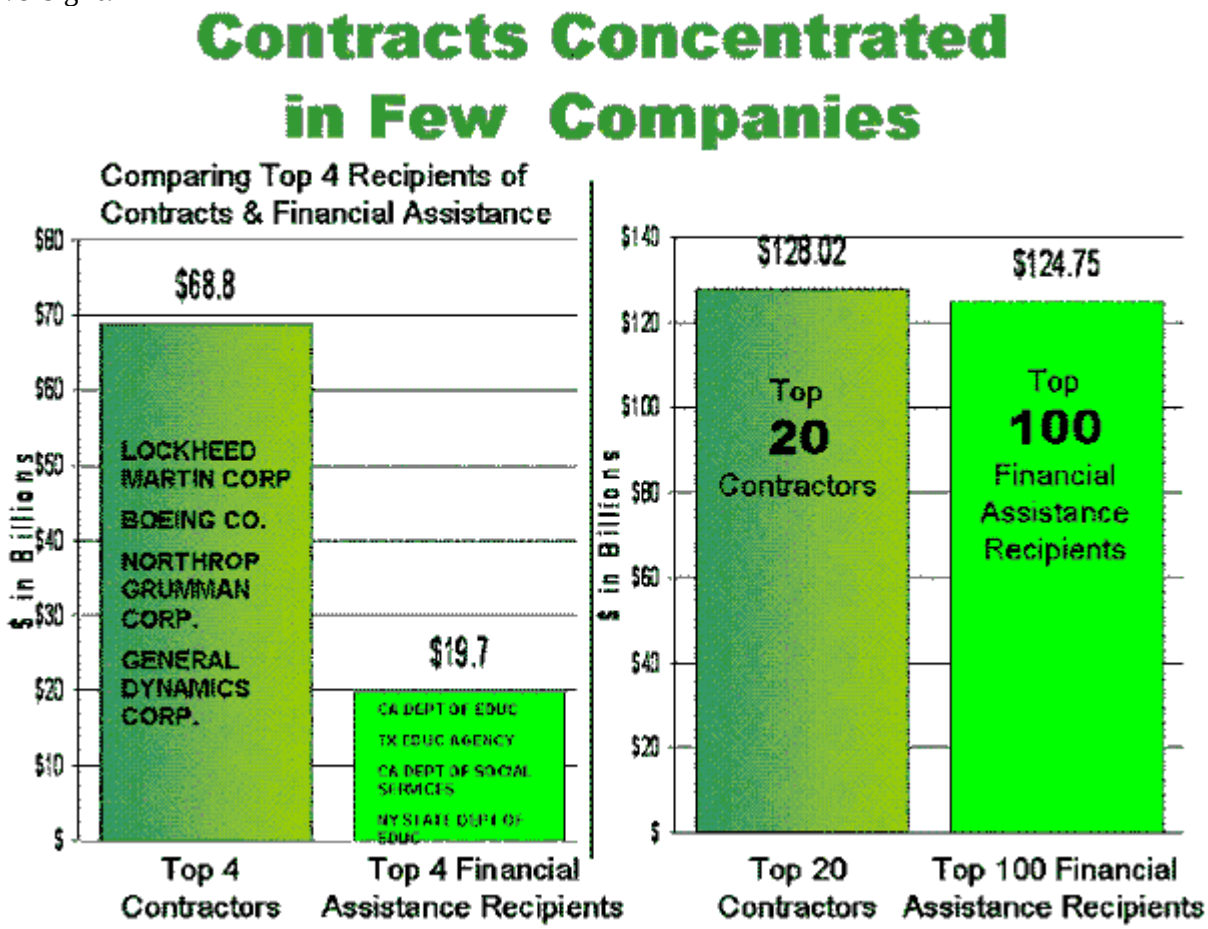
- The Defense Department issued the largest amount of contracts in FY 2005 ($272.9 billion or 71.5 percent of all contracts);
- Florida's 14th Congressional District (represented by Rep. Connie Mack (R)) received the most federal assistance in FY 2004, driven primarily by money from flood insurance coming into his district;
- Lockheed Martin, the largest contractor in FY 2005, received $24.8 billion, of which only one-third was awarded through full and open competition

With a little digging and basic knowledge of spreadsheets, the public can now discover that spending on federal contracts jumped $173 billion -- or 83 percent -- since FY 2000, pushing procurement spending to $381.9 billion. It is now the fastest growing part of discretionary spending, with nearly 40 cents of every discretionary dollar being spent on contracts with private companies.

At the same time no-bid and other noncompetitive contracts have skyrocketed 115 percent over the last five years (from $67.5 billion to $145 billion). This should raise questions about

potential cronyism, and, even if no special favors are being granted, it is an open door to potential problems. This is the stuff of waste, fraud and abuse.

FedSpending.org also shows 35 percent of all contract money awarded in FY 2004 was awarded to just 20 corporations. The amount of money they received was just slightly more than the top *100* recipients of financial assistance (such as grants, loans, and insurance). See the graph below for a comparison of contractors to recipients of financial assistance. This concentration of resources in the hands of a few companies raises the need for vigilant oversight.



FedSpending.org makes available much of the information that the recently passed Federal Accountability and Transparency Act will require the Office of Management and Budget to provide to the public by Jan. 1, 2008. FedSpending.org will function not only as a tool for the public and journalists to find out about government spending, but also as a prototype against which to measure the success of OMB's endeavor.

The Oct. 10 Launch

FedSpending.org was supported with a grant from the Sunlight Foundation, which hosted an event at the National Press Club in Washington. At the same event, the Center for Responsive Politics (CRP) announced several expansions of its pioneering government transparency Website, OpenSecrets.org. The first allows users to see overviews of congressional members' net worth and holdings. The second gives updated information on trips taken by members and their staffs that are financed by third parties -- in many cases special interests with business before Congress. Finally, CRP unveiled a work-in-progress database that will track the "revolving door" between positions in government and lucrative jobs at lobbying firms that members and staff often rotate through.

At the event, OMB Watch's Executive Director Gary Bass noted that "when you or I buy something at a store, we get a receipt. FedSpending.org is America's receipt for federal government spending."

More than 300 people joined the launch through a live online video stream. An archived copy of the webcast is available here. It includes presentations by the Sunlight Foundation's Ellen Miller, OMB Watch's Gary Bass, and the Center for Responsive Politics' Sheila Krumholz. Following are short demonstrations of FedSpending.org by OMB Watch's Sean Moulton and of CRP's new databases by Krumholz.

Information about FedSpending.org presented at the release event is available here. In addition, seven short videos, ranging from 2 1/2 to 9 minutes, on how to use FedSpending.org are also available in the Website's tutorial section.

FedSpending.org's design is very flexible, allowing users to get to information quickly. The navigation bar on the left hand side runs throughout the site, so that users can easily switch back and forth to get information on either grants and contracts. See the homepage below which is linked to FedSpending.org.

Treasury Releases Third Version of Anti-Terrorist Financing Guidelines

On Sept. 29, 2006 the U.S. Department of the Treasury released the third version since 2002

of its Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities. The new Guidelines come after Treasury requested public comments on the Dec. 2005 revision of the original Guidelines. In an annex to the latest version, Treasury provides an unconvincing explanation of its perception that abuse of charities by terrorists is a substantial problem. Treasury also uses the latest version to place greater emphasis on the voluntary nature of the guidelines. However, the fundamental problems that lead the nonprofit sector to call for withdrawal of the Guidelines remain unchanged.

A Treasury press release announcing the revised Guidelines notes public comments but ignores the sector's request that the Guidelines be withdrawn. Treasury did issue a response to public comments submitted on the Dec. 2005 version that acknowledges the call for withdrawal. It explains Treasury's position that voluntary use of the Guidelines will not adversely impact the sector, and its belief that Treasury "is uniquely positioned to provide recommended measures to the charitable sector that are particularly relevant for combating the ongoing and pervasive terrorist abuse and exploitation of charities." This sweeping claim of abuse is not substantiated by any evidence.

Part I: Introduction

A lengthy introductory footnote repeats Treasury's position that the Guidelines are meant to assist legitimate charities, and are not intended to address the problems raised by sham charities acting as fronts for terrorist organizations. It adds a sentence to the 2005 version requested by commentors: "Non-adherence to these Guidelines, in and of itself, does not constitute a violation of existing U.S. law." However, the remaining language also makes it clear that following the Guidelines offers no legal protection from Treasury sanctions. With the Guidelines providing no safe harbor, we believe legal reforms are needed to provide nonprofits acting in good faith with effective recourse against Treasury's power to seize and freeze organizational assets if it believes anyone "associated with" the nonprofit has in turn been "associated with" a terrorist organization.

In addition to a clear statement that the Guidelines are voluntary, the Introduction does a better job of recognizing that a "one-size fits all approach is untenable and inappropriate due to the diversity of the charitable sector" so that the Guidelines "will not be applicable to every charity, charitable activity or circumstance" and each charity should apply them to a degree commensurate with its own risk of "abuse and exploitation" by terrorists.

The revised Introduction now states, "Investigations have revealed terrorist abuse of charitable organizations, both in the United States and worldwide, to raise and move funds, provide logistical support, encourage terrorist recruitment or otherwise cultivate support for terrorist organizations and operations." It also maintains that "[t]he goal of these Guidelines is to facilitate legitimate charitable efforts and protect the integrity of the charitable sector and good faith donors by offering the sector ways to prevent terrorist organizations from exploiting charitable activities for their own benefit" (new language underlined).

This significantly expands Treasury's goals beyond blocking terrorist financing and compliance with existing sanctions programs to include vague and undefined goals of preventing "abuse" and "exploitation" or action that will "otherwise cultivate support" for terrorist operations. This appears to exceed Treasury's statutory authority, which is limited to preventing diversion of resources to designated entities and individuals.

Part II: Fundamental Principles of Good Charitable Practice
The Guidelines provide a short list of four very general principles: that charities should 1) follow the law, 2) exercise due care in performing their duties, 3) maintain fiscal responsibility, and 4) consider precautions that are above and beyond legal requirements. The Treasury Guideline Working Group, a group of U.S. charities and foundations, asked Treasury to include two principles from its Principles of International Charity that were not in the 2005 version. These state that the charitable sector is independent of government, and must safeguard relationships with the communities it serves "in order to deliver effective programs." In response, Treasury added to the first principle, "Charities are independent entities and are not part of the U.S. Government."

Part III - V: Governance Accountability and Transparency, Financial Accountability and Transparency, and Program Verification
Treasury has reorganized Parts III — V and given them new titles. In general, these sections address governance and transparency of charities and are outside the expertise of the Office of Foreign Assets Control (OFAC), the division of Treasury that wrote the Guidelines. They are not relevant to the goal of preventing diversion of funds to terrorists and will likely create confusion for nonprofits, who already must comply with Internal Revenue Service (IRS), state and local regulations. This is one reason nonprofits called on Treasury to withdraw the Guidelines. Although the ambiguity of these sections remains, some positive changes were made. For details see our side-by-side comparison of the 2005 and 2006 versions.

Part VI: Anti-Terrorist Financing Best Practices
This section encourages charities to "apply a risk-based approach, particularly with respect to foreign recipients" but does not explain what factors indicate increased risk. In addition, it does not distinguish between foundation grants to charities and charitable aid provided to individuals. The Preface continues to cover both financial and in-kind resources. Despite this reference to the voluntary status of the Guidelines, this section makes frequent use of the work "should." In addition, the phrase "best practices" implies that other measures a charity might take to protect its assets from abuse would somehow fall short. This makes the Guidelines internally inconsistent, and will create confusion in the nonprofit sector over just how "voluntary" Treasury really intends the Guidelines to be.

Part VI lists information charities "should" collect from grantees. Because Treasury disagreed with comments maintaining that "the information-collection procedure are burdensome and of little utility," it left these provisions almost entirely intact. Although the definition of grantee remains vague, Treasury's response to comments says use of the word "is intended to clarify the information-collection recommendations by explaining what charities should do for immediate grantees versus downstream grantees. 'Grantee' is defined as an immediate grantee of charitable resources or services."

Treasury, however, encourages charities to apply safeguards in downstream sub-grantees "to the extent reasonably applicable" and cautions charities against working with grantees if there is doubt about their ability to "ensure safe delivery of charitable resources." The practicality of these suggestions is questionable, since even the federal government does not have sub-recipient information for its own grants and contracts.

Lengthy footnotes describe the government's various lists of designated terrorists and their supporters. Treasury's maintains its view that charities should function as government investigators when it suggests charities search public information about their key employees to "determine whether any of its key employees is suspected of activity relating to terrorism". It goes to state a charity should not employ someone "where any terrorist-related suspicions exist." This judges employees guilty based on mere suspicion. The Guidelines further suggest that charities report board members or key employees to OFAC if they find "any suspicious activity relating to terrorism, including terrorist financing or other support, which does not directly involve an OFAC [list] match."

Annex to Guidelines

Treasury responded to criticism that it failed to document its claims of widespread use of charities as conduits for terrorism by including a two-page annex to the Guidelines. The Annex does little to support Treasury's claims, instead clarifying Treasury's view of its mission, by saying the risk of terrorist abuse "cannot be measured from the important but relatively narrow perspective of terrorist diversion of charitable funds..." Rather, Treasury is also concerned, according to the Annex, with "exploitation of charitable services and activities to radicalize vulnerable populations and cultivate support for terrorist organizations and networks."

It then goes on to cite examples of exactly the type of organizations it says the Guidelines are not meant to address: front organizations, primarily operating overseas. In support of its position Treasury includes a lengthy footnote citing news reports about front organizations or the role of terrorist networks in areas affected by natural disasters. Its use of secondary sources implies that Treasury does not have its own hard evidence of terrorist abuse of charities.

In the Annex, Treasury attempts to justify its emphasis on charities by noting that 43 charities are on the OFAC list of designated terrorists and/or supporters. It fails to note, however, that only six of these are U.S.-based organizations, out of over 1 million charities recognized by the IRS. Treasury then adds 29 individuals associated with these 43 charities, to get a total of 72 charity-related designations on the SDN list, comprising 15 percent of the total SDN listings. However, Treasury does not provide dollar figures associated with this 15 percent of designations. Since the 9/11 Commission found that other types of enterprises provide the vast bulk of financing for terrorist organizations, the percent of actual dollars represented by charity-related designations is likely to be much smaller than 15 percent.

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IN THIS ISSUE

Opposition to Dudley as Regulatory Czar Mounts

A Senate committee recently announced a hearing for Nov. 13 to consider the nomination of Susan Dudley to be the head of the White House's regulatory office. The Dudley nomination has created a firestorm of protest from organizations representing workers, environmental issues, consumer protections, and other public interest concerns.

The Senate Committee on Homeland Security and Governmental Affairs has scheduled a hearing on the Dudley nomination to the post of administrator of the Office of Information and Regulatory Affairs (OIRA) within the White House's Office of Management and Budget for 2:30 pm on the first day of the lame-duck congressional session. Only one witness is scheduled to testify: Dudley.

OIRA was created through the Paperwork Reduction Act of 1980 and has been a vehicle for

pushing through the policies and priorities of presidents since Ronald Reagan. OIRA often operates outside of public scrutiny, yet has enormous sway over agency actions. All information collection efforts that affect 10 or more people (e.g., surveys, reporting requirements) must be approved by OIRA. All major regulations must also go through OIRA screening.

Many corporate and conservative interests look on OIRA as an advocate in reducing government regulation. Many in the public interest community view OIRA as a significant barrier in pursuing public protections. OIRA not only oversees agency regulatory transactions, it sets the policies by which agencies do assessments of whether to create regulations.

The last OIRA administrator, John Graham, who left earlier this year bound for academia, was accused of tilting the scales decidedly in favor of industry. Graham's history regarding regulation also made his nomination highly controversial, and Graham received the second most "no" votes (37) after John Ashcroft for any nomination in Bush's first term.

Sen. Susan Collins (R-ME), the chair of the Homeland Security and Governmental Affairs Committee, has not scheduled a mark-up to report out the Dudley nomination, though the chair could quickly call for such a mark-up. [ED note: an earlier version of this article indicated that there were rumors Collins might have a mark-up by the end of the week of the hearing. On Oct. 26, Collins' office confirmed that they have not scheduled a mark-up.] In the past, Collin's has often sought to report out nominees with unanimous consent, a tactic that might prove difficult with such widespread opposition to Dudley's nomination.

On Oct. 23, 12 leading national environmental groups sent a joint letter to the oversight committee urging the committee "to oppose Susan Dudley's nomination." The groups also called on the committee "to ask President Bush to withdraw her nomination, unless her views can receive a full airing." The environmental groups describe Dudley as "far outside the mainstream."

This sentiment was echoed in a sign-on letter developed by Public Citizen and circulated by OMB Watch. In less than 24 hours, the sign-on letter received more than 100 organizational signatories. Additionally, an alert by OMB Watch generated roughly 2,000 emails to the Senate in as much time opposing the Dudley nomination. All of which indicates just how considerable is opposition to Dudley's nomination within the public interest community.

Dudley appears far more ideologically driven than Graham. So if Graham's nomination received 37 votes during a period of popularity for Bush, many wonder what will is in store for the Dudley nomination with Bush's popularity waning.

This would not be the first time Dudley was under the employ of OIRA, and recently, as the head of the industry-backed Mercatus Center, she has written extensively about regulatory issues. These writings, considered extreme even by some of her conservative colleagues, led Public Citizen and OMB Watch to recently conclude that Dudley is unfit to serve.

Dudley's anti-regulatory leanings have led her to advocate against stronger health standards regarding arsenic in our drinking water; against government requirements for air bags in automobiles, and against the very existence of OSHA regulations. She has written, "There is no economic justification for a federal role in defining construction practices and determining wages, as required by the Davis-Bacon Act." She has even argued that ozone, the key component of smog, is good for you since it protects against skin cancer. For more on Dudley's views, visit http://www.ombwatch.org/regs/dudley.

Recently six former OIRA administrators sent a letter to the oversight committee describing Dudley as a person of "integrity, experience, and relevant training." But even that letter did not endorse her. Instead, the six past OIRA administrators say the "nomination merits careful scrutiny and deliberation" and they urge "prompt and fair-minded Senate review" of Dudley's nomination. This was similar to a letter they sent regarding John Graham's nomination.

To email the Senate and ask that lawmakers vote 'no' to the Dudley nomination, click here.

Ballot Initiatives Threaten Regulatory Protections

November ballot initiatives in six states would force state governments to provide compensation for lost property value as a result of regulation or be forced to waive the regulatory protection.

The "regulatory takings" ballot initiative uses fear of eminent domain, spurred by the 2005 Supreme Court case *Kelo v. New London, Conn.*, to push forward a sweeping anti-regulatory initiative. If the initiative wins voter support, it could have an enormous chilling effect on state and local governments' ability to pass and uphold needed health, safety and environmental protections.

In the Supreme Court decision, *Kelo v. New London, Conn.*, the court upheld the right of the city government to seize property in order to redevelop. The ruling created a backlash at the state levels, and approximately 30 states passed laws limiting eminent domain. Right-wing, anti-government groups have used the property rights movement galvanized by the court decision to piggyback their anti-regulatory agenda.

Now, Washington, Arizona, California, Idaho, Montana, and Nevada are set to vote on regulatory takings ballot initiatives. Arizona, California, Idaho, Montana and Nevada will vote on a ballot initiative that includes both restrictions to eminent domain and regulatory takings restrictions. The measure in Washington is solely to limit regulatory takings.

Called "Kelo-plus" by supporters, the measure would require states to compensate landowners for lost property value as a result of a law or regulation limiting land use, including any environmental, health or safety regulations that limited what an individual could do on private property. If the government could not pay, then most of the ballot initiatives require the

regulation to be waived or amended.

A similar ballot initiative passed in Oregon in 2004, and already the measure has had far-reaching implications. Some 2,200 claims have been filed in the state totaling over $5 billion. About half of the cases have been resolved. Without the money to pay out claims, the state has been forced to waive the regulations in all cases. Under the auspices of upholding property rights, the law, known as Measure 37, has essentially provided a backdoor to deregulation.

The misleading connection drawn between property takings and regulatory takings in the ballot initiatives is no accident. In fact, this strategy was articulated by the libertarian magazine *Reason* in April of this year. All six of the ballot initiatives are funded by Howard Rich, head of Americans for Limited Government. Rich is also backing another radical ballot initiative, the Tax Payer's Bill of Rights (TABOR), which would put draconian limits on state spending. According to the Ballot Initiative Strategy Center, ALG has spent upwards of $11 million to push through the TABOR and regulatory takings measures.

Bill Requires Release of Sensitive Security Information

In a positive development for open government, earlier this month President Bush signed into law the 2007 Homeland Security Appropriations Act which included provisions that mandate that all documents categorized as "sensitive security information" (SSI) be released after three years. Only a determination by the Secretary of the Department of Homeland Security (DHS) that there is a "rational reason" to continue to withhold the information can postpone the release.

SSI is a category of sensitive but unclassified information (SBU) - information which is unclassified but restricted from public access - that is used by the Transportation Security Administration (TSA), an agency within the DHS. In June of 2005, the Government Accountability Office (GAO) concluded that TSA did not have the guidance or procedures for establishing what constituted SSI, who could designate information SSI, or when SSI would be reviewed. Nor did TSA have procedures for tracking SSI information and could offer no estimate of the number of documents classified as SSI or the number of people with the authority to designate information as SSI.

Section 525 of the 2007 Homeland Security Appropriations Act is an effort to address these problems. It requires the DHS Secretary to draft SSI policies that require "the release of certain SSI information that is three years old unless the Secretary makes a written determination that identifies a rational reason why the information must remain SSI." Section 525 also requires SSI be made available in civil court cases if the judge determines it is needed, if the release of the information would not pose a security risk, and if the requesting party cannot access it elsewhere without "undue hardship."

The section requires the DHS secretary to report to the Appropriations Committees within 120 days on the department's progress in implementing the new SSI policy, and GAO is also requested to assess the department's progress after one year. While the appropriations provisions only apply to SSI, successful implementation may trigger the use of time limitations on other categories of SBU information.

FedSpending Spotlight: Skyrocketing Contracts, Less Competition

Lurita Doan, the new head of the General Services Administration (GSA), recently complained about the growth of Government-wide Acquisition Contracts (GWACs) and the loss of contracting efficiency. Data from FedSpending.org reinforces these efficiency concerns by revealing the fast growth in federal contracts and, specifically, the remarkable growth of contracts for which there was little to no competition.

Given that hundreds of billions of taxpayer dollars are spent each year on federal contracts, maximizing efficiency should be a primary concern among federal agencies. Unfortunately, it appears this is often not the case. According to Doan, companies spend millions to get GWACs with agencies and then pass the costs onto government. GWACs are contracts established by individual agencies that give companies the potential to supply any agency with products and services. Companies listed on GWACs are supposed to be the most competent and reliable providers but not necessarily the cheapest. Even after narrowing the list of approved companies, competition among companies for individual task-order awards is supposed to exist.

However, too frequently only company bids on task orders under GWACs are taken into consideration. GSA wants to eliminate unnecessary GWACs and consolidate purchasing of technology and services under the GSA so the government can maximize competition and volume discounts. GSA believes that limited competition and reduced mass-purchasing power means that the government and American taxpayers are not getting the best price.

Research conducted through FedSpending, OMB Watch's new website that tracks more than $12 trillion in federal spending over the last six years, demonstrates the validity of Doan's concerns. The data reveals that from FY 2000 to FY 2005 the amount spent by the federal government on contracts has grown an astonishing 83 percent, rising from $208.8 billion to $381.9 billion.

In addition, the data indicates that a major portion of this growth is driven by contracts in which agencies permit limited or no competition for the contract. The amount of money spent on federal contracts awarded with no competition was $48.7 billion in FY 2000 and grew to $97.1 billion in FY 2005, an increase of 99.4 percent. Moreover, during the same time, the federal government went from spending $17.8 billion on contracts with only one bid to spending $40.1 billion, an increase of 125.3 percent over six years.

Competition is a fundamental tool to drive down prices, avoid wasteful spending and ensure that tax dollars are spent fairly and wisely. However, data indicates that federal agencies are abandoning this contracting principle. Previously, the lack of access to usable data made evaluating the level of competition in federal contracting extremely difficult, if not impossible, to perform. FedSpending is a new window into the world of federal government expenditures that enables citizens, journalists, and researchers to hold government more accountable for how it spends national resources.

While raising serious concerns about the lack of competition to keep federal contract costs under control, the data does not provide us with a clear picture of why this is the case. Perhaps the shift away from competition is an effort to achieve greater speed or is a by-product of fewer procurement staff available to oversee contract competitions. Whatever the reason, with hundreds of billions of tax dollars on the line, these streamlined agency contract decisions and their results deserve greater scrutiny from Congress, the media and the public.

Attorney General Gives Thumbs Up to Agencies on FOIA Plans

Attorney General Alberto Gonzales issued a report last week to President Bush on the implementation of Executive Order 13392, which required agencies to establish Chief Freedom of Information Act (FOIA) Officers and develop FOIA improvement plans to reduce backlogs and increase public access to highly sought-after government information. The report showers praise on agency improvement plans, in sharp contrast to an OpenTheGovernment.org review that found agencies failed to address important FOIA improvement areas.

Claiming E.O. 13392 "should prove to be the most significant development in [FOIA's] history," the report finds that agencies have implemented the executive order "in a vigorous manner fully commensurate with the importance of this unprecedented Presidential initiative. Overall, they have followed the extensive implementation guidance that has been provided to them and where necessary have demonstrated a strong commitment to promptly making adjustments to their initial planning efforts as required."

The attorney general identifies "significant areas of FOIA administration improvement have been firmly embraced by the agencies." The report states that agency plans demonstrate a commitment to, among other things, implement technologies to improve FOIA processing; proactively disclose information; treat requesters courteously and professionally; improve tracking of FOIA requests; and decrease backlogs of FOIA requests.

This positive overview of agency FOIA improvement plans sharply contrasts with a July 4 report issued by OpenTheGovernment.org. The report found after reviewing a number of FOIA improvement plans that "many of the improvement areas were either not addressed or rated as poorly addressed." The Securities and Exchange Commission and the Office of Management and

Budget plans received the worst ratings, failing to address 24 and 22 of the 27 identified improvement areas, respectively. Generally, agencies produced plans that focused on a narrow set of problems and only explored short-term solutions with little effort spent considering larger issues or longer-term improvements.

The Government Accountability Office (GAO) issued its own report on FOIA earlier in the year finding that, "Despite processing more requests, agencies have not kept up with the increase in requests being made." Increasing backlogs of unprocessed requests are cited as a major problem by GAO, which found "the number of pending requests carried over from year to year has been steadily increasing, rising to about 200,000 in fiscal year 2005--43 percent more than in 2002."

The Department of Justice recognized that the subject of timeliness of FOIA responses and backlog reductions was inadequately addressed by some agencies and requested that agencies revise their improvement plans accordingly. The Department of Education, Federal Energy Regulatory Commission, National Aeronautics and Space Administration, National Archives and Records Administration, and Securities and Exchange Commission have completed the suggested revisions. Fourteen additional agencies have committed to revising their improvement plans.

Surprisingly, the Office of Management and Budget's improvement plan, which OpenTheGovernment.org found to be the second worst of all federal agencies subject to FOIA, was not asked to be revised. The Attorney General also did not address other pressing FOIA improvements, such as requiring responses to FOIA requests be made available on agency websites.

With the failure of E.O. 13392 to adequately address various shortcomings in FOIA procedures, legislative proposals have been introduced to strengthen FOIA and improve public access to government information. Last September, the Senate Judiciary Committee approved the Openness Promotes Effectiveness in Our National (OPEN) Government Act of 2005 (S. 394). The bill, sponsored by Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT), would, among other things, 1) allow the public to recoup legal costs from the federal government for improperly withheld documents; 2) establish a tracking system for requests; and 3) create a system to mediate disputes between those requesting information and federal agencies.

In March 2005, Cornyn and Leahy introduced a second bill, the Faster FOIA Act of 2005, to establish a commission to study backlog problems and possible improvements of agency procedures. Similar bills, the OPEN Government Act (H.R. 867) and Faster FOIA Act (H.R. 1620), have been offered in the House by Reps. Brad Sherman (D-CA) and Lamar Smith (R-TX).

Treasury Reports Quarter-Trillion Dollar Deficit; President Still Obscures Fiscal Problems

When the Treasury Department closed the books on Fiscal year 2006 on Sept. 30, one number precipitated a furious round of back-slaps and high-fives in the halls of the White House and the Office of Management and Budget - $248 billion. President Bush had no compunction about expressing glee about the nearly quarter-trillion dollar federal budget deficit for FY2006. Unacknowledged by the president, of course, was the simple fact, as pointed out by the Government Accountability Office, that "today's fiscal policy remains unsustainable." And in ignoring the reality of forecasts from all economic quarters, Mr. Bush continues to misconstrue the state of the economy and the fiscal health of the nation.

Earlier this month, Bush gave his own unique characterization of the state of the deficit:

In 2004, I made a promise to the American people, we would cut the federal budget deficit in half over five years. Today I'm pleased to report that we have achieved this goal, and we've done it three years ahead of schedule. (Applause.)...These budget numbers are not just estimates; these are the actual results for the fiscal year that ended February the 30th. [sic] These numbers show that the budget deficit has been reduced to $248 billion and is down to just 1.9 percent of the economy...these budget numbers are proof that pro-growth economic policies work.

The president failed to mention several key facts about current budget deficits that would have greatly changed the outlook. Firstly, the repeated mantra of "in half by 2009" leaves the impression that the reduction of the budget deficit by half is a benchmark on the way to eliminating budget deficits. This is a false impression. The president's FY2007 budget and recent Congressional Budget Office (CBO) estimates both project growing deficits after 2009. Secondly, the deficit number that Mr. Bush claims to have cut in half never materialized. This fact is absent in his pronouncements but starkly presented in OMB's Mid-Session Review:

...the President is on track to meet his goal of cutting the deficit in half by 2008, a year ahead of schedule, from its projected 2004 peak of 4.5 percent of GDP, or $521 billion.

The actual deficit for Fiscal year 2004 was significantly lower than the $521 billion the president has used as his benchmark. Using real figures, the deficit has actually been reduced by 40 percent, not "half" as the president promised.

Trotting out an incomplete or outright imaginary set of budget numbers in support of his fiscal policies is not a new game for this president. President Bush and OMB have taken to the extreme the practice of inflating budget forecasts for the purpose of claiming budgetary victory when the actual deficit numbers turn out to be smaller. In 2005, the president's budget projected a $426 billion deficit; it turned out to be $318. Those numbers in 2006 were, respectively, $432 billion and $248 billion.

The year-end budget figures are, of course, a favorite horse for the president to beat on the

campaign stump. On Oct. 12, for instance, he told reporters:

As a result of good fiscal policy in Washington, D.C., this economy is strong. And the best way to keep it there is to make the tax cuts we passed permanent. (Applause.)...You might remember the debate about the deficit -- [Democrats] go around the country saying, well, we got to solve the deficit and we need to raise taxes...It's amazing what happens when you cut taxes; the economy grows, you end up with more tax revenues.

Again, the president comments are intentionally vague and exceedingly misleading. Numerous sources and analyses have concluded that any economic growth that results from tax cuts cover only a small fraction of their costs. The CBO, the Treasury Department, a former chair of the president's Council of Economic Advisors, and the president's own budget all conclude, without exception, that tax cuts do not spur enough economic growth to pay for even a fraction of their cost. Those Democrats to whom Mr. Bush refers are certainly not alone in their assessment that tax cuts result in huge deficits over the long haul.

The president conceals the fact that the surge in federal revenues this year didn't result from a sudden fattening of the pocketbooks of working Americans. Wages for working Americans have stagnated in the current recovery. The latest Census figures show that household income rose 1.1 percent from 2004 to 2005. In fact, this paltry increase, which was not large enough to cover the erosive affects of inflation, was the first time that real household income has risen at all since 1999. The CBO has indicated the "revenue surprise" this year that was partly responsible for the smaller deficit was mostly the result of an increase in corporate income tax payments. If President Bush's fiscal policies are meant to grow the economy, they are certainly not designed to ensure that working Americans share in the nation's prosperity.

Economic growth (and contraction) is the result of countless factors that are mostly beyond the reach of federal fiscal policy. However, Bush insists on pointing to a growing economy following massive tax cuts as "proof that pro-growth economic policies work." If the president believes that his tax cuts are fueling the recent recovery, then he must also believe that his predecessor's tax increases are, in fact, a superior method of spurring economic growth. After President Clinton raised taxes in 1993, the economy continued to grow unabated for six and a half years at the brisk pace of 3.9 percent per year on average - far greater than growth under Bush.. Clinton's fiscal policies, unlike those of his successor, resulted in a budget surplus - a surplus which Bush promptly traded in for massive tax cuts mainly benefiting the wealthy and a return to deficits - this time record-setting.

But the president is not the only actor who refuses to seriously confront the fiscal state of the nation. A dysfunctional Congress yet again failed to execute its most basic duty and pass the necessary spending bills to keep the government running for Fiscal year 2007, which began on Oct. 1. Congress's unwillingness to come to terms with the federal budget has been abetted by a lack of leadership from the White House. Unless the president changes his head-in-the-sand

attitude toward the impending financial strains of a retiring Baby Boom generation and spiraling Medicare costs, he will continue to constrain the options available to policymakers for years to come. Bush's lack of concern betrays his desire to break a decades-long covenant between the federal government and working Americans to provide a minimum of security to the elderly.

In addition to cutting off possible solutions to meeting impending obligations, the president, through deficit financing, has imposed an increased tax burden for generations to come. Deficit spending financed by loans is pushing the cost of current policies onto future generations. As recent analyses by Citizens for Tax Justice conclude, the increase debt burdens more than negate the tiny sums of money 99 percent of Americans received from the Bush tax cuts. Future generations will be forced to bear the burden of Bush's refusal to face the hard facts of prevailing, main-stream economic theory (and for that matter, of simple arithmetic).

The start of the new fiscal year on Oct. 1 was greeted by a growing economy that is leaving behind most working Americans; a federal budget deficit that, by the admission of the president's own budget, is about to start ratcheting up again; a national debt on which annual interest payments (at $226 billion) are *25 percent* of discretionary spending and nearly as large as the federal budget deficit itself.

All of these factors are restricting the policy options available to lawmakers to deal with ballooning Medicare costs and possible long-term Social Security imbalances. Instead of exhibiting the leadership necessary to right the listing ship, Bush (and many in Congress) would prefer to tell fairytales about magical tax cuts and employ rhetorical sleights-of-hand to obscure unsuccessful and unsustainable fiscal policies.

A Fiscal Policy Review of the 109th Congress

With just a few short post-election, lame-duck weeks left, the 109th Congress will leave behind a legacy of woefully inadequate action on fiscal policy. With a set of fiscal challenges that included the need for comprehensive tax reform, concerns over Social Security insolvency, large and growing deficits, the 109th Congress' list of accomplishments is almost non-existent.

After Congress failed to enact a sinister overhaul of Social Security in 2005 and comprehensive tax reform disappeared from the national agenda in early 2006, it seemed plenty of time remained on the agenda for Congress to complete its fundamental annual budget work. Unfortunately, 2006 would be particularly bad year for Congress' fiscal policy work.

Among the many failures:

- No budget resolution agreement early in the year, setting the stage for additional fiscal breakdowns later on
- Enactment of only two of the 12 spending bills Congress needed to pass in order to fund

the government during FY 2007, which began Oct. 1
- Failure to enact a slew of important legislation, from lobbying and budget process reform, to closure of wasteful tax loopholes that encourage overseas outsourcing and the Alternative Minimum Tax (ATM) patch
- No action to address the long-term solvency of Social Security and Medicare

In addition, with House and Senate leaders obsessed with an estate tax rollback, other popular priorities like a minimum wage increase and the extension of the dozen-plus expiring tax credits, ranging from those for corporate R&D to tuition tax credits, continued to languish.

It is little wonder that, according to an Oct. 19 *Wall Street Journal*/NBC poll, 16 percent of Americans approve of the job the 109th Congress has done. To put that in perspective, that's less than half of the Americans who currently approve of the job the president has done. It is the worst rating for Congress *ever* recorded.

"When we say this is the most do-nothing Congress in the history of our country, this isn't just flippant ... This is true", Senate Minority Leader Harry Reid (D-NV) told *The New York Times* last month.

It's not just the opposition in Congress that is leveling the "do-nothing" label. Recently, the "Dean" of political reporters, the *Washington Post's* David Broder, gave Congress what could modestly be described as bad marks. Broder reported that 11 prominent nonpartisan economists - "people who, by virtue of their work and long careers outside of politics, have earned reputations for delivering unvarnished analysis of economic policy" were asked to grade the economic performance of the Republican Congress. The class average: C-.

In addition, a bipartisan pair of respected long-time congressional observers, Thomas Mann (senior fellow at the Brookings Institution) and Norman Ornstein (resident scholar at the American Enterprise Institute), reviewed the record of the 109th and concluded, "After 37 years in Washington... we are pretty well inured to shenanigans [but] the output of the 109th is pathetic measured against its predecessors."

While some observers would argue a Congress that governs least governs best, there are significant consequences to Congress' inaction on fiscal matters. Problems that went unaddressed, such as finding a permanent solution to the creep of the AMT or the rapidly accelerating interest payments on the national debt, will only get worse - and more expensive - the longer Congress waits.

In addition, because political leaders have exaggerated good short-term news on budget deficits, the long-term structural problems remain with no solution in sight, and the retirement of the Baby Boomers is one year closer.

It would be unfair to suggest that Congress actually did *nothing* of significance on fiscal policy. It

passed and the president signed a $781 billion extension of the debt limit. It was the fourth time Congress has raised the nation's credit limit since 2003, accounting for an additional $3 trillion of debt - or a loan equivalent to $30,000 from every American family.

Not resting at simply failing to fix the country's fiscal problems, Congress actually made them worse. The Center on Budget and Policy Priorities recently concluded that the 109th Congress "took our already large projected budget deficits and passed legislation that will make them larger. The legislation increased projected deficits from 2005 (the year the [109th began]) through 2011 (when the current five-year budget window ends) by a total of $452 billion." Also making matters worse - despite continued statements from Congress decrying the complexity of the tax code - legislation passed since 2001 has "added more than 100 tax breaks to an already unwieldy tax system," according to the nonpartisan Urban-Brookings Tax Policy Center.

Congress' only other notable fiscal accomplishment is also probably not one they are bragging about in campaign speeches. Before leaving Washington to try and convince the American electorate to send them back to Congress, the House and Senate passed a continuing resolution (CR) that continues to fund the government in the absence of completed appropriations bills. This CR contains a nasty hitch that sets funding at the lower of three levels: the House-only, Senate-only passed appropriations bills, or the previous year's funding level. The Labor-HHS-Education appropriations bill (H.R. 5647) did not pass either chamber, leaving funding for the vast array of domestic programs under the bill at the fiscal 2006 level - an effective cut after inflation.

The CR remains in effect only until Nov. 17, and Congress will return to a lame-duck session after the elections on Nov. 13 How much time Congress will spend in session during the lame duck is unknown. Among the various loose ends that lawmakers will likely attempt to tie up are the remaining appropriations bills and the expiring tax extensions, collectively known as the "extenders." Passage of the "extenders" package is long overdue, with popular support for the legislation from both Democrats and Republicans. While these are the only items Congress will likely have time for, they could also attempt to pass a much needed increase in the minimum wage.

The election outcome may still dictate strategy for the majority, but regardless of what they are able to pass in November, the fiscal policy accomplishments of the 109th Congress can already be judged a failure.

Citizens for Tax Justice Give Congress, President Failing Marks on Tax Policy

The last six years of fiscal policy under the Bush Administration have been a bad deal for 99 percent of Americans, according to two reports released last week by Citizens for Tax Justice

(CTJ).

The first of the reports, *The Bush Tax Cuts: Is Your State Better Off?*, examines who in each state has benefited from Bush's tax policy. To more accurately represent the long-term effects of the tax cuts, the report not only shows the size of the tax breaks received by each income group, but also the disproportionate share of the increased national debt that each group must pay off.

Each time Congress passed tax cuts over the last six years, it "paid for" these cuts by borrowing money - adding enormously to the national debt. To take that into account, CTJ makes the assumption that the additional debt added over the last 6 years will have to be paid back in the future through spending cuts and tax hikes on a broad range of taxpayers. From this vantage point, very few taxpayers came out ahead in the tax cuts. Generally, only the wealthiest 1 percent benefited at all.

Ohio, for example, is still struggling to recover from the 2001 recession. Yet nearly all Ohioans except a wealthy few have received no net benefit from the tax cuts after increased national debt burdens are factored in. Moreover, the wealthiest 1 percent of taxpayers there got to keep 27 percent of the total amount of money released by the tax cut - far more than the *entire* bottom 60 percent, according to the CTJ report.

Effects of Tax Cuts on Ohio Families and Individuals in 2001-2010:
Share of Tax Cuts by Income Group

Income group	Ave. 2006 Income	% of Total Bush Tax Cuts In Ohio										
		2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	10 yrs
Lowest 20%	$ 10,500	2.9%	1.9%	1.2%	1.2%	1.2%	1.2%	1.6%	1.6%	1.7%	1.5%	1.5%
Second 20%	24,100	13.4%	8.3%	6.2%	6.3%	7.3%	7.2%	9.2%	9.5%	9.1%	8.1%	8.0%
Middle 20%	39,100	18.2%	12.0%	10.3%	10.2%	11.6%	11.3%	14.1%	14.3%	13.6%	11.8%	12.2%
Fourth 20%	59,500	25.9%	18.4%	18.1%	17.3%	18.6%	18.0%	20.8%	20.8%	19.3%	16.3%	18.7%
Next 15%	94,600	25.4%	20.8%	25.4%	24.8%	27.6%	27.6%	21.7%	19.9%	17.5%	14.0%	22.4%
Next 4%	187,000	8.9%	12.9%	14.7%	14.7%	13.6%	13.8%	6.3%	5.6%	5.6%	6.0%	10.5%
Top 1%	784,700	5.2%	25.8%	24.1%	25.6%	20.0%	20.9%	26.3%	28.2%	33.2%	42.3%	26.7%
ALL	$ 55,600	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
ADDENDUM:												
Poorest 60%	$ 24,600	34.5%	22.2%	17.7%	17.7%	20.2%	19.7%	24.8%	25.4%	24.4%	21.4%	21.6%
Top 20%	$ 147,900	39.5%	59.5%	64.3%	65.1%	61.2%	62.3%	54.3%	53.8%	56.3%	62.3%	59.6%

Citizens For Tax Justice, "The Bush Tax Cuts: Are Ohioans Better Off?" Page 3.

In Michigan, where jobs are still being lost, the tax cuts have failed to bring relief to those who need it most. There, 99 percent of all taxpayers gain nothing from the tax cuts, while the richest 1 percent receives nearly 30 percent of the money from the tax cut. Unfortunately, this upward redistribution seems to have done little to stem the tide of lay-offs and job losses, particularly in the manufacturing sector.

Effects of Tax Cuts on Michigan Families and Individuals in 2001-2010:
Share of Tax Cuts by Income Group

Income group	Ave. 2006 Income	% of Total Bush Tax Cuts in Michigan										
		2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	10 yrs
Lowest 20%	$ 10,000	2.4%	1.7%	0.9%	0.9%	0.8%	0.8%	1.0%	1.1%	1.1%	1.1%	1.1%
Second 20%	23,900	11.9%	7.6%	5.2%	5.4%	5.8%	5.7%	7.0%	7.2%	6.9%	6.3%	6.4%
Middle 20%	41,100	18.8%	12.9%	10.6%	10.4%	11.2%	10.7%	13.1%	13.3%	13.1%	11.9%	12.0%
Fourth 20%	64,500	26.3%	18.8%	17.4%	16.8%	17.8%	17.1%	19.9%	19.9%	18.5%	15.9%	18.1%
Next 15%	104,600	25.5%	21.0%	26.3%	25.4%	28.5%	28.3%	22.1%	20.2%	18.0%	14.5%	23.0%
Next 4%	198,000	8.7%	12.0%	13.7%	13.4%	12.8%	13.1%	6.1%	5.5%	5.3%	5.6%	9.8%
Top 1%	891,400	6.4%	26.2%	26.0%	27.7%	23.1%	24.3%	30.7%	32.8%	37.0%	44.7%	29.6%
ALL	$ 59,800	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
ADDENDUM:												
Poorest 60%	$ 25,000	33.1%	22.1%	16.7%	16.7%	17.9%	17.2%	21.1%	21.5%	21.1%	19.3%	19.5%
Top 20%	$ 162,100	40.6%	59.2%	66.0%	66.6%	64.3%	65.7%	58.9%	58.6%	60.3%	64.8%	62.4%

Citizens For Tax Justice, "The Bush Tax Cuts: Are Michiganders Better Off?" Page 2.

The second report, *A Congressional Tax Report Card*, is a companion piece to the first and breaks down the voting records of all current congressional representatives on tax policy over the last six years. Representatives and senators are graded based on how they voted on each of the major tax initiatives since 2001.

For reference, the two senators from Ohio voted for the tax cuts an average of 70 percent of the time, while Michigan's senators voted against the tax cuts 90 percent of the time.

The report card's introduction also provides a useful overview of the last six years in tax policy: Congress has cut corporate taxes three times, lowered income tax rates once, and twice moved to lower taxes on capital gains and dividends.

Report Details Abramoff Abuse of Nonprofits, Recommends New Rules

An Oct. 12 report from Senate Finance Committee Ranking Member Max Baucus (D-MT) examines interactions between five tax-exempt organizations and disgraced lobbyist Jack Abramoff and his associates, finding instances of serious abuse. The report recommends a broad expansion of the definition of lobbying, increased disclosure requirements and enhanced penalties for violations. Its recommendations for further action by federal agencies with investigative and enforcement authority has received national attention. Receiving less media attention, however, is committee chair Charles Grassley's (R-IA) call for a more comprehensive examination of the role of nonprofits in lobbying and politics. Nonprofits thus will need to pay close attention to future committee action that could substantially affect nonprofit advocacy rights.

In September 2005, following revelations from a Senate Indian Affairs Committee investigation

into problematic transactions between lobbyist Jack Abramoff and some conservative nonprofit organizations, the minority staff of the Senate Finance Committee launched an investigation that reviewed emails, news reports, IRS Form 990 data, and other materials. The report found that five organizations took contributions from Abramoff and "undertook actions on Mr. Abramoff's clients' behalf." The organizations investigated are:

- *Americans for Tax Reform* (ATR): a 501(c)(4) organization headed by anti-tax activist Grover Norquist
- *Citizens Against Government Waste* (CAGW): a 501(c)(3) organization established in 1984 to eliminate inefficiency in government
- *Council of Republicans for Environmental Advocacy*(CREA): a 501(c)(4) organization created in 1997 by Grover Norquist, former Interior Secretary Gale Norton and Italia Federici
- *National Center for Public Policy Research*(NCPPR): a 501(c)(3) conservative think tank established in 1981 that seeks free market solutions to public policy problems.

Noting that "some officers of these organizations were generally available to carry out Mr. Abramoff's requests for help with his clients in exchange for cash payments," the report details activities that appear to be unrelated to the groups' tax-exempt mission and provide benefit to private individuals, which are not permitted by nonprofit 501(c) groups. These include:

- disguising the source of funds by accepting payments and passing them through to other groups, sometimes after subtracting a substantial fee
- accepting payment for writing op-eds and press releases favorable to Abramoff clients
- facilitating introductions between Abramoff clients and government officials, and
- accepting payment from Abramoff clients to act as front organizations sponsoring trips by members of Congress and their staff.

The central problem with the activities described in the report is that they were unrelated to the organizations' tax-exempt purpose, and benefited organizational insiders or individuals associated with Abramoff, rather than the general public. The report notes that this behavior "amounted to profit-seeking and private benefit behavior inconsistent with their tax-exempt status," calling it "a fraud on other taxpayers." It concludes that, if it is found that a substantial part of the organizations' activities have benefited a for-profit entity or private individuals, the groups could lose their tax-exempt status and the individuals that approved and participated in the activities could be subject to civil and criminal penalties.

The report recommends that the Finance Committee "consider legislation clearly addressing the practices exposed in this report." The following "options for discussion" are listed:

- Expand the definition of lobbying for 501(c)(3) organizations to include payment for travel, meals "and similar expenses" for government officials if the group has a registered

lobbyist that is a substantial contributor or holds a position of influence in the organization. This would not require that any specific legislation be discussed.

- Expand the definition of lobbying for 501(c)(3) organizations to include "lobbying of the Executive branch (including administrative agencies) and lobbying with respect to federal appointments"
- Require 501(c)(3) organizations that pay travel costs of government officials to disclose corporate donors and contributions for registered lobbyists
- Increase tax penalties for excess lobbying by 501(c)(3) organizations
- Deny a percentage of the tax deduction for donors to 501(c)(3) organizations that mirrors the percent of the group's budget spent on lobbying, and require the groups to inform donors of this amount
- Consider new rules for groups with members of Congress who are founders or "exercise control" of a 501(c)(3) organization
- Make corporate contributions to 501(c)(4) organizations that lobby non-deductible as business expenses or treat them as taxable unrelated business income of the organization
- Treat all contributions to 501(c)(4)s that have any "expectation of a quid pro quo" as taxable unrelated business income
- Require disclosure of all corporate donors to 501(c)(4)s that lobby, and
- Subject managers of 501(c) organizations that "knowing accept and disburse contributions" that provide private benefits to excise taxes.

The proposed reforms will require close scrutiny by, and significant discussion within, the nonprofit sector. For example, substantial expansion of the definition of lobbying by 501(c)(3) organizations without a corresponding expansion in the dollar limits on these activities will severely reduce the overall permissible advocacy allowed these organizations. Moreover, as research indicates many nonprofit leaders are confused about what constitutes lobbying - and that confusion leads to less engagement, and expanding that definition will add to the chilling effect on participation. This raises the question of whether abuse by five organizations justifies such changes for the over one million 501(c)(3) organizations recognized by the IRS.

The charities listed in the report should be fully investigated. Following the report's release, the National Committee for Responsive Philanthropy issued a statement calling on the IRS to conduct a thorough investigation. A statement from Independent Sector expresses deep concern with the findings, and promises to "work closely with Congress to ensure that any legislation ...preserves the ability of charitable organizations to engage with lawmakers on policy matters on a nonpartisan basis."

First Church Electioneering Bill Introduced in Senate

On Sept. 27, Sen. James Inhofe (R-OK) introduced S.3957, the Religious Freedom Act of 2006, which would prevent houses of worship from losing their tax-exempt status if they speak out on

"public issues, election contests, and pending legislation made in a theological or philosophical context." The bill was sparked by increased scrutiny on religious and charitable organizations as specific cases of possible partisan campaign intervention have come to light. Similar legislation has failed to pass in the House during this Congress.

The bill aims to grant houses of worship permission to endorse candidates and engage in partisan political activity without risking their tax-exempt status. These organizations could also be allowed to make political contributions to candidates and political parties.

With vague language and no definition for "election contests," S. 3957 could open the door to allow places of worship to engage in highly partisan activity. The bill also discriminates against non-religious 501(c)(3) organizations, which would still be prohibited from engaging in similar political activity. If the standards for 501(c)(3) organizations are changed, all 501(c)(3)s, including secular ones, should be granted the same speech rights.

The legislation is similar in principle to the H.R. 235 Houses of Worship Free Speech Restoration Act, introduced in the House by Rep. Walter Jones (R-NC). While the bill failed in the House, a renewed campaign for its passage, the "Houses of Worship Free Speech Petition," has been taken up by The American Center for Law and Justice.

Religious organizations are among organizations exempt from federal income taxes by Section 501(c)(3) of the Internal Revenue Code, which also exempts charities, educations and scientific organizations. This is the only category of exempt organizations that receives tax-deductible contributions. Accordingly, it is the only category subject to a prohibition on partisan activity. The IRS notes "all 501(c)(3) organizations, including churches and religious organizations, are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office." These organizations can not endorse any candidate, make campaign donations, or become involved in any other direct or indirect activity that may either help or harm a candidate, including fundraising. However, the IRS also says that "501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office." (For more information, read IRS Fact Sheet 2006-17 *Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations*.)

Introducing the legislation on the Senate floor, Inhofe told his colleagues, "They [Americans] may be surprised to learn that the Federal Government of the United States of America, in the land of the free, does not allow religious leaders in houses of worship of all religious orders to say anything that might be construed as political in nature." Inhofe is mistaken when he asserts that religious leaders can not comment on the issues of the day. Inhofe's claim ignores the fact that such organizations are allowed to engage in issue advocacy. The law distinguishes between taking positions on issues and taking positions on candidates. Houses of worship are bound to be a haven

for issue advocacy with so many public policy debates are tied to religious values.

If the rules regarding religious organizations and charities participation in elections were more precise and the role these groups can positively play in public policy debates was better defined by law, perhaps places of worship would not feel they are denied their right to free speech. IRS enforcement of electioneering ban has raised serious questions about this lack of clear standards and even-handedness. These problems are reflected in the campaign to promote S. 3957.

Databases Monitor Activity of Peace Activists, Public Opinion

The American Civil Liberties Union (ACLU) has revealed more evidence of Pentagon spying on nonprofits that oppose the war in Iraq. Meanwhile, new Homeland Security Department programs that will monitor public opinion, emails and blogs raise further concerns about the free speech rights of nonprofits and the civil liberties of Americans.

The ACLU issued a press release on Oct. 12 detailing a military anti-terrorism database that keeps records on non-violent protest groups. According to that release, the Pentagon has conducted surveillance of groups opposed to the Iraq war, such as student groups and Quakers, who are committed to nonviolence.

As reported in previous Watcher articles on Feb. 7, 2006 and June 27, 2006 , the ACLU filed a Freedom of Information Act (FOIA) request after news reports revealed that the Pentagon was secretly conducting surveillance of anti-war organizations, protest activities, and those opposed to military recruitment. The Pentagon shared the collected information with other government agencies through the Threat and Local Observation Notice (TALON) database, which was intended to track individuals with links to terrorism. This equates peaceful anti-war activity with terrorism, raising serious civil liberties concerns.

Elaborating on the ACLU revelations, *The New York Times* reported last week that "intelligence reports and tips about antiwar protests, including mundane details like the schedule for weekly planning meetings, were widely shared among analysts from the military, the Federal Bureau of Investigation and the Department of Homeland Security."

The ACLU release highlighted several examples of Pentagon surveillance in Ohio, Massachusetts, Florida and Texas, noting "One document, which is labeled 'potential terrorist activity,' lists events such as a 'Stop the War NOW!' rally in Akron, Ohio on March 19, 2005. The source noted that the rally 'will have a March and Reading of Names of War Dead' and that marchers would pass a military recruitment station and the local FBI office along the way."

Still more frightening an example of surveillance of Americans who do not pose any harm is the Homeland Security's Analysis, Dissemination, Visualization, Insight, and Semantic Enhancement (ADVISE) program, one of the 12 data mining programs being test by the department. Congress

Daily (subscription required) reports that concerns have been raised that the ADVISE program could be an infringement on privacy rights. ADVISE collects online public information, including emails and blogs, and then cross-references it against all other records on individuals. The information is then shared with federal, state, and local government agencies.

The concept of mass surveillance of public opinion is taking a further step, according to a recent *New York Times* article, which reveals that Homeland Security money has been given to numerous universities in the form of $2.4 million in grants to develop software that would allow the government to monitor negative opinions of the United States in publications abroad. This comprehensive monitoring of global news would be used to identify potential threats. It could also be used to monitor negative opinions of administration policies by domestic organizations, opening the door to the kinds of surveillance discovered by the ACLU on an even broader scale. In addition to the likelihood of serious errors in software interpretations of public opinions, the program could likely have a chilling effect on speech worldwide.

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In This Issue

Tumultuous Week for Voting Rights, Confusing One for Voters

A series of last-minute court cases and pre-election maneuvers will likely leave many voters confused about their rights as they go to the polls today. Widespread concern surrounds electronic voting and a host of voter identification requirements that could create inequities at polling centers across the country. Legal challenges to voter requirements will not be resolved until after this election cycle, so concerned groups have launched new efforts to document voter fraud and disenfranchisement of minorities, and elderly and disabled persons.

The legal issues involved in court challenges in the four states below indicate the frustration and uncertainty surrounding today's election. In response, EvolveStrategies launched an online nonpartisan voter complaint system, VoterStory.org. A number of organizations have featured the VoterStory.org "widget" on their web sites to help voters to record problems they encounter at the polls. VoterStory.org also automatically refers visitors who've faced problems to voter protection organizations for intervention and

support.

On Nov. 3, Project Vote released two briefing papers that describe anticipated election problems in 33 jurisdictions in nine states. One report focuses on the problems of voting machines in each jurisdiction. The second report highlights potential problems based on election management problems identified currently and in recent elections. The states examined are Arizona, Colorado, Florida, Maryland, Michigan, Missouri, New Jersey, Ohio and Pennsylvania.

OHIO

On Nov. 1, after a confusing series of decisions on a case challenging a new law requiring voters to show proof of identification when casting a ballot, a federal judge laid out clear rules for the upcoming election in Ohio. The order in *Northeast Ohio Coalition for the Homeless v. Blackwell* was a consent decree that followed 13 hours of negotiations between the unions and poverty groups that challenged Ohio's voter identification requirements and state Attorney General Jim Petro. The decision, which both sides claimed as a victory, allows people to cast provisional ballots without identification, but does not invalidate the contested law.

The court's decision only applies to this election. The court ruled that all county boards of election must count absentee or provisional ballot with a voter's name, address, date of birth, and signature, even absent the provision of a driver's license number or other form of identification required by the law. Those actually present at the polls will be allowed to cast provisional ballots if they do not have identification. The provisional ballots will be counted if they meet various requirements such as verification of address with state voter rolls. (More information on the decision is available here.)

The order follows a number of contradictory lower court decisions. On Oct. 26, U.S. District Court Judge Algenon Marbley agreed the law went too far when applied to absentee voting. Petro appealed the decision to the U.S. Sixth Circuit Court of Appeals, which granted a stay on Oct. 29 and left many Ohio voters confused about the requirements for early voting. The appeals court then overturned the district court's decision on Oct. 31. Marbley arrived at the negotiated agreement on Nov. 1.

MARYLAND

Republican poll workers in Maryland received instructions to challenge the eligibility of voters in the final week before the election. The instructions, contained in a guide written by state Republican Party officials, are "tantamount to a suppression effort," according to one Democratic Party lawyer. The *Washington Post*, which obtained a copy of the guide, printed excerpts from it on Nov, 1: "Your most important duty as a poll worker is to challenge people who present themselves to vote but who are not authorized to vote." This has heightened concerns among poll workers and observers, and a fleet of Democratic lawyers have been dispatched to investigate the possibility for black

disenfranchisement at the polls. Republican officials reject such suspicions.

An additional disturbing development in Maryland, set for closely contested senatorial and gubernatorial races, is news that someone has been calling poll workers around the state and falsely informing them that their precinct assignment had changed. This mystery further clouds an already murky election season in Maryland. On Sep. 12, primary voters complained of widespread voting machine malfunctions. The uncertainty about in-person voting has contributed to more than 175,000 absentee ballots--a record number--being requested in the state.

ARIZONA

In 2004, Arizona's voters passed Proposition 200 that requires voters to present either photo identification or two forms of approved non-photo identification in order to vote. After a series of court battles, the Ninth Circuit Court of Appeals issued an injunction to stop Proposition 200 for this election cycle, forcing everyone to return to the earlier system. On Oct. 20, just two weeks before the election, however, the U.S. Supreme Court ordered the state to proceed with implementing Proposition 200's requirements. The court's six-page opinion in *Purcell v. Gonzales* did not rule on the constitutionality of Proposition 200. Instead, it found the lower court applied the wrong standard to the facts of the case, sending the case back to the federal district court for review of the law's constitutionality.

On Nov. 1, a federal judge required election officials to count the number of people who do not meet the requirements of Proposition 200 and leave without voting, but would not allow other observers inside voting stations to monitor the count. Opponents of Proposition 200 wanted to have observers present at the polls to count those turned away for failing to meet the identification requirements. U.S. District Judge Roslyn Silver ordered state election officials to keep count of those who are turned away, reasoning that Arizona state law limits the number of people at polling places to prevent intimidation and harassment. Critics object to the decision saying it creates a conflict of interest, and that the officials will likely not perform the count as rigorously as their own workers. Local election officials for their part complain about the last-minute ruling for adding yet another wrinkle to their taxing responsibilities.

TEXAS

On. Nov. 4, the U.S. Supreme Court refused to hear a request to prevent Texas Attorney General Greg Abbott from prosecuting people who help elderly and disabled voters cast mail-in ballots. This was a day after a federal appeals court overturned a lower court's preliminary injunction against enforcement of a law making it a crime to help another vote. Abbott will now be allowed to continue his policy of prosecuting third parties who assist others in the act of voting. Opponents of the law include the Mexican American Legal Defense and Educational Fund and the Texas NAACP, who contend that it is a common practice for the elderly to vote absentee and designate a person or persons to

turn in the ballots for them.

On Oct. 31, a federal district judge ordered Abbott to stop prosecuting Texas citizens who help their elderly and disabled neighbors to vote. After the appeals court overturned this decision, the Texas Democratic Party and affected individuals filed a petition asking the Supreme Court to intervene.

ACORN Voter Registration Drive Investigated

Voter registration drives sponsored by the Association of Community Organizations for Reform Now (ACORN) are being investigated by federal authorities and the Senate Finance Committee after allegations that fraudulent voter registration cards were submitted in four of its 17 state efforts. The group is cooperating with authorities and says misconduct by temporary workers appears to be at the root of the problem.

ACORN, founded in 1970, is primarily dedicated to advocating for low-income Americans. It has been particularly active in registering low-income voters, and this year ran registration drives in 17 states. In October, allegations of problems with voter registration cards surfaced in Ohio, Pennsylvania, and Colorado. According to the Associated Press, "In Franklin County [Ohio], prosecutors are looking at almost 400 cards the county elections board said included already registered voters or people with the wrong address." In Philadelphia, about 3,000 cards were rejected because of missing information or invalid addresses.

On Nov. 2, the U.S. Attorney's office in St. Louis, MO, indicted four former-temporary voter registration workers employed by ACORN on felony voter fraud charges. In a Nov. 6 press release, ACORN announced it fired all four after an October internal review revealed problems and reported it to authorities. It has cooperated with the FBI inquiry with officials announcing, "Now we want to see these folks prosecuted to the full extent of the law." On Nov. 2, the Associated Press reported that election officials in St. Louis have found at least 1,500 cards that could have been fraudulent, including ones for dead and underage people.

In Ohio, a dozen people have been subpoenaed in an investigation of fraudulent registration cards, and three may be charged with felony election fraud. ACORN has referred problem registrations to election authorities for investigation and has cleared suspicion from some forms with additional information. ACORN organizer Barbara Clark told the Columbus Dispatch that the group " provided photos of homes at addresses thought not to exist, and it discovered one potential voter who purposely listed an incorrect Social Security number because he feared identity theft." In Denver, CO, election officials sent about 200 voter registration cards with identical handwriting on signatures to the secretary of state's office for investigation.

News of these charges caught the attention of Senate Finance Committee Chair Charles

Grassley (R-IA), who has been active in investigating nonprofit organizations. Grassley proceeded to write ACORN National President Maude Hurd, asking 62 questions to determine whether or not the organization violated the law that grants nonprofits their tax-exempt status. Grassley expressed concern that "misuse of tax-exempt organizations for political and lobbying activities is a widespread problem." His letter also drew a connection between ACORN and the misuse of nonprofit organizations by disgraced lobbyist Jack Abramoff and his associates. Grassley requested ACORN provide vast information in a searchable, electronic format within *nine days*, and many of his questions had no apparent relationship to the organization's voter registration activities.

The investigation's outcome remains unclear. Serious concerns have been raised about quality control in large scale voter registration drives such as those carried out by ACORN. Still equally serious concerns are raised that nonprofits will be discouraged from conducting voter registration drives, fearful of investigations if mistakes are made.

The revelations of voter fraud may have a ripple effect on nonprofit speech rights. For example, a Nov. 6 opnion piece by Terence Scanlon of the Capital Research Center ran in *The Examiner*, maintaining that the incidents justify legislation that would disqualify any nonprofit that conducts voter registration drives or lobbies from applying for funds from a proposed federal affordable housing fund. ACORN has an affiliated community development corporation that has received federal housing funds in the past. The legislation referred to by Scanlon passed the House last year, but has not moved in the Senate. For more information on this proposal see OMB Watch Resource Center: New Nonprofit Gag Provision in GSE Bill.

ACORN has been operating large-scale voter registration drives for a number of years. In 2004, the group registered over 1 million voters. ACORN was accused of fraud in 2004 for activities in Ohio, Florida, Minnesota, North Carolina and Virginia and in 2003 in Missouri. According to a statement from the organization, however, these allegations were proven false. "In Ohio, allegations against ACORN (and other organizations helping minorities register to vote) were contained in a lawsuit funded by the Free Enterprise Coalition. The plaintiffs withdrew the suit as ACORN began discovery." In 2004, as in 2006, they cooperated with prosecutors to convict employees who submitted duplicate registrations or other problematic cards.

Nonprofits Call for Release of Frozen Funds for Humanitarian Efforts

In a letter sent Nov. 6, a group of charities and nonprofit sector leaders asked the Treasury Department to release frozen funds belonging to charities designated as supporters of terrorism "to trustworthy aid agencies that can ensure the funds are used for their intended charitable purposes." According to the letter, the request "takes no position on whether these designations were appropriate. Instead, [the authors'] concern

is with ensuring that charitable funds are put to good use."

The Treasury Department's Office of Foreign Assets Control (OFAC) lists 43 charities as supporters of terrorism on its Specially Designated Nationals list, including five U.S.-based charities. In its 2005 Terrorist Assets Report to Congress the Treasury Department estimated that these designations have resulted in more than $13.7 million in frozen assets. Research of public sources indicates that none of these blocked funds have been released for charitable purposes.

The Treasury Department has rejected several requests from designated U.S. charities to have funds released for charitable purposes:

- In 2002, the Benevolence International Foundation asked that its funds be transferred to a children's hospital in Tajikistan and Charity Women's Hospital in Dagestan, with appropriate safeguards to ensure safe delivery of the funds.
- In 2004, the Holy Land Foundation asked that $50,000 of its funds be transferred to the Palestine Children's Relief Fund.
- In 2006, KindHearts for Charitable Humanitarian Development asked that its funds be spent on charitable works through the USAID program or any other nongovernmental organization, and requested priority be given to refugees of the 2005 Pakistani earthquake, since most of the funds had been earmarked for that purpose.

The letter from 20 organizations and two philanthropy experts notes that "[m]ost of these funds come from relatively small donors who intended to provide food, medical care, shelter, education and other basic needs to refugees, people displaced by war or famine and others in need. Many of these donors are Muslims whose giving fulfills a religious obligation." Noting that humanitarian need continues to grow and substantial time has passed since many of the funds were frozen, the letter calls on the Treasury Department to update its policy.

Under the Code of Federal Regulations, the Treasury Department has the legal authority to release frozen funds pursuant to a special license application from the designated organization. (See 31 CFR 501 and 597.) The recent letter specifies that funds should only be released when the governing body of the designated group makes such a request. Where the group is no longer active and no legal owner of the funds can be identified, the letter asks the Treasury Department to develop a process that will "ultimately allow these funds to fulfill their charitable purposes."

The letter reflects growing concern over the chilling impact of Treasury Department policies on international grant making and charitable giving. Donors may choose not to give because they cannot be certain that their contributions will reach those people and causes they seek to assist. This chilling impact is most keenly felt by Muslim-American communities, where the religious obligation to give to charity is frustrated by fear of government reprisal. *The New York Times* recently reported drastic reductions in giving

during this year's Muslim holy month of Ramadan. Signatories of the recent letter called for reforms that will not only allow more funds to achieve their intended charitable purposes but that may also help reinvigorate Muslim charitable giving.

The signatories requested a meeting with Treasury Department officials to discuss the proposal in more detail. Among the letter's organizational signers were the Council on Foundations, the Center for Global Justice and Reconciliation, Independent Sector, the Global Fund for Women, the Muslim Public Affairs Council and OMB Watch.

Declassification Board: Bulwark Against Excessive Secrecy or Executive 'Puppet'?

Controversy was sparked this week over how much authority the newly-funded Public Interest Declassification Board (PIDB) has to investigate excessive secrecy. A bipartisan group of Senators from the Senate Intelligence Committee requested that the board review two reports on intelligence failures leading up to the U.S. invasion of Iraq for possible over-classification. In an interim response, the board maintained it can only review a document after receiving authorization from the president. If this decision stands, PIDB will hold no independent power to review potential abuses of power and cases of unnecessary secrecy.

Set up to "promote the fullest possible public access to a thorough, accurate, and reliable documentary record of significant United States national security decisions and significant United States security activities," PIDB was the recommendation of the late-Sen. Patrick Moynihan's (D-NY) Commission on Protecting and Reducing Government Secrecy to be enacted. Though the board was created in 2000, its first members were appointed in 2004, and it did not receive funding until 2005.

Congress's first request for an investigation was sent to the board on Sept. 19, 2006 by Sens. Ron Wyden (D-OR), Kit Bond (R-MO), Dianne Feinstein (D-CA), Mike DeWine (R-OH), Russ Feingold (D-WI), Orrin Hatch (R-UT), and Jay Rockefeller (D-WV).

"The Senate Select Committee on Intelligence, on which we serve, recently released two reports addressing prewar intelligence issues regarding Iraq. We believe that portions of these two reports remain unnecessarily classified," stated the senators' request. "We ask that the Board review these two documents and evaluate whether any of the currently classified portions could be made public without negatively impacting national security."

In response, L. Britt Snider, chairman of the Public Interest Declassification Board, wrote, "The president must request that the board undertake such a review before it can proceed." In the Intelligence Reform Act of 2004, Congress reauthorized the board which was set to sunset in 2004 and also revised the statutory language governing the board to include what some have interpreted to be two contradictory provisions. The bill states that PIDB is authorized to "review and make recommendations to the President in

a timely manner with respect to any congressional request, made by the committee of jurisdiction, to declassify certain records." At the same time, the bill states that, "If requested by the President, the Board shall review in a timely manner certain records or declinations to declassify specific records, the declassification of which has been the subject of specific congressional request."

In its interim response, the PIDB stated that the latter provision takes precedence, and the Board's review of a classified document can thus only be triggered by the president, even if a congressional committee with jurisdiction requests a review. Speaking to United Press International in late October, Steven Aftergood of the Federation of American Scientists warned that the board is in danger of becoming a "White House puppet." Aftergood went on, stating, "The board needs the capacity for independent action; otherwise, it might as well not exist."

The PIDB is expected to meet next week further discussion before issuing a final response to the Senate request. As the first major one its kind, the PIDB decision will have a lasting impact on the power and authority of the board to effectively oversee classification decisions and maintain government openness and accountability on matters of national security. With the 9/11 Commission and a number of national security experts concluding that the government's failure to adequately share information and its propensity toward over-classification are ongoing barriers to national security, PIDB has a unique opportunity to help reverse the tide of government secrecy and its counterproductive effects.

Nuclear Commission Re-proposes Secrecy Rule

The Nuclear Regulatory Commission (NRC) has once again proposed a revision to its rules on information that should be withheld from the public under a category called Safeguards Information (SGI). The rule was originally proposed in February 2005. Now based on public comments and changes to the Energy Policy Act of 2005, the NRC has proposed additional changes. While apparently narrowing the scope of some provisions, making it harder to withhold information, the amended rule would significantly expand SGI's definition, inserting language and add a new category of covered information -- Safeguards Information-Modified Handling (SGI-M).

The SGI category was created under the Atomic Energy Act of 1954 to prevent inadvertent release and unauthorized disclosure of "sensitive but unclassified" information that might compromise the security of nuclear facilities and materials. Most SGI information was only released on a "need-to-know" basis. On Feb. 11, 2005, the NRC proposed a rule to broaden the already expansive SGI regulations to withhold any information about emergency planning procedures, safety analyses, or defense capabilities. The NRC also proposed the addition of Safeguards Information-Modified Handling (SGI-M), a new sensitive but unclassified designation that would allow nuclear materials producers already using SGI regulations to hide additional types of regulated

information. This proposal is in spite of the agency's own estimations that SGI-M data carries a lower risk if released to the general public.

OMB Watch and other public interest groups submitted comments last year criticizing the February 2005 NRC proposal for including overly vague provisions that could hide vast amounts of information from public purview, thereby reducing access and accountability. In the newest proposal, the agency made slight improvements in response to these criticisms improving language and definitions to reduce the possibility that the new categories withhold emergency planning and public accountability information. Unfortunately, the improvements notwithstanding, the agency rejected most of the larger complaints and continues to propose expanding the amount of information restricted as SGI and SGI-M with few oversight provisions to protect against overuse.

NRC is accepting public comments on the revised proposed rule until Jan. 2, 2007. OMB Watch and other members of the public interest community will undoubtedly again push for common sense disclosure that protects communities and first responders.

Intelligence Agencies Go Wiki

John Negroponte, director of National Intelligence, announced that federal intelligence agencies have implemented a new Wikipedia-like tool to share information across agencies. Intellipedia allows 16 intelligence agencies to access, update and revise pages on matters of national security. This cutting-edge venture in government information management is a welcome development for agencies that have often been stymied by turf warfare and other impediments to information sharing.

Among the major problems affecting intelligence agencies is information "silo affect," by which agencies across the federal and state levels fail to share information with each other. The 9/11 Commission cited silo effect as a contributing factor to the failure of U.S. intelligence and law enforcement agencies to track down the terrorists involved in the 9/11 attacks. By enabling users to access different parts of the Intellipedia that contains information designated sensitive but unclassified, secret, or top secret, this new tool may help remedy this problem and encourage collaboration among federal and state officials. In its first 7 months of use, Intellipedia has ballooned to over 28,000 pages and 3,600 users. "The real question is whether or not people will really use it - and the initial answer seems to be that they're off to a good start," the blogger Techdirt recently observed.

Another problem associated with intelligence agencies has been the "group-think" phenomenon in which the opinions of powerful members of a group become dominant and sidelines valid but contradictory views. Many analysts have cited group-think as contributing to intelligence failures in the lead-up to the Iraq war. According to the *Washington Post*, officials are also looking into extending access to intelligence agencies

in Britain, Canada and Australia. Parts of the Intellipedia network could also be extended to doctors and emergency responders to enable collaboration and enhanced information access on possible pandemics and terrorist attacks. Inclusion of and enhanced access to such diverse views may help alleviate the problem of group-think.

U.S. News and World Report reports that Negroponte has also overseen implementation of internal blogging by intelligence agents. Originally these intelligence blogs numbered as many as 1,500, but their numbers have fallen to around 125. These blogs also create the potential for increased access to otherwise sidelined opinions, they can, however, also lead to information cascades in which false beliefs become dominant merely because others promote them. Nevertheless, the implementation and use of new methods of information sharing and aggregation are refreshing given the recent intelligence failures of Iraq and 9/11. Use of these technologies, while not a cure-all for false intelligence or inadequate collection methods, may help alleviate some of the systemic problems affecting intelligence agencies in recent years.

Tax Policy on the Campaign Trail

During the current campaign season, both Democrats and Republicans have allowed election-year rhetoric to distort the true nature and outcomes of current tax policy.

The administration and Republicans across the country assert that Democrats plan to raise taxes for most citizens and that these "tax increases" would devastate the economy. At a recent campaign rally in Colorado, Bush was direct in asserting this view:

And the American people must understand the facts; if you vote Democrat you're voting for a tax increase.

It is a powerful statement without any facts supporting it. First, the simple claim "you're voting for a tax increase" misrepresents the current state of federal taxes.

Provisions in the current tax code, if not proactively altered by Congress, will expire in 2010. Bush might be claiming that a Democratic Congress would seek to pass new legislation that would increase taxes, although Democrats have not suggested this. On the other hand, Bush may also be claiming that a Democratic Congress would fail to re-pass Bush's first-term tax cuts set to expire--a tax hike in the mind of Bush and his compatriots. In fact, the sunset provisions of the current tax code are politically advantageous for those who originally drafted them: a Republican Congress could claim to cut taxes by making the tax cuts permanent, while a Democratic Congress could be blamed for raising taxes by allowing the law to remain as written.

But Republicans are not alone in using the temporary nature of recent tax laws to accuse the opposition of "raising taxes." Senate Minority Leader Harry Reid (D-NV) issued a statement in October accusing Republicans of "raising taxes on the middle class and on

businesses" by not passing an "extenders" bill for certain tax credits- the very same tactics currently being used by Bush and other Republicans to confuse the issue.

In addition, statements by Bush and other candidates generalize about the impact of the expiration of those tax cuts, assuming all Americans will be effected equally. Not all tax code changes are equal, and any future change would affect different taxpayers in different ways. For instance, a change in the rate for capital gains or dividend taxes would mainly affect the richest 10 percent of the population - the owners of 70 percent of American wealth.

Some Democrats have been severely critical of the entire package of tax cuts passed by the Bush administration - including many cuts that do help middle-income families like the child tax credit, marriage penalty relief, and college tuition deduction. House Ways and Mean Ranking Member Charlie Rangel (D-NY) recently told Bloomberg News that he could "'not think of one' of Bush's tax cuts that would merit renewal."

Despite Rangel's statement, it remains unclear what position Democrats will take on many of the Bush's first-term tax cuts should they take power in Congress. Most Democratic candidates have been largely silent on the issue, although many have spoken out on addressing economic problems and on the fact that the rich are getting richer. The Democrats' position is also difficult to gauge because of the virtually limitless permutations of tax code changes that are possible under new leadership.

Certain Democrats, especially Reid and Sen. Max Baucus (D-MT), have been among the most vocal supporters of the "extenders" tax cut package that stagnated in Congress this year, including a combination of business tax cuts and a more cosmopolitan collection of populist cuts, including expansion of the child tax credit, the college tuition tax credit, the state and local tax credit, the teacher credit, and marriage penalty relief.

Democrats may seize the opportunity to change the tax code, but the provisions that impact most Americans are unlikely to change much. The only likely difference would be that the Democrats may extend many of the popular tax breaks passed under Bush, but would offset their cost elsewhere - a position supported by almost all Democrats and more than a few Republicans. Additionally, there is the explosive issue of the Alternative Minimum Tax, which was designed to make sure that super-wealthy taxpayers pay at least a minimum amount of tax, but which now affects many upper-middle-income taxpayers. The cost of fixing the tax is becoming increasingly expensive each year, and if Democrats hold true to their promises to offset the cost of a reform proposal, it could mean significant cuts to spending or increases in other taxes.

Tax Policy and the Economy

In an attempt to credit his tax policies with kick-starting the economy, Bush has declared an unambiguous connection between current economic expansion and his tax cuts:

Well, the facts are in. The tax cuts have led to a strong and growing economy...And if

you're voting Republican you're voting for low taxes and a strong economy.

Bush is warning voters that if his tax cuts are allowed to expire, it will have direct and detrimental consequences for economic growth. Yet, not all of the facts support the president's claims. There were six-and-a-half years of enormous economic growth and widely shared prosperity after President Clinton raised taxes in 1993. If one assumes tax policy is the prime mover of the economy, as Bush is wont to do, then a comparison of the years after President Clinton's tax increase and Bush's tax cuts reveals that tax increases are a far superior method of increasing economic growth. Between 1996 and 2000, the economy grew 18 percent and resulted in a $236 billion budget *surplus*. In the years following the Bush tax cuts (2001-2005), on the other hand, the economy grew 13 percent and resulted in $318 billion budget *deficit*.

The current recovery is not just weak compared to that of the 1990s. It is also incredibly weak by historical standards. In a recent report from the Center for American Progress, John Irons and Mirra Levitt point out that, when compared to other recoveries, the current one is rather dismal. Average GDP growth of the previous 10 recoveries has been 19 percent. The current Bush recovery has seen the economy grow 15 percent, ranking seventh out of the past 10 recoveries. Employment growth has been considerably paltry, as well. In the previous 10 recoveries, employment increased, on average, 7.9 percent; Bush's "strong and growing" economy has resulted in an increase in employment of just *1.9 percent*, placing Bush job-growth tally in ninth place.

While tax policy, the federal budget, and the economy are favorite campaign-speech fodder for the president and congressional incumbents, a detailed examination of election-year rhetoric reveals how disingenuous politicians are about fiscal policy. The federal budget deficit is on track to expand even more in future years; inflation pressures continue to rise; the economy is sputtering along at a below-average pace for most Americans; and there remain many daunting long-term fiscal challenges. Americans deserve leaders who are upfront about fiscal and economic policy, whether it is an election year or not.

Congress Continues Insufficient Oversight of Federal Contracts

Even as reports of contracting fraud and contractor malfeasance continue to stack up, Congress has taken steps to reduce the federal government's capacity to investigate and oversee how government contracts are awarded and administered.

Last month, the House Appropriations Committee announced it had eliminated the jobs of 60 investigators charged with closely monitoring defense contracting and intelligence spending. Congress also threw a last-minute provision into the 2007 Defense authorization bill that effectively abolishes the office of the Special Inspector General for

Iraqi Reconstruction, which had focused on contractor abuses in Iraq.

Congress could in effect be crippling its own capacity to hold contractors accountable. Typically, only government officials have the authority and resources to perform comprehensive reviews of government contracts. Were it not for these offices, much of what Congress and the public now know about contract abuse may never have emerged.

For instance, the Special Inspector General for Iraqi Reconstruction was responsible for providing the factual basis of many recent media accounts on contracting waste and abuse. One attention-getting report found that Halliburton-subsidiary Kellogg, Brown and Root (KBR) claimed exorbitant overhead and administrative fees in its contracts. In some cases, KBR took in fees that consumed more than half of a contract's budget, and KBR overhead charges were generally a full 10 percent higher than those reportedly charged by other companies.

The Inspector General also found that the Parsons Corporation had failed to complete numerous projects it had been awarded contracts for. In one vivid example, Parsons had constructed a building to house an Iraqi police academy that was built so badly - with waste from defective plumbing flowing through floors - that it has never been occupied.

Thanks to the oversight role of Inspector's General investigations, some federal program administrators have held faulted contractors accountable. In fact, after reports emerged of Parsons Corp.'s failures, the Army Corp of Engineers canceled more than $300 million worth of contracts with the company.

Sadly, these instances of successful oversight are the exception, rather than the rule. Administrative and congressional inaction has been the order of the day recently. In a June 2006 report, the Special Investigations Division of the House Committee on Government Reform found few contractors have been punished for known abuse, and many contractors who have been cited for abuses or failures have obtained additional contracts nonetheless.

Congressional neglect has extended to its investigative responsibilities. The House Appropriations Committee investigative team found it difficult to get the committee interested in oversight even before the staff firings. "There wasn't anybody down there who gave a hoot about intelligence spending," Scott Wyman, a former investigator, told CQ Today.

The recent staff cut-backs also attest to the disinterest among House Appropriations Committee leaders in informing the public of the true extent of our government's failures during the Hurricane Katrina recovery effort. The team conducted extensive investigations of government contracts related in the recovery. Yet Chairman Jerry Lewis (R-CA), who ordered the firings and is the target of an FBI corruption investigation, has refused to release any of these reports. The investigative team was also on track to complete a final report on the Katrina contracts, which Lewis had promised would be

released to the public, but the staff shortage has made it impossible to finish this report.

Fortunately, neither of these harmful decisions may be difficult to undo. Senate Republicans have already begun discussing ways to restore the authorization of the Special Inspector General's office, and a new House Appropriations Committee chair could decide to hire back the fired members of the investigative team, or recruit new ones.

Congressional leaders who made these decisions, however, are unlikely to reverse them. As it becomes increasingly clear that more oversight is needed, Congress has acted to make it harder for itself and the executive branch to keep up even the current, grossly inadequate, level of oversight.

EPA Falters on Commitment to Environmental Justice

Less than two months after the Inspector General for the Environmental Protection Agency issued a report critical of the agency's commitment to environmental justice, EPA closes the doors of one of its regional offices for minority advocacy.

EPA Fails to Conduct Environmental Justice Reviews

In September, EPA's acting inspector general (IG), Bill A. Roderick, issued a report revealing that EPA had frequently failed to perform environmental justice reviews of its programs and regulations. In a survey of 15 regional and program offices, nine out of 15 responding administrators said they had not performed environmental justice reviews and 13 out of 15 claimed EPA had not directed them to do so. According to the IG, "though some offices may not be subject to an environmental justice review, the respondents expressed a need for further guidance to conduct reviews, including protocols, a framework, or additional directions. Until these program and regional offices perform environmental justice reviews, the Agency cannot determine whether its programs cause disproportionately high and adverse human health or environmental effects on minority and low-income populations."

As a result of the report's findings, the IG recommended that EPA programs and regional offices evaluate which "programs, policies, and activities need environmental justice reviews" and to perform reviews to "determine whether the programs, policies, and activities may have a disproportionately high and adverse health or environmental impact on minority and low-income populations." The IG also recommended that EPA offices develop guidance for conducting environmental justice reviews and designate an environmental justice office to "compile the results of environmental justice reviews," and "recommend appropriate actions to review findings and make recommendations to the decisionmaking office's senior leadership."

EPA is required to perform environmental justice reviews under Executive Order 12898, Federal Actions To Address Environmental Justice in Minority Populations and Low-

Income Populations, which states,

To the greatest extent practicable and permitted by law ... each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.

Signed Feb. 11, 1994, E.O. 12898 came in response to findings that minority and low-income populations were disproportionately impacted by environmental harms. Blacks are 79 percent more likely than whites to live in polluted areas, according to a December 2005 analysis by the Associated Press.

EPA Closes Doors of Northwest Minority Advocacy Office

Less than two months after agreeing to the recommendations of the IG, EPA announced that it will close its Region 10 environmental justice office, which serves Idaho, Oregon, Washington and Alaska. The Office of Civil Rights and Environmental Justice assists minority and low-income groups with environmental clean-up, advocacy and education. According to local environmental groups, the office has been instrumental in providing information and support to the community. Region 10 will be the first EPA regional office without dedicated staff to address environmental justice issues.

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In This Issue

Americans Demand New Direction in New Congress

With the midterm elections over, exit polling and voter reactions indicate Americans want reform on issues close to home, and not the partisanship and corruption of Congress's past. In a post-election letter from Executive Director Gary Bass, OMB Watch solicited responses from its email subscribers and appreciates the thoughtful and insightful comments. The responses received make one thing clear: Americans want our nation led down a new path - one with honest campaigns, an inclusive economy, and a clean environment.

The most common issue of concern among responses is the need for reformation of the election process. The Democrats' 100 hours agenda includes many ambitious goals, but Americans are clamoring for the new majority to address lingering problems with our elections. "I think the 100 hours agenda is good," says Donna D., but she contends "critical issues are missing." She wants Congress to begin "protecting our vote with verifiable paper trails." Donna continues, "If cash registers can print receipts, why can't voting machines?" Lance B. echoes her concerns, calling for a policy to "eliminate or fix electronic voting machines" by employing "paper trails, open-source programming, and

bullet-proof security."

Americans also feel campaign finance and lobbying reform should be top priorities for the new Congress. Dick K. says: "I think there needs to be a fundamental change in the way we run campaigns for national office as well as limits on how lobbyists can access and contribute to national officers. Perhaps if the government funded national campaigns or there were limits on campaign spending at the least, the power of influence peddlers would be reduced."

Further responses express concern over the influence of corporations in elections and policy. Tom A. from San Dimas, CA maligns "the corporate interests in this country that put their profits ahead of the common good." Gale S. would like Democrats to add to their agenda "election reform with an end to corporate donations even through PACs, and a return of the fairness in broadcasting doctrine," adding, "Then this nation may heal."

Discontent with the lack of transparency in the voting process and a fear of corrupting influences in government may reflect a backlash against corruption which voters expressed in exit polling. Seventy-four percent of respondents indicated "corruption and scandals in government" as extremely or very important in their Election Day decisions - and 41 percent said it was extremely important.

The only issue more important to voters than corruption in government, according to exit polling, was the economy. (Terrorism and Iraq were rated third and fourth respectively.) Eighty-two percent of respondents rated economic issues as extremely or very important. Responses received by OMB Watch bolster this finding. "With personal debt at a record high, with healthcare costs impacting more and more budgets, and with stagnant wages a fact of life, Americans are finally looking past the Bush rhetoric and demanding change," says Patricia C.

Some of the responses OMB Watch received take dead aim at the Bush administration's tax policy. "The fiscal burden on future generations that the last six years of tax legislation has created is unacceptable and must be addressed sooner rather than later," says Linda B. She continues with advice for the 110th: "The new Congress should therefore rethink the various revenue reductions enacted over the last six years and re-focus tax provisions to provide reasonable tax rates for ordinary Americans and a fairer share of the tax burden for those in the top five percent." One specific way of doing that, she says, is preserving the estate tax: "Estate tax repeal or reduction makes no sense whatsoever."

The Alternative Minimum Tax (AMT) is also of concern to Americans. Brent P. of Brownsburg, IN says: "The AMT and standard deductions need to be increased by $10,000 and the AMT then needs to be indexed to inflation like the standard deduction. The tax revenue losses can be replaced by increasing taxes on the wealthy and estates over $5 million." With a recent study by the Tax Policy Center (a joint project of the

Urban Institute and the Brookings Institution) showing that the AMT is likely to encroach upon more and more of the American middle class, Congress would be wise to act upon this voter sentiment.

The health of our environment is another major concern. In reaction to the Democrats' 100 hour agenda, Nancy asks, "Where in all these issues is environmental protection?" Specifically, voters are concerned about American energy policy. Jerry P. comments: "The new Congress will have ample opportunity to conduct effective oversight on global climate change and the deficiencies in current energy usage. Their outcome should be an aggressive new national energy policy that elevates renewable sources, conservation and responsibility reflective of our contribution to global carbon dioxide emissions."

On a related note, OMB Watch received many responses demanding action on climate change. "If the developed world cannot provide leadership in this issue, climatic change will become ever bigger and more quickly irreversible," says Deborah W. "To me, global warming is the biggest issue the planet faces," says Shirley B. of Maryville, TN.

The overarching message voters seem to be sending is their desire for substantive change. According to a Democracy Corps poll taken the weekend before the election, 79 percent of respondents indicated the following statement - Getting politicians to work for the public good, instead of the special interests - to be one of the top three reasons to vote for Democratic candidates. Voters have grown weary of partisanship and corruption, and they demand action. Can Democrats enact change? Not everyone is sure. "I am a life-long Democrat who has been disappointed in the party over the last ten years," says Bonnie B. of New Hampshire. However, like most Americans, Bonnie is hopeful, saying she "deeply hopes that the party makes substantial and relevant changes forward for the country."

Senate Committee Set to Vote on Dudley for Regulatory Czar

The Senate is likely to vote in December on the nomination of Susan Dudley to be the new regulatory czar, according to Sen. Susan Collins (R-ME). Despite widespread criticism from the public interest community on the nomination, a confirmation hearing in which Dudley evaded disclosing much about her views, and new concerns about a perception of a conflict regarding her husband serving as head of an office that writes environmental regulations, it appears that Collins's committee will move forward with the nomination.

Collins, the current chair of the Committee on Homeland Security and Government Affairs, was the only Republican member of the committee to attend the November 13 hearing on Dudley's confirmation to administer the Office of Information and Regulatory Affairs (OIRA) at OMB. OIRA is the office that makes final decisions about which federal agencies' regulations are approved, as well as what information is collected by federal

agencies.

The incoming chair, Sen. Joseph Lieberman (ID-CT), did not attend but submitted an extensive list of questions to Dudley prior to the hearing. The Democrats on the committee asked Dudley probing questions concerning her views on regulation of arsenic, ozone, the Toxics Release Inventory, and her writings on the economic benefits of regulations generally, as well as her ideas about managing OIRA if confirmed. Dudley has written extensively on the benefits of using market forces to regulate public interest protections rather than having governments issue protective standards. Dudley was most recently on the staff of George Mason University's Mercatus Center, where she was the director of regulatory studies.

The Dudley hearing was another example of how such nominating hearings have become exercises in obfuscation, with the nominee revealing little and vowing openness once confirmed. Generally, Dudley evaded answering specific questions while promising to use OIRA only as the implementing mechanism for agency regulations. Time and again she acknowledged that cost-benefit analysis was but one tool in determining the reasonableness of proposed regulations. Her writings, however, have strongly urged the use of free market solutions to health and safety issues.

Even when pushed on issues by Sens. Carl Levin (D-MI), Mark Pryor (D-AR), and Tom Carper (D-DE), Dudley evaded the questions with answers suggesting that the Senators were reading her writings too broadly or saying she would be willing to talk about these issues once confirmed. For example, Pryor seemed especially vexed by Dudley's position on the "senior death discount." On October 31, 2001, in public comments to the Environmental Protection Agency, Dudley criticized the EPA's stricter standards on arsenic in drinking water, arguing that "EPA's value [per statistical life] likely overstates the benefits of the rule. . . . This can be addressed with sensitivity that estimates benefits based on a value per life-year saved, or an *age-adjusted value per life*." [Emphasis added.] That is, assigning a monetary value to the life of someone affected by the standard would mean discounting the value of someone with an average of 10 years to live compared with the value assigned to someone with 70 years of life left. In her answers to Pryor, Dudley was deceptive in refusing to acknowledge that calculating *how many years* was an age-based criterion.

Dudley retreated from only one position. When Collins asked if Dudley really believed that states such as Maine, which are downwind of Midwestern power plant pollution, should be in the position of compensating polluters, Dudley admitted that she "was wrong" and suggested those words were an example of someone engaged in scholarly writings instead of a practical regulatory role.

Collins may have been impressed with this moment of candor as she told the press after the hearing that she was leaning toward supporting the nominee and expected to bring the nomination to a committee vote during the December lame duck session. No other members on the committee have taken positions. However, given the probing questions

by the Democrats and evasive responses from Dudley, it would appear that the concern over her nomination will not likely dissipate. Now that the record is closed, one would expect Lieberman to take position on the nominee once his office has reviewed her record.

A recent BNA article emphasized a potential conflict of interest for Dudley. Her husband is an EPA official responsible for regulatory analysis and policy development. The BNA article cites several ethics analysts who question the appearance of conflict and propose ways in which potential conflicts on EPA's regulatory issues might be avoided. No committee members asked Dudley directly about conflicts, but Collins opened the hearing saying that the committee needed to resolve whether there was anything regarding a conflict of interest that would prevent Dudley from doing the job. The Office of Government Ethics has provided a letter to the committee saying it believes Dudley complies with all rules governing conflicts of interest.

OMB Watch has joined with Public Citizen, the United Auto Workers, Natural Resources Defense Council, and the American Federation of State, County and Municipal Employees in sending a letter to Collins and Lieberman opposing Dudley and calling for the committee to reject the nomination. This letter follows on the heels of a letter signed by more than 100 organizations that indicated opposition to the Dudley confirmation.

The fact that Dudley is outside the mainstream in her views on regulatory matters and dodged the tough questions during her confirmation hearing has added to speculation that the Senate Democratic leadership may oppose bringing her confirmation to the Senate floor. There is uncertainty how long the lame duck Congress will stay in session, but increasingly it seems the Dudley nomination will take considerable floor time if the Democratic leadership opposes her nomination.

A few weeks ago, we requested that you to take action against this nomination. Now that it is clear that Collins wants to send her nomination to the floor, we ask you again to contact your Senators, while they are examining Dudley's record, and urge them to oppose her nomination. Her refusal to honestly answer questions about her beliefs and plans as OIRA director prevents Senators from exercising their constitutional responsibility of advice and consent. If left with only her writings to gauge her beliefs, then the Senate should reject this nominee.

Democrats Pledge Ethics Reforms

Two weeks after the election, attention has turned to considering what the results mean for government priorities and the likely impacts on the way Congress operates. Democratic leaders in the House and Senate are working on an agenda for the 110th Congress that includes ethics and lobbying reform proposals as part of their "100 Hours" initiative. As incoming Speaker of the House Nancy Pelosi (D-CA) said, "We will start by cleaning up Congress, breaking the link between lobbyists and legislation and commit to

pay-as-you-go, no new deficit spending."

Lobbying reform is a high profile topic since exit polls revealed that corruption was one of the main issues to energize voters in this midterm election. Forty-one percent of those polled said that corruption and scandal was a very important issue in their vote for the House. This is consistent with a Democracy Corps poll taken the weekend before the election. According to the poll, ethics and corruption were among the top issues for Republicans who intended to vote for a Democrat.

Both the House and the Senate passed broad ethics bills (HR 4975, S 2349) this past year, but they were not able to resolve differences between the two bills. The primary obstacle was whether regulation of independent 527 organizations should be expanded. (It was included in the House bill, but not the Senate version.) In addition, the Senate bill, passed in March, includes a provision requiring disclosure of grassroots lobbying expenses over a certain threshold, but this requirement is not in the House version.

While details of the Democrats' lobbying reform proposals are not yet available, the agenda for change in January does not include the controversial 527 provision. As the *New York Times* details, "Their initial proposals, laid out earlier this year, would prohibit members from accepting meals, gifts or travel from lobbyists, require lobbyists to disclose all contacts with lawmakers and bar former lawmakers-turned-lobbyists from entering the floor of the chambers or Congressional gymnasiums." More ambitious proposals may also be added. Sen. Barack Obama (D-IL) told the *Times* "The dynamic is different now."

Reform advocates see the switch in power as an opportunity to restart lobbying and ethical reform legislation. On November 9, six reform groups held a press conference praising Pelosi and calling on her to uphold her pledge to change lobbying and ethics rules. These groups, Public Citizen, Common Cause, Democracy 21, the Campaign Legal Center, League of Women Voters, and U.S. PIRG, will be seeking the establishment of an independent office to investigate ethics violations, rather than leave enforcement to congressional ethics committees. Their statement said, "Put simply, the House and Senate ethics committees have no credibility with the American people, and for good cause. With the worst corruption and lobbying scandals in decades, the ethics committees took no public action to hold any member of Congress or any staff member accountable in connection with the scandals. Neither the House nor Senate ethics committees, furthermore, publicly undertook an investigation of Jack Abramoff and his numerous scandalous activities in connection with Members and staff." Obama supports this proposal, but it is opposed by Sen. Diane Feinstein (D-CA), who will chair the Rules Committee, because it would create new federal bureaucracy.

Reform issues that are back on the table also include earmark transparency and S. 1508, the Senate Campaign Disclosure Parity Act, which would require electronic filing of Senate campaign contributions. Currently, Senate candidates are not required to file their campaign contributions electronically, unlike all other federal candidates. The

Campaign Finance Institute reported that in six Senate races, voters could not retrieve information on election contributions made after June 30.

It is not clear how the House will proceed with its reform legislation, although it is part of the Democrats agenda for the first 100 hours. Pelosi has been discussing the idea of breaking up the reform legislation into separate bills to allow more focus on the corruption issue. For example, there might be a bill on the enforcement issue separate from the ban on travel and gifts from lobbyists. It is likely that pay-as-you-go rule changes will also be part of this overall package of reforms.

FEC Expands Regulation of Voter Guides

A Nov. 9, 2006 enforcement decision by the Federal Election Commission (FEC) expands federal campaign finance regulation to voter guides that do not endorse or oppose candidates if the FEC determines the guide's overall content implies support or opposition to federal candidates. The case arose from a complaint filed in December 2004 by Edmund A. Hamburger of Pinellas Park, FL, which claimed "the Sierra Club was advocating the election of Senator Kerry to the Presidency of the United States." On Nov. 9, the Sierra Club chose to settle the case and pay a $28,000 civil fine rather than incur further legal expenses, but denied any wrongdoing. The case could discourage future efforts by advocacy organizations to educate voters about candidates' track records.

The complaint against the Sierra Club cited four voter guides, titled "The Dirt," "Let Your Conscience Be Your Guide," "The Environment for Dummies," and "From one friend of our environment to another." The FEC dismissed the complaints against all but the "Let Your Conscience Be Your Guide" pamphlet, finding in July 2006 that there was probably cause to believe the Sierra Club made a prohibited independent expenditure by spending $69,771 to produce and distribute it. The FEC essentially held that the Sierra Club could only pay for this type of voter guide with funds raised from individuals and subjected to FEC contribution limits and reporting requirements.

The Federal Campaign Finance Act (2 U.S.C. 431(17)) prohibits corporations from spending treasury funds on communications "expressly advocating the election or defeat of a clearly identified federal candidate," even when the effort is independent of candidate campaigns or political parties. This case is notable because it moves away from long-standing practice following the Supreme Court's 1976 decision in *Buckley v. Valeo*, which defined "express advocacy" as clear "vote for" or "vote against" statements. The FEC noted that Supreme Court's opinion in *McConnell v. FEC*, which upheld the Bipartisan Campaign Reform Act of 2002, said that Congress' authority to regulate election related speech is not limited to "vote for" or "vote against" statements, but can include communications that are "unmistakable, unambiguous, and suggestive of only one meaning" so that they can "only be interpreted by a reasonable person as containing advocacy of the defeat of one or more candidates."

This standard had not been previously enforced because two federal courts had held its application unconstitutional, requiring the "magic words" of express endorsement or opposition. After the *McConnell* decision, the FEC said it had authority to regulate implied support or opposition as well. In the FEC press release on the case, FEC Chairman Michael Toner said, "This is one of the most important express advocacy cases the Commission has resolved in recent years. I am very pleased that the Commission was able to conciliate this case and provide further guidance to the public on the appropriate scope of the express advocacy test." The statement went on to note that the Sierra Club case "represents the first major case to consider the reach of the express advocacy test in light of the landmark Supreme Court case, *McConnell v. FEC*."

The "Conscience" voter guide compared the environmental records of the Presidential candidates, George Bush and Sen. John Kerry (D-MA), as well as Sen. Mel Martinez (R-FL) and challenger Betty Castor. The heading said, "LET YOUR CONSCIENCE BE YOUR GUIDE", and the inside went on to say, "AND LET YOUR VOTE BE YOUR VOICE." It used check marks in boxes to compare the environmental record of the candidates, along with narrative descriptions that the FEC said "made it clear that a checkmark represented a favorable environmental record in the eyes of the Sierra Club," thus promoting Kerry and Castor and opposing Bush and Martinez. The July memo from the FEC General Counsel to the Commissioners responded to the Sierra Club's complaints that the standard is too vague by saying the "reasonable person test" is objective, and no express advocacy would be found "if there is genuine room for 'varied understanding of [reasonable] hearers.'"

It appears the check boxes in the "Conscience" voter guide tipped the balance in the eyes of the FEC, since the other three guides were deemed acceptable and did not use checkboxes. Attorney Bob Bauer notes on his blog that the "Dirt" guide also had a favorable narrative description of Kerry's record on the environment, saying it builds on "a thirty year record of supporting strong environmental protection" while Bush has "consistently chosen to protect the interests of his oil and gas industry campaign contributors at the expense of public health..." and urges readers to go and "dig deeper for facts about the candidates." The General Counsel's July report distinguishes this guide from the "Conscience" guide by noting, "It also contains no symbols, percentages, or any other similar indication that a candidate agrees with the Sierra Club position 100% of the time." It appears the FEC sees this as urging the public "to become better informed," as opposed to favoring one candidate over the other.

The Sierra Club's press release announcing the settlement called this a "subjective and murky interpretation" of the law, but said "we've decided we have better things to do with our money - like continuing to inform Americans where candidates stand on clean air, safe water and protecting our treasured lands." They note the FEC's decision is based on "a fuzzy definition that courts have found unconstitutionally vague" and that the Supreme Court's decision in *McConnell*"did not give the Commission authority to use this smell test." Instead, the Sierra Club says the case leaves nonprofits with less clarity about the law, which will "surely frighten some groups into silence, squelching efforts to

educate voters on important issues."

The impact of this case could be a widespread reluctance by nonprofits to provide voters with materials that mention one's conscience or values, or to use elections to hold politicians accountable for their records. It moves what was a clear cut area of law - the "magic words" definition of express advocacy - into vague and uncertain terrain similar to the IRS "facts and circumstances" test, which is used to determine when charities and religious organizations illegally intervene in elections. This has not worked well in tax law, and is not likely to work well in election law either. Nonprofits should continue to demand clear cut rules that allow them to express views on the actions and policies of elected officials and candidates for office.

Same Old Congress, Same Old Budgetary Gridlock: Long-Term CR Likely in December

Congress has made very little progress toward being able to finally adjourn for the year, leaving most of their appropriations work, a set of popular tax breaks, and funding problems in the State Children's Health Insurance Program still unaddressed. With time running out, Congress will probably pass another extension of a budget-cutting continuing resolution, once again neglecting its duty to enact the annual spending bills.

In order to keep the government running, Congress did recently pass an extension of the severe continuing resolution (H.J. Res. 100) it originally enacted before recessing to campaign in October. When Congress returns from its Thanksgiving recess, it will probably pass another extension of the same CR, which will likely last until early January, though some conservatives have made a push to have the next extension cover all of FY 2007.

Earlier this year, appropriators had promised to avoid a long-term CR, but a handful of conservative Senators are making a concerted effort to block the passage of "minibus" or "omnibus" appropriations bills that would attract spending earmarks. So obstructed, the lame-duck Senate only cleared one of 10 remaining appropriations bills - the Military Construction-Veterans Administration bill (H.R. 5385). CQ Daily recently reported that Senate Majority Leader Bill Frist (R-TN) now does not plan to try to pass more appropriations bills this year, and will likely encourage a long-term extension of the CR that will last through January.

This strategy, however, should only serve to *delay* the passage of an omnibus bill, since Congress will still probably use an omnibus vehicle to clear the 10 remaining appropriations bills. The result of delaying a vote on an omnibus bill may be to make the incoming,110th Congress seem responsible for passing multiple earmarks and making unpopular spending choices in 2007. Even if an omnibus bill is passed in December, spending will be constrained by a tight cap on discretionary spending that the Defense and Homeland Security appropriations bills have made even tighter. Human needs

programs may suffer cuts as a result.

Part of the reason conservatives in the Senate are advocating a long-term CR is because of the way the resolution is worded. This CR is structured in a way that cuts funding for all programs it covers. It funds all discretionary programs at the *lowest* of either the FY 2006 level, or the level passed by the House or Senate - making the highest possible funding the FY 2006 appropriations. After accounting for inflation and population growth, the CR will flat-fund many government programs and make more drastic cuts in other areas.

The longer this CR is extended, the deeper the funding cuts will be. It will also keep in place budgetary decisions that may no longer be appropriate or desired. This is particularly true for the Labor/HHS bill, which funds many programs that achieve important social policy goals. Neither the House nor the Senate passed a Labor/HHS bill, so the CR will continue to fund programs at the same level as last year's bill. Unfortunately, last year's Labor/HHS bill also cut funding for many vital programs below the level to maintain services. (For a list of all program cuts in 2005's Labor/HHS bill, see this chart from the Coalition on Human Needs.)

Furthermore, the dependence on continuing resolutions may cause problems for agencies that already need to plan for the FY 2008 budget. By early February, all agencies are expected to estimate how much funding will be necessary to maintain current levels of services. If agencies do not know what services they will be providing in the current year, they may have trouble estimating how much funding it will take to maintain these services into the following year. And as things stand now, agencies may not have this knowledge until it is too late.

SCHIP Funding Still Unresolved

Congress has also failed to provide needed funding for the State's Children Health Insurance Program. If not addressed, a funding shortfall may cause over 500,000 children to loose health insurance.

SCHIP is a joint federal/state program that shores up Medicaid coverage for low-income children. Unfortunately, increased health care costs and greater participation have put pressure on SCHIP programs in a number of states. Without more funding, administrators will either have to request additional state funds or begin to scale back services.

It should be noted that SCHIP is not funded through the appropriations process. Rather, as a mandatory block-grant program, its funding levels are guaranteed to stay at a fixed level each year, unless Congress takes action.

Unfortunately, the November election does not seem to have changed this Congress much. They will have three weeks in December to try to turn it around.

Threat of Estate Tax Rollback Finished For 2006

Outgoing Senate Majority Leader Bill Frist (R-TN) admitted last week the Senate was unlikely to pass any permanent reduction to the estate tax in 2006, despite repeated attempts and rhetorical ultimatums from Frist and his allies.

Frist has insisted for months that the so-called Trifecta's component parts - the first increase in the minimum wage since 1997, the extension of a package of popular tax credits, and a major rollback of the estate tax - would be voted on together as a package or not at all. But Frist appears unable to follow through on his threat. Last week, he admitted it was most likely the Senate would work on one or more of the individual parts of the Trifecta bill before finally adjourning for the year in December.

Frist created the Trifecta bill this summer in a sly, yet potentially brilliant legislative strategy aimed at enticing the three final votes needed to pass a drastic rollback of the estate tax. Unfortunately for Frist and his supporters, the vote count on the Trifecta legislation in late July was precisely the same as on a House-passed estate tax repeal bill in early June. In the end, the Trifecta strategy seemed to be based more on Frist's desire to excite his party's base than one based on a realistic assessment of legislative likelihood.

While Trifecta may be dead and gone, some of the individual parts are likely to arise soon, either in this lame-duck session or in the 110th Congress, as stand-alone pieces of legislation.

Minimum Wage

Members of both parties campaigned on an increase on the federal minimum wage. It is less likely to find time in the three weeks left of congressional action, but the incoming Democratic leadership has promised prompt action on a proposal to raise the minimum wage from $5.15 to $7.25 per hour over the next two years. In fact, it's a leading part of incoming House Speaker Nancy Pelosi's (D-CA) "first 100 hours" agenda. While many Democrats inside and outside of Congress are calling for the wage to be indexed for inflation to assuage future erosion of its value, Sen. Ted Kennedy (D-MA) and other leaders in the incoming 110th Congress will likely prefer to wait until more increases have been agreed to before locking in an automatic inflationary adjustment.

Because increasing the minimum wage is very popular - a Pew Research poll conducted this spring indicates that over 80 percent of Americans, and 70 percent of Republicans, support it - President Bush will be hard-pressed to veto it, particularly if the increase includes some targeted tax credits to small businesses affected by it. Unhitched from the estate tax reductions, an increase in the minimum wage is almost assured of passing.

Extension of One-Year Tax Credits ("The Extenders")

The second leg of the three-part Trifecta bill is a package of popular tax credits due to

expire at the end of 2006. Included in this package are a research and development credit for business, a state sales tax deduction, the work opportunity and welfare-to-work credit, and a college tuition deduction.

This package was originally part of the 2005 reconciliation tax bill and has gone through a series of changes over the last 20 months - moving from the reconciliation bill to a "trailer" bill, to the pension reform bill, and then to the Trifecta. The two-year, $40 billion set of tax credit extensions is widely considered must-pass legislation, but this consideration has not helped move it along since 2005. In addition, some Democrats have expressed concern that, should they re-instate Pay-As-You-Go (PAYGO) budget rules next year - another item on Pelosi's "first 100 hours" agenda - they would then need to offset the $40 billion costs. More likely, however, is the extenders will be overwhelmingly passed in December before PAYGO rules are reestablished.

The Estate Tax

Both the minimum wage and extenders package are likely to see action in Congress in the next few months, if not sooner. What the future holds for the estate tax, although, is much less clear.

The 2001 law that gradually phased out the estate tax does not expire until 2010, when it is scheduled to revert to 2001 levels - an outcome almost no one in Congress sees as a viable solution. Incoming House Ways and Means Committee Chairman Charles Rangel (D-NY) has not mentioned the estate tax and has already ruled out making Bush's 2001 and 2003 income tax cuts (also expiring in 2010) permanent. Action on the estate tax in early 2007 in the House is therefore less likely since it would have to go through Rangel's committee first.

On the Senate side, however, incoming Finance Committee Chairman Max Baucus (D-MT) has been a long-time supporter of estate tax repeal. At the helm of the Finance Committee, Baucus could exercise considerable influence over moving an estate tax compromise forward in both the Senate and the House. In 2006, Baucus often remarked he was interested in a reform that would retain about half of the revenue from the estate tax (approximately initial signals from the incoming chairman indicate he will have other priorities in 2007.

Supreme Court May Hear Secret Regulation Case

Several groups are appealing to the U.S. Supreme Court a Ninth Circuit Court of Appeals ruling on a secret Transportation Security Administration (TSA) regulation. The regulation requires airlines to check the identification of passengers. The Ninth Circuit held that, even though the rule is not publicly accessible, it does not violate the Constitution's protection of due process.

The lawsuit originated from an experience John Gilmore had when he attempted to

board a plane in California, bound to Baltimore-Washington International Airport, more than four years ago. A Southwest Airlines clerk required Gilmore to show a form of identification in order to board the plane. When Gilmore questioned the policy, he was informed that it was a government requirement which could not be shown to the public. TSA considers the regulation to be sensitive security information (SSI) and is, therefore, kept secret from the public.

The central question at issue in the case, *Gilmore v. Gonzales*, was whether or not TSA's regulation violates due process. Gilmore argued that the law is unconstitutionally vague because it regulates public behavior but, due to its secrecy, does not inform people of what conduct is prohibited. On Jan. 26, the Ninth Circuit rejected this argument on the grounds that the regulation does not impose criminal sanctions and merely prevents people from boarding a plane. The court concluded the rule does not regulate public behavior because there are other forms of available travel. Moreover, people have "actual notice" of the identification policy because airlines publicly post the identification requirements.

Gilmore appealed the decision and petitioned the U.S. Supreme Court, which has yet to indicate if it will review the case. Several open government organizations submitted amicus briefs supporting Gilmore's arguments and encouraging the Court to take up the case. The groups contend that the TSA's secret regulation violates the basic principles of a free and open democratic society. "Unpublished, secret laws undermine the very essence of self-government," wrote the Electronic Privacy Information Center (EPIC) in an amicus brief. "Central to the American form of government has been a longstanding commitment to public trials and to openness in government decisionmaking."

The Electronic Frontier Foundation and seven sign-on groups argue in another amicus brief that TSA's regulation not only violates the Constitution's protection of due process, but also the Freedom of Information Act (FOIA). "Congress created a mechanism to ensure that agencies would not be permitted to impose secret law when it passed the FOIA, a law that grants the public the right to obtain all government agency records with few exceptions."

Needing four justices to agree to a review, it is uncertain whether the Supreme Court will take up the case. If the Court declines to review the case, the justices will essentially allow the Ninth Circuit decision to stand.

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In This Issue

Lame Duck Session Holds Little Hope for Appropriations Bills

The congressional lame duck session began Dec. 5 as the 109th Congress returned to work on a set of long-deferred tax and budget items. However, Congress will likely postpone action on the bulk of these issues until the next session and quickly pass a continuing resolution (CR) that will last until early 2007.

The Budget

Though the first two months of the fiscal year are already over, Congress hasn't been able to finish work on ten of the 12 appropriations bills providing funding for the federal government in FY 2007, passing only the Defense and Homeland Security spending bills. With insufficient time - and even less political will - remaining this year to complete work on the remaining bills, GOP congressional leaders have announced they will extend

the current CR to keep the federal government operating until Feb. 15, 2007, pending an agreement with Democrats.

The impetus to block progress on the spending bills came chiefly from Sens. Tom Coburn (R-OK) and Jim DeMint (R-SC), who argued the CR would eliminate what they claim are "nearly 10,000 earmarks, or member-sponsored pork projects, larded throughout the spending bills Congress is currently considering, [which] could save taxpayers a cool $17 billion."

Under the CR, discretionary programs would be funded at the *lowest* of the FY 2006 level (last year's spending level), or the level passed by the House or the Senate for this year, thereby killing any proposed new spending, including all earmarks. This also means there is no inflation adjustment for agencies, the equivalent of cutting program resources. Were the CR to be extended to cover all of FY 2007, nominal cuts totaling about $7 billion in school breakfast and lunch programs, housing vouchers, assistance to veterans, and other social program spending would result.

The current CR expires this Friday, Dec. 8. If not extended, most of government will need to shut down.

Yesterday, Dec. 4, on National Public Radio, Senate Minority Leader Harry Reid (D-NV) indicated this week's lame duck session will not address program cuts resulting from the CR, and a full fiscal-year extension (through Sept. 30, 2007) of the CR was under serious consideration by Democrats. He noted the Democrats cannot address two years of appropriations bills in such a short time, and instead, they would focus on dealing with finishing appropriations bills for the start of the following fiscal year (FY2008) on Oct. 1, 2007.

Others have speculated the Democrats could wait until the last day of the CR and send the president a gigantic omnibus appropriations bill, lumping all the individual appropriations bills together, in a take it or leave it approach. The president has vowed to veto anything over $873 billion in total discretionary spending, but would be forced into shutting down government if he were to veto an omnibus spending bill above his bottom line.

Tax Extenders

It appears that after months of delay, a package of popular tax break extensions known as "extenders" will finally get an up-or-down vote, possibly with additional tax "sweeteners" that have been promised to specific members of Congress throughout 2006. Among the central elements of the package are:

- the research and development credit for business
- an exemption on federal income tax forms for state and local sales tax in those states without a state income tax
- incentives for employers to hire former welfare recipients

- deductions for restaurant improvements
- a deduction for out-of-pocket teacher expenses
- the college tuition deduction

This package failed in the Senate in July when it was tied to a poison pill, a proposed permanent estate tax cut.

On a stand-alone basis, the package would cost nearly $20 billion to extend retroactively through the end of 2006 and close to $40 billion if extended through 2007. This time, the package is widely expected to include a provision to forestall a scheduled five percent cut in Medicare payments to physicians, scheduled to take effect in January. The provision would cost an estimated $10.8 billion over five years. Also under consideration is a leftover "sweetener" provision from the first vote - a tax cut for timber industry capital gains - as well as an unrelated amendment that would grant permanent normal trade relations with Vietnam.

Uncertainty still exists regarding both the term and content of the package, but it is possible the House could vote on it as early as Tuesday, Dec. 5, and the Senate one day later.

Darkhorse Fixes: Agricultural Disaster Aid and the AMT Patch
The Senate has scheduled a vote today on a $4.5 billion agriculture disaster aid package proposed by Senate Budget Committee ranking member Kent Conrad (D-ND). However, according to *Congress Daily* (subscription required), Senate conservatives have threatened to drag the bill down with dozens of amendments, and President Bush has vowed to veto it unless offsets are provided.

Congress may also seek to provide a "patch" for the Alternative Minimum Tax (AMT), which would hold harmless the 20 million new taxpayers who next year would otherwise join the 3.5 million taxpayers currently paying the tax. The patch would be a heavy $40 billion lift, but some Democrats in Congress may be inclined to attach it to the extenders package this week rather than wait until next year, when revenue-neutral (PAYGO) budget rules may be in place and $40 billion in offsets would be required to pay for it. More likely, however, the GOP leadership will take no action, adding this item to the lengthy list of thorny tax and budget issues that will confront the Democrats when the 110th Congress convenes in early January.

Alternative Minimum Tax Likely to be Large Issue in 2007

The continuing creep of the Alternative Minimum Tax (AMT) is threatening to impact tens of millions of Americans in 2007 - a fact that will push it to the forefront of tax policy issues.

In 1995, 414,000 wealthy tax payers paid the Alternative Minimum Tax (AMT), and in

2001, that number grew to 1.3 million. Unless Congress acts, 23.4 million Americans are expected to be snagged by this "stealth tax" in 2007, which was originally intended to affect only 20,000 wealthy taxpayers.

However, it is not simply the large and growing number of people paying the AMT that is troubling, but *who* exactly is paying the tax. What was virtually unthinkable in 1969, when the tax was conceived, is now happening - households earning less than $100,000 are paying a tax that was originally designed to ensure that millionaires paid some minimum amount of income tax.

Recent tax policy under the Bush Administration has exacerbated the problem of the AMT. The 2001 and 2003 Bush tax cuts were designed to increase the amount of taxes paid through the AMT. The Tax Policy Center, which has written extensively about AMT, notes that tax cuts enacted between 2001 and 2006 have "more than doubled the projected share of taxpayers who will face the AMT in 2010, from 16.0 percent to 33.6 percent."

In fact, the degree to which Bush and his tax-cut supporters relied on the stealth tax to make his tax cuts appear more affordable is betrayed by the fact that if current tax law is extended beyond its 2010 sunset date, it will cost the Treasury more to repeal the AMT than it would to repeal the regular income tax.

Unlike the regular income tax, the AMT's exemptions and brackets are not indexed for inflation. As average incomes grow with inflation (and the AMT does not), more and more taxpayers incur liabilities in this parallel tax universe. As the AMT reaches deeper into the middle class, Congress is forced to periodically apply stopgap measures (typically called "patches") that adjust the AMT upwards to keep middle-class families from paying a tax they were never intended to pay.

Key Democrats have indicated their intention to put AMT reform at the top of their list. Rep. Charles Rangel (D-NY), incoming chair of the House Ways and Means Committee, has announced that he plans to make AMT repairs a top priority of his agenda, and Sen. Max Baucus (D-MT), incoming chair of the Senate Finance Committee, has been a longtime foe of the AMT.

The Center on Budget and Policy Priorities estimates the potential price tag of full repeal at $1.2 trillion through 2015. This is seen as the least desirable fix for a variety of reasons. Primarily, it is unaffordable, but repeal is also a regressive solution as more than half of the benefits of repeal would go to households earning more than $200,000 in 2010. Although Baucus may wish for full repeal of the AMT, it is not likely to be on the 110th Congress's agenda because of the cost of offsetting the lost revenue.

Short of full repeal, Congress has a number of options varying in cost and detail. For example, AMT exemption amounts and brackets could be indexed for inflation, with 2006 as the base year. The CBO projects this would cost $376 billion through 2015. But

this estimate assumes the 2001 and 2003 tax cuts are allowed to expire - a key point due to the large degree these tax cuts increase the cost of changing the AMT. If the tax cuts are extended, the cost of inflation indexing jumps to $848 billion.

Another option is for Congress to change the "preferences" of the deductions allowed under the AMT. Preferences are those deductions allowed under the regular income tax but not included in AMT liability calculations. For example, households may deduct state and local income taxes from their regular federal income tax, but not from the AMT. Depending on which credits or deductions are allowed under the AMT, this option would reduce the number of AMT taxpayers by more than 20 million, at a cost of $529 billion through 2015. There are numerous permutations of "preferences" possible, all of which would affect who would be liable for the AMT, how much they would pay, and the total cost of the fix.

However, AMT reform does not necessarily require forgoing considerable amounts of revenue. Leonard Burman at the Tax Policy Center has devised several revenue-neutral options that reinstitute the original goals of the AMT. In his paper, "The Expanding Reach of the Individual Alternative Minimum Tax," Burman proposes inflation indexing and allowing dependent exemptions, coupled with an increase in the rate of the top AMT bracket. In addition to these changes, Burman recommends other technical changes that would actually *raise* $9 billion in revenue through 2015.

Burman has also suggested eliminating the AMT, applying desirable AMT provisions to the regular income tax code, and adjusting the regular income tax brackets (i.e., increase tax rates) to make up for lost AMT revenue. This solution would do away with the parallel tax systems and simplify the tax code while maintaining progressivity. However, this idea most likely would be harder for Congress to swallow, since it would likely be branded as a "tax increase."

It is unclear whether any of Burman's proposals are a silver bullet that would painlessly fix the AMT to restore its equity (and revenue), but Congress will likely need to consider ideas like his in the AMT debate in the coming months.

EPA Drops Plan to Change TRI Reporting Frequency, Major Flaws Remain

In light of the midterm elections and ongoing pressure from the current Republican controlled Congress, the U.S. Environmental Protection Agency (EPA) is changing its views on some plans for the Toxics Release Inventory (TRI), the nation's premiere environmental right to know program. EPA has announced it will retain annual reporting of toxic pollution, dropping its proposal to shift reporting to every other year. At the same time, however, EPA has not dropped its plans to significantly raise the threshold for detailed reporting under the TRI program, resulting in less information

about toxic chemicals in our communities.

In Sept. 2005, the EPA announced three planned changes to the TRI reporting requirements:

- Move from the current annual reporting requirement to biennial reporting for all facilities, eliminating half of all TRI data;
- Allow companies to release ten times as much pollution before being required to report the details of how much toxic pollution was produced and where it went;
- Permit facilities to withhold information on low-level production of persistent bioaccumulative toxins (PBTs), including lead and mercury, which are dangerous even in very small quantities because they are toxic, persist in the environment, and build up in people's bodies.

The proposed changes have met serious opposition from a wide range of stakeholders. The agency has received more than 122,000 public comments, with the vast majority voicing strong opposition to all of EPA's plans. The Environmental Council of the States, a national association of state and territorial environmental agency leaders, passed a resolution urging EPA to withdraw its TRI proposals. The EPA's own Science Advisory Board sent an unsolicited letter expressing concern that the TRI changes would "hinder the advances of environmental research used to protect public health and the environment." The House passed an amendment to one of its spending bills to prevent the EPA from spending money to finalize the proposals.

In the Senate, opposition to the TRI rollbacks came the form of a hold from Sens. Frank Lautenberg (D-NJ) and Robert Menendez (D-NJ) on Molly O'Neill, the nominee for EPA Assistant Administrator in charge of the Office of Environmental Information. In a press release, Lautenberg chided the proposed changes for their potential to "deny thousands of communities - including 160 in New Jersey - full information about the release of hazardous toxic emissions in their neighborhoods."

In response to the hold, the midterm elections, which will put Democrats in charge of the Senate, and other mounting opposition, EPA began discussions with the senators over their concerns. Eventually, EPA agreed to drop its plan to change from annual to biennial reporting in exchange for Lautenberg and Menendez lifting their hold on O'Neill. In a letter to the two senators, EPA Administrator Steven Johnson wrote, "You will be pleased to know that I have decided against moving forward with changes to TRI reporting frequency." While not legally binding, the public assurance appeared to be sufficient to convince Lautenberg and Menendez that the agency will no longer pursue the less frequent reporting.

However, the problem of higher reporting thresholds remains, and it seems that Lautenberg and Menendez are unlikely to ignore this issue just because EPA has abandoned less frequent reporting. In a Nov. 30 statement, Lautenberg said, "It is welcome news that the Bush Administration is throwing out part of this bad idea, but

they still need to get rid of the rest. The Administration's proposed changes to the Right-to-Know Law would essentially gut it. The Administration's proposed changes are nothing more than a giveaway to corporate polluters at the cost of everyday Americans' health. The Democratic Congress is not going to let this kind of irresponsible policy stand. The wise course for the Bush Administration is to drop this entire pro-polluter plan."

With this contentious proposal still on the table, OMB Watch will continue to monitor the situation. Sean Moulton, Director of Federal Information Policy for OMB Watch, said: "We are disappointed EPA has not taken this opportunity to drop the entire ill-conceived proposal. Considering the almost unanimous opposition, EPA is going against the will of the American people, and putting the public's health at risk in the process." It is expected that EPA will issue a final rule on the reporting threshold changes by the end of December.

Terrorism Information Sharing Initiative Faces Several Hurdles

The Director of National Intelligence (DNI) submitted the Information Sharing Environment (ISE) Implementation Plan to Congress in November. Through changes in policy and technology, the plan articulates a multi-year vision for improving terrorism information sharing across the federal government and between foreign, federal, state and local governments, as well as key members of the private sector.

The ISE plan has a number of shortcomings, however. Most notably, it fails to include an explicit role for the public or any opportunity for the accountability and oversight that public involvement can provide. Additionally, the plan must overcome the problems posed by information being housed at different agencies, often within incompatible technologies, and controlled by cultures which are often reluctant to share information. One of the recent and significant information problems that agencies have created is the proliferation of sensitive but unclassified information categories, which severely restrict information flow.

Where's the Accountability?

Essential to the ISE implementation plan are oversight and accountability across the federal government and at key state and local nodes in the information nexus. The vastness of the plan necessitates diligent oversight to ensure that technologies, policies and information sharing practices are being appropriately implemented.

Ambassador Thomas McNamara, program manager of the ISE, has stated that the DNI lacks the capacity to conduct centralized oversight at the numerous federal and state agencies that will be a part of the ISE. Instead, the plan will count on Inspectors General (IG) at the various agencies to conduct oversight. The specifics of oversight, such as frequency of reporting and primary areas to review, should be formalized as the ISE plan

moves forward, ensuring compatibility of the IGs' oversight on agencies' progress.

An important source of oversight that is missing from the plan is the public. The media, public interest groups and the general public have long played a powerful role in overseeing government activities and practices. Public accountability has led to, among other things, the exposure of the government's failures in the aftermath of Hurricane Katrina and the shortcomings of the government's pre-9/11 counterterrorism efforts. The ISE plan, though, fails to recognize the role that the public needs to play in overseeing the implementation of a robust terrorism information sharing network.

More thought should be given to what level of access the public should have to terrorist threat information and how the public can regularly access information regarding the government's homeland security efforts. Available information should not be so detailed as to provide a roadmap for terrorists, but it should allow interested citizens to be assured that the government is taking steps to protect them, their families and their communities. If weaknesses exist in the government's homeland security preparations, little motivates the government faster than public outrage.

Sensitive But Unclassified Quagmire

A major problem facing any effort to link different agencies together are the new pseudo-classification categories of information that have proliferated since 9/11, unnecessarily restricting information flow. Agencies have created over 100 sensitive but unclassified (SBU) information categories, which are often poorly defined and lack explicit instructions on how to correctly categorize information.

There are many problems with the current SBU policies that make it increasingly difficult for the government to properly manage and utilize all of the information it possesses. For instance, the authority to mark documents as an SBU category is decentralized, and at some agencies, even government contractors can mark documents as SBU. This often leads to excessive use of the SBU category and the restriction of information that need not be controlled. Moreover, there are no time limits on how long information is to remain as SBU, and no review procedures have been formalized to oversee the process. These and other SBU shortcomings have led an informational standstill in which homeland security analysts often cannot access essential information at other agencies.

The Government Accountability Office (GAO) has reported on the problems relating to SBU, having released reports on problems at the Department of Energy, Department of Defense, Tranportation Security Administration, and across the federal government. In its most recent analysis, GAO investigated problems at the Department of Justice (DOJ), where it found that the department has failed to specify its policy, implement a training program, or offer any kind of review procedure. DOJ replied that it is waiting for DNI's ISE to issue its agency-wide SBU policy. It is unclear why DOJ cannot begin to make basic changes in its approach to training and in clarifying its application to the

thousands of employees at DOJ.

ISE is charged with reviewing agencies' SBU policies and issuing a centralized policy that all federal agencies are to follow, thereby helping to disentangle the policy quagmire. The ISE plan states that, "the growing and non-standardized inventory of SBU designations and markings is a serious impediment to information sharing among agencies, between levels of government, and, as appropriate, with the private sector." During the first quarter of 2007, ISE, in consultation with federal, state and local officials, will issue recommendations for SBU standardization.

Open government advocates hope these recommendations will help to create a robust policy that limits the amount of information withheld from the public to a minimum. Advocates say the policy should specify review procedures, require training programs, mandate regular reports, and, most importantly, enable information sharing of vital homeland security information across federal, state and local governments.

Pelosi and Reid Promise Increased Congressional Transparency

The new Democratic leadership in Congress is urging transparency as a primary tool to reform the legislative process. According to statements from incoming House Speaker Nancy Pelosi (D-CA) and incoming Senate Majority Leader Harry Reid (D-NV), the leadership is planning several new rules and pieces of legislation on tracking earmarks, requiring time to read proposed legislation, and media access to conference committee activities - all with a central theme of increased congressional transparency.

After the Jack Abrahmoff, Duke Cunningham, and Tom DeLay scandals, the flow of money into and out of government are likely to be a major focus of the Democrats' reform efforts. Pelosi and Reid have announced that rules to diminish lobbyists' influence will be among the first items addressed in January. Included in the proposed rules are requirements that earmarks, line items in appropriations bills that members of Congress designate for specific projects in their districts, be identified with the name of the sponsoring member. The proposed earmarks would then have to be cleared by policymaking committees before being sent to the Appropriations Committee for approval. The expectation of such requirements is that the disclosure will shame legislators from proposing or fighting hard to protect wasteful, inappropriate pork projects, while leaving the earmark funding option for worthwhile programs that members are willing to publicly advocate.

Another Democratic proposal would give legislators and the public more time to read and evaluate legislation before a vote. The expectation is that the additional time will allow congressional offices, public interest groups, and members of the media to review proposed bills and identify problematic and inappropriate provisions. The expected end result would be fewer bills that contain unread provisions being fast-tracked through the

legislative process. A prime example of this type of activity was the passage of the USA Patriot Act of 2001, a bill several hundred pages long that included provisions that have had sweeping impacts on civil liberties. Congress voted on the bill just hours after the final wording was printed. Later, some members of Congress apologized for voting for the USA Patriot Act without having time to read the entire bill.

As part of their initiative to cleanse Congress of corruption, Pelosi and Reid have announced that conference committees in the 110th Congress will be open to the media. Introducing transparency to the conference committee process may reduce conferees' incentives to strike provisions which passed both chambers of Congress and tack on unrelated language or provisions that were not considered in either chamber.

Shrouded in secrecy, the House-Senate conference committees that form when different bills pass the two chambers of Congress have been sources of late-night deals which often succumb to the demands of House and Senate leadership and powerful interest groups. For instance, the Democrats were essentially shut out of the conference committee negotiations on the Medicare Prescription Drug Improvement and Modernization Act of 2003. Both the House and Senate versions of the bill included a provision to allow the purchase of drugs from other countries at lower prices, but this language was stripped from the final bill by conference committee members.

Court Says Parts of Executive Order Used to Shut Down Charities are Unconstitutional

A Nov. 27 decision by a federal district court in Los Angeles found that two portions of Executive Order 13224 (EO), used to designate organizations as supporters of terrorism, are unconstitutional. The case was filed by the Humanitarian Law Project (HLP) and other nonprofits that want to provide support for "lawful, nonviolent activities" of the Kurdistan Workers Party (PKK) and Tamil Tigers (LTTE), which have both been designated as terrorist organizations.

The 46-page opinion of the court said the EO lacks standards for designating terrorist organizations, giving the President "unfettered discretion", so that designations could be "for any reason, including for.... associating with anyone listed... or for no reason." The opinion also struck down provisions allowing designation of people and groups "otherwise associated" with terrorism because the EO "contains no definable criteria for designating individuals and groups... [and] imposes penalties for mere association." The Center for Constitutional Rights, which acted as counsel in the case, issued a press release, in which Georgetown Law professor David Cole said, "The court's decision confirms that even in fighting terror, unchecked executive authority and trampling on fundamental freedoms is not a permissible option." The Justice Department says it has not yet decided on whether to appeal the ruling.

The court's opinion notes that PKK and LTTE both represent groups seeking self

determination in countries where plaintiffs allege they have been subjected to human rights abuses and discrimination. Their activities include political organizing and advocacy, social services, humanitarian aid, and defending people from human rights abuses. HLP brought the case because the law prohibits it from engaging in transactions with the groups, since they have been designated as terrorist organizations. HLP wishes to provide:

- training in human rights advocacy and peacemaking negotiations
- legal services to establish institutions that could provide humanitarian aid and negotiate a peace agreement
- direct humanitarian aid to the PKK and LTTE
- engineering and technical services to help rebuild infrastructure in areas devastated by the tsunami of 2004
- psychiatric counseling for tsunami survivors

EO 13224's power to designate people and organizations as "Specially Designated Global Terrorists" comes from the International Emergency Economic Powers Act (IEEPA), as amended by the USA Patriot Act, and the Anti-Terrorism and Effective Death Penalty Act of 1996. These acts authorize the President to declare an emergency with respect to "grave acts of terrorism and threats of terrorism." The laws give the President authority to make regulations to carry out the law, and he in turn has delegated power to make designations to the Secretary of the Treasury. This gives Treasury power to freeze and seize the assets of all persons or groups determined "...to assist, sponsor, or provide financial, material, or technological support for... such acts of (foreign) terrorism or those persons listed in the Annex to this order...or to be otherwise associated with those persons." The original Annex listed 27 persons and organizations, and now includes over 430 entities.

ACLU Seeks Congressional Hearings on Monitoring of Antiwar Groups

The American Civil Liberties Union (ACLU) recently released more documents highlighting government surveillance of antiwar organizations. As information on the scope of the Pentagon's Threat and Local Observation Notice (TALON) database continues to accumulate, the ACLU has requested a congressional investigation into this use of counterterrorism resources for surveillance of nonviolent domestic organizations.

A Nov. 21 ACLU press release describes new documents that again prove counterterrorism resources were used to monitor American groups opposed to the war in Iraq and military recruitment. The information came in response to a Freedom of Information Act lawsuit the ACLU filed earlier this year because of evidence that the Pentagon was conducting surveillance of peaceful antiwar organizations, including Quakers and student groups. The new documents consist of nine reports that describe planned demonstrations at military recruitment sites as "threats" and outline events that

took place at protests, such as reading the names of the dead.

Veterans for Peace was one of the groups cited in the new documents. Their executive director, Michael T. McPhearson, told the *New York Times* that he was not surprised his group was monitored and plans to continue to use the Internet to plan protests. One TALON entry on the group states, "Veterans for Peace is a peaceful organization, but there is potential future protest could become violent." Other groups mentioned in the newly released documents include the Georgia Peace and Justice Coalition and the War Resisters League, which advocates nonviolence.

In light of these new findings, the ACLU has called on Congress to hold formal hearings on the TALON database. Caroline Fredrickson, Director of the ACLU Washington Legislative Office, said, "Congress must shed light on this effort to spy on veterans and Quakers. We are pleased that new leaders have signaled a desire to get serious about congressional oversight." The ACLU wants Congress to find out how the Pentagon gathered the information, whether it was shared with other agencies, and use of TALON for FBI surveillance of antiwar, religious, animal rights and environmental groups.

According to a *CQ Today* article (subscription required), at least two Senate committees have shown interest in examining the issue, and all oversight committees have been briefed by the Pentagon. Wendy Morigi, a spokeswoman for incoming Senate Intelligence Committee Chairman John D. Rockefeller IV (D-WV), said the panel is aware of the issue and will continue to watch the Pentagon's activities. Morigi said, "Looking ahead, you can expect that the committee will continue to monitor and provide greater oversight of TALON, the NSA program, DoD activities, FBI intelligence gathering and any other domestic collection program." Sens. Carl Levin (D-MI) and Patrick Leahy (D-VT), both to be chairs of oversight committees, have also expressed concern over the problems with the material in the database.

The CQ report also indicates that officials acknowledged some information gathered by TALON should not have been collected. In January 2006, Deputy Secretary of Defense Gordon England required all DoD intelligence and counterintelligence employees to have new training on the policies for "collection, retention, dissemination and use of information related to U.S. persons." TALON was reviewed for any material that should not be there. "That review turned up 186 out of 13,000 reports that 'did not meet the criteria or intent of the TALON program,' said a Pentagon spokesman, Maj. Patrick Ryder."

Daniel J. Baur, director of the office that runs TALON, told the *New York Times* that changes were made earlier this year to prevent collection of information on protest groups. "Mr. Baur said that those operating the database had misinterpreted their mandate and that what was intended as an antiterrorist database became, in some respects, a catch-all for leads on possible disruptions and threats against military installations in the United States, including protests against the military presence in

Iraq."

Supreme Court Wades into Climate Change Debate

The U.S. Supreme Court heard oral arguments November 29 on the U.S. Environmental Protection Agency's (EPA) authority under the Clean Air Act to regulate carbon dioxide and other greenhouse gases (GHG) in new cars and trucks. The case, *Massachusetts v. EPA*, marked the first time the Court has heard arguments related to climate change. The Justices appeared most interested in whether the petitioners had standing to bring the case, and the Court spent little time on regulatory and environmental questions.

According to a BNA story and supported by the transcript of the oral argument, most of the questions from Justices Antonin Scalia, Anthony Kennedy, Samuel Alito and Chief Justice John Roberts focused on whether the petitioners suffered real harm from climate change, the standard for achieving legal standing. James R. Milkey, assistant attorney general for Massachusetts, argued the case on behalf of several states, environmental groups and three cities. In his responses to the standing questions, Milkey noted that Massachusetts alone is likely to lose more than 200 miles of coast as climate change occurs.

Deputy Solicitor General Gregory C. Garre, arguing on behalf of the EPA and the auto industry, said the administrative decision not to regulate GHG from new vehicles was an appropriate exercise of agency discretion. Garre also argued that the science of climate change is too uncertain for development of regulatory standards. The Bush administration has consistently argued this position, coupled with its concerns about the economic impact of regulating GHG.

Roberts and Alito noted that since auto emissions make up only about six percent of carbon dioxide emissions, the effect of federal regulations would be relatively small. This ignores the potential impact that a regulatory regime for carbon dioxide would have on emissions from other sources. Utilities, refineries, manufacturers and automakers would potentially be affected by EPA's ability to regulate GHG. Such regulation would also enhance the potential for development of cleaner technologies, green buildings and solar power. Industry groups are split over this issue; many industries moving toward a non-carbon future support the regulation of GHG.

Four Justices, David Souter, Ruth Bader Ginsberg, Stephen Breyer and John Paul Stevens, appeared more skeptical of the government's position. Souter argued that even small improvements in the amount of harmful emissions would lead to real benefits. Stevens noted that, according to EPA scientists involved in the decision, the agency omitted information from its administrative response that would have supported existing scientific information on climate change.

The Court's decision is expected in the spring, with Kennedy being the all-important

swing vote. If the petitioners win, the case will be sent back to the EPA for reconsideration of its decision on whether to regulate GHG; if the Court decides in EPA's favor, the decision not to regulate stands.

The case stems from a 2003 decision in which the EPA claimed it did not have the authority to regulate GHG emissions from new vehicles under Section 202 of the Clean Air Act. That decision was appealed in 2005 to the U.S. Court of Appeals for the DC Circuit, which issued a split opinion on the matter.

The outcome has significance for efforts at the state and regional levels to regulate GHG. In the Northeast, the Regional Greenhouse Gas Initiative (RGGI) is a cooperative effort to regulate carbon dioxide in states from Maine to Delaware. California also has a GHG initiative that is currently being challenged by the auto industry and may be impacted by the Court's decision in *Massachusetts v. EPA*.

FDA Negotiates Increase in Drug Company User Fees

Amidst concerns raised by public interest advocates, the Food and Drug Administration is negotiating with drug industry representatives to increase controversial user fees, according to news reports.

User Fees to Expand, Include Advertising

In 1992, Congress authorized drug companies to pay user fees directly to FDA to help underwrite the cost of drug approvals. With congressional funding for FDA on the decline, the agency has become increasingly reliant on drug companies to fund the drug approval process. At minimum, this arrangement gives the appearance of a conflict of interest that can harm public trust in FDA approvals. Drug-approval scandals over the last few years, however, such as the highly publicized Vioxx scandal, have raised troubling concerns that the agency spends much more time and resources approving drugs than testing their safety.

Ongoing negotiations between FDA and the drug industry are expected to increase fees for drug approval. While fees would ensure FDA review all new drug applications within two-and-a-half months, some of the user fees would also fund post-market safety research. Moreover, FDA is considering expanding user fees to expedite approval of pharmaceutical advertisements. Under the proposal, drug companies would pay FDA $40,000 to $50,000 before each television ad campaign.

A tentative user fee agreement will be published in the *Federal Register* sometime in December, according to the BNA Daily Report for Executives (subscription only).

Critics Blast User Fee System

The Prescription Drug User Fee Act (PDUFA) must be reauthorized by Congress in 2007. During its last reauthorization in 2002, Ranking Member Henry Waxman (D-CA) strongly rebuked the agency for putting expedited approval above public safety and called for industry to pay user fees to ensure that drug ads were not misleading. "Speeding the review of new drugs is important. But ensuring the public that drugs are safe and effective demands more. We cannot sacrifice safety for speed. And we must be vigilant in our oversight of prescription drug ads to be sure that misleading ads do not prompt unsafe or inappropriate use of drugs." Waxman will chair the House Government Reform Committee when reauthorization occurs next year.

The Institute of Medicine released a report in September detailing necessary improvements to FDA's drug approval and safety programs. Along with recommendations to increase FDA's enforcement and oversight capabilities, IOM blasted the user fee system, saying that "[t]he Prescription Drug User Fee Act mechanism that accounts for over half of the Center for Drug Evaluation and Research's funding and the reporting requirements associated with the user-fee program are excessively oriented toward supporting speed of approval and insufficiently attentive to safety." IOM recommended Congress "introduce specific safety-related performance goals in the Prescription Drug User Fee Act IV in 2007." Moreover, IOM called for adequate funding of FDA, saying that over-reliance on user fees "hurts FDA's credibility and may affect [the] agency's effectiveness."

GAO Urges New Congress to Increase Oversight in Key Areas

Congress's investigative arm, the Government Accountability Office (GAO), is prodding the upcoming 110th Congress to increase its oversight role, something Democrats are chomping at the bit to do. In a Nov. 17 report, GAO identifies 36 areas in need of congressional oversight, organized into three categories: near-term oversight; policy and program reform; and governance issues in need of long-term attention. The recommendations are comprehensive, covering an array of issues including, but not limited to, government contractor responsibility, tax and budget policy, environmental regulation, and government transparency.

Contractor Responsibility

Throughout its recommendations, GAO repeatedly calls for greater oversight of government contractors and grantees. Under near-term oversight, GAO recommends Congress "address governmentwide acquisition and contracting issues." GAO lists contract management as one its "high-risk areas," pointing out that acquisition and contract management issues "collectively expose hundreds of billions of taxpayer dollars to potential waste and misuse."

Specifically, GAO asserts that Congress should conduct oversight on the preexisting mechanisms agencies use to prevent contract abuse. Congress should also "monitor the

implementation of agency action plans to address the GAO high-risk areas related to acquisition and contract management." The recommendation singles out the Department of Defense (DoD), Department of Energy (DOE), and NASA because of their large budgets. DoD, DOE and NASA were also the three agencies that contracted out the most dollars in Fiscal Year 2005.

The report also mentions the General Services Administration (GSA), ranked fourth in terms of dollars contracted in FY 2005, as another oversight priority. Recently, GSA Administrator Lurita Alexis Doan announced that the agency will reduce audits of contractors - audits that often uncover and deter contractor abuse. On Dec. 2, the *Washington Post* reported Doan plans to cut $5 million in audit spending.

Under issues in need of long-term attention, GAO calls for increased scrutiny of recipients of federal grants. The recommendation states the existing audit structure does not go far enough and should include the "numerous federally established entities receiving significant federal funding that lack statutory requirements for accountability oversight." GAO recommends the creation of a "governmentwide accountability council" to reprioritize federal accountability issues and to coordinate the efforts of GAO, the White House Office of Management and Budget (OMB), and other oversight organizations.

Also within the scope of contractor responsibility, GAO recommends oversight on the collection of royalties that mining and energy companies owe for extracting resources from federal lands, with specific proposals for assessing the reliability of the data provided by oil companies, and reflecting market values in royalty rules. Democrats have vowed in their first 100 hours agenda to target oil companies by ending subsidies, including royalty reductions.

Budget and Tax Policy

In its recommendations, GAO also enters the tax policy debate. Under near-term oversight, GAO critiques the tax gap - the difference between what taxpayers pay and what they actually owe, a favorite issue of Sen. Max Baucus (D-MT), incoming chair of the Senate Finance Committee. The recommendation cites an Internal Revenue Service (IRS) figure estimating a net tax gap for 2001 of $290 billion. In order to rectify this financial blunder, GAO proposes more congressional oversight of the IRS. Among the ideas are: allowing the IRS greater withholding power on capital gains and securities sales; simplification of the tax code; and greater use of technology in taxpayer service and enforcement.

GAO goes into greater detail of its tax code simplification proposal in the policy and program reform category. The report criticizes the current income tax system and then calls for an overhaul that would broaden and simplify the process. One proposal calls for agencies to consider in their strategic plans the tax incentives they institute. Another suggestion calls for a bipartisan commission to examine options for both entitlement and

income tax reform.

GAO also has deep concerns over the country's long-range fiscal health, or lack thereof. With the debt and deficits high and likely rising, GAO comments, "Failure to grapple with these challenges will result in a government unable to respond to any new challenges and a crushing fiscal burden for future generations." GAO proposes a number of recommendations to mitigate the fiscal imbalance. Among the most interesting are the reintroduction of pay-as-you-go (PAYGO) rules (already likely to gain traction in the 110th Congress); requisite estimates of "long-term cost implications of major policy proposals (tax and spending) before they are acted upon;" earmark review; and consideration of biennial budgeting.

Environmental Regulation

GAO calls for increased oversight of various environmental laws and regulations. Throughout the report, GAO stresses the need for sound environmental information. "Without this kind of information," GAO states, "the nation's environmental policy and priorities will continue to be driven by anecdote and perception, rather than fact."

Government Transparency

GAO also recommends oversight of the ways in which the federal government allows access to some of its information. GAO recognizes the link between a transparent government and a healthy democracy, then goes on to suggest ways in which Congress could preserve said health. One proposal calls for Congress to compare how agencies respond to Freedom of Information Act requests from Congress, GAO, Inspectors General, and the public. Another recommendation calls for Congress to look into how and when agencies are deeming information sensitive but unclassified, and whether or not that designation impacts agency responses to information.

GAO recognizes the broad and beneficial implications congressional oversight can create. In the report, the head of GAO, U.S. Comptroller David Walker, calls for oversight to be constructive and to "hold people accountable for delivering positive results." He goes on to state, "This balanced approach is likely to help accelerate progress while avoiding a further erosion of the public's trust and confidence in government."

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In This Issue

The 2006 Transparency Awards

For years, the Bush administration has been labeled by many as the most secretive administration to occupy the White House in decades. This penchant for secrecy has pushed the pendulum far from openness and transparency. And while the pendulum did not swing back significantly in 2006, the movement toward greater secrecy was finally challenged and slowed. The year still contained many proposals to reduce government accountability and openness. However, there were also indications that the public and certain officials had come to believe that excessive secrecy had become unmanageable and ran contrary to the stated goals of its proponents — to create a better, safer country. Such differing viewpoints often gave rise to high drama, and in recognition of that, we present the 2006 Transparency Awards.

Award for Best New Transparency Law — Federal Funding Accountability and Transparency Act

After a month of secret holds, back-room maneuvering, stall tactics and butting of heads, the Senate and House passed the Federal Funding Accountability and Transparency Act (S. 2590), and on Sept. 26, President Bush signed it into law. The new law will increase

government accountability and public access to federal spending data by creating a free, public, searchable website of all federal spending, including government contracts and grants. The site, to be overseen by the Office of Management and Budget, must be online by Jan. 2008. OMB Watch launched a prototype of such a website, called FedSpending.org, which uses currently collected data on contracts, grants, loans, direct payments and insurance to provide online searchable access to more than $12 trillion in federal spending from the past six years.

Award for Biggest Secret — National Security Administration's Warrantless Spying Program

The discovery that President Bush authorized the National Security Administration (NSA) to spy, without warrants, on the international communications of U.S. citizens was perhaps the most jarring government secret that we wrestled with in 2006. The *New York Times* broke the story in Dec. 2005, but the ongoing battle that ensued between the Bush administration and Congress played out throughout this year. Many members of Congress were outraged that the White house did not inform key committees on intelligence, homeland security and judiciary matters about the program. The Bush administration vigorously fought to keep details of the program secret from such committees as they attempted to conduct oversight. Dodging questions in the Senate Judiciary Committee, Attorney General Alberto Gonzales did little to inspire confidence in the oversight process. According to a Washington Post-ABC News poll released Dec. 13, 66 percent of Americans think the federal government is spying on its citizens in the name of investigating terrorism and over half think Congress should hold hearings on this surveillance.

Award for Greatest Missed Opportunity — Lobby Reform

At the start of 2006, all of Washington was abuzz with the idea of lobby reform. On the heels of a guilty plea by lobbyist Jack Abramoff, both parties began hurriedly preparing lobby and ethics reform legislation. The Abramoff scandal brought into sharp focus, for both Congress and the public, how easily money could be used to influence government decisions. The lobby reform frenzy gave rise to numerous interesting ideas from both sides of the aisle to reign in the influence of money on the political system. Transparency and disclosure were common tools applied to the difficult issue of making lobbying and legislating more accountable. Provisions to require improved reporting of gifts and sponsored travel were common. Other offices proposed overhauling the lobbying disclosure procedures to make the tracking of lobbyists easier, or requiring the activities of conference committees to be more public and open. While a host of bills with differing combinations of such provisions were introduced in both the House and Senate, none of them were signed into law. As months passed, the spotlight faded from the lobby reform issue and so too did Congress' interest in tackling this difficult issue. According to top agenda items listed by Democratic leaders, Congress may have another chance to follow through on such reforms in 2007.

Award for Worst Reversal — Cutting Toxics Release Inventory Reporting

While officially announced toward the end of 2005, most of the fighting over these

controversial proposals occurred in 2006. The Toxics Release Inventory (TRI) program, operating since 1998, has long been heralded by the U.S. Environmental Protection Agency (EPA) and others as an ideal environmental program — simple, low-cost and effective. The program simply collects data on toxic pollution and makes the information public each year. The public pressure to reduce toxic releases has been so effective that in last six years, there has been an estimated decline in annual toxic waste of 2.8 billion pounds. Despite the enormous success of the TRI program, EPA has been pushing plans to significantly cut back the data by raising the threshold for detailed reporting and reducing the frequency of reporting. Opposition to these proposals has been massive. As an OMB Watch report documented, more than 122,000 people wrote into EPA opposing the rollback, the agency's own Science Advisory Board voiced concerns about EPA's plans, and the Environmental Council of the States passed a resolution urging the EPA to withdraw the proposals. The House passed an amendment to bar EPA from spending money to finalize its plans. Unfortunately, since the Senate did not pass an Interior Appropriations bill, no similar amendment was possible in the Senate. Instead, New Jersey Sens. Frank Lautenberg (D-NJ) and Robert Menendez (D-NJ) placed a hold on an EPA nominee in protest of the agency's TRI proposals. As a result, EPA agreed to drop its consideration of switching annual reporting to every other year. However, EPA moved ahead with a final rule raising the threshold for detailed reporting.

Award for Most Overdue Effort — FOIA Improvement

The Freedom of Information Act (FOIA) was originally passed in 1966, amended in 1974, and bolstered with the Electronic Freedom of Information Act in 1994. In the past few years, there had been little effort to improve the nation's safety net for access to government information. However, in 2006, both the House and Senate seriously considered legislation to speed up FOIA and relieve agency backlogs, and agencies implemented an Executive Order to improve FOIA. Two FOIA bills, sponsored by Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT), were well received in both the House and the Senate. The Openness Promotes Effectiveness in our National (OPEN) Government Act and the Faster FOIA Act contained provisions to allow the public to recoup legal costs for challenging FOIA denials in court; mediate disputes between those requestors and federal agencies; and establish a commission to study FOIA backlog problems and recommend improvements. July brought FOIA Improvement Plans from all the federal agencies, as required by Executive Order 13392, issued in 2005. While the improvement plans met with considerable criticism, the executive order is still widely viewed as a significant acknowledgement of the importance of FOIA. Openness advocates hope the progress made on the bills in the Senate in 2006 indicates that similar legislation will advance in 2007.

Award for Most Obvious Bad Idea — Closure of EPA Libraries

President Bush's budget proposal, released in early February, included a whopping 80 percent cut in EPA's library budget from 2006 funding levels, dropping it from $2.5 million to only $500,000. The EPA libraries are a vital component of the agency, providing scientists, government personnel, and the public with access to important

environmental and health information. Opponents of the measure said that there was no logical reason to hit such a fundamental and worthwhile arm of EPA with such a drastic budget cut except to cripple the agency's libraries. In response to the cuts, EPA has started closing regional libraries around the country, including the agency's Headquarters library. The agency also plans to discontinue the Online Library System, an electronic catalogue, without which regional libraries will be unable to locate individual holdings.

Award for Most Confusing — Proliferation of Sensitive But Unclassified Information Categories

Despite there being no government-wide policies or procedures on "sensitive but unclassified" (SBU) information, more that 100 different SBU designations have been created by federal agencies to restrict public access to government information. Federal agencies lack uniform rules governing who makes such decisions and how such information is then handled, making the management of SBU information confusing even to them. In a GAO report issued this year, first responders "reported that the multiplicity of designations and definitions not only causes confusion but leads to an alternating feast or famine of information." The government has finally recognized the seriousness of the problem and begun efforts to create an Information Sharing Environment to ensure easier management and facilitate faster sharing of information between agencies and different levels of government. A substantial project within this effort will be to reign in the large number of SBU designations.

Honorable Mention for Most Confusing — National Archives' Reclassification

On Feb. 21, Matthew M. Aid of the National Security Archive disclosed the scope of a multiple-agency reclassification program. The extensive reclassification program appears to be a backlash to a 1995 executive order by President Clinton that required government agencies to declassify all historical records that were 25 years or older, with national security exceptions. Dissatisfied with the results of this order, government agencies began removing declassified documents from the shelves of the National Archives and considering them for reclassification. What made the matter even more confusing was that many of the documents did not contain any sensitive information. Some of the reclassified documents dated back to World War II, others contained embarrassing details about the government, and still others were easily available to the public — such as some that were published by the State Department and for sale at Amazon.com. Over 55,000 pages of documents were reclassified, of which the National Archives estimates that one-third should not have been removed. Once the program became known, the reclassification was suspended and an audit was conducted. The National Archive now plans to implement procedures to ensure that "re-review and withdrawal actions are rare."

Award for Most Offensive Stonewalling — Congressional Review of Katrina Response

Committees in both the House and Senate held more than 15 hearings in 2006 to

investigate exactly what went wrong in the preparation for and response to Hurricane Katrina. Determining the timeline of what officials knew and when they knew it, relative to actions taken, were essential to those investigations. The Bush administration, however, refused to disclose relevant communications and prevented key officials, like Homeland Security Advisor Frances Fragos Townsend and White House Chief of Staff Andrew Card, from testifying before Congress. The lack of cooperation from the White House made it nearly impossible for Congress to exercise effective oversight of the federal government's preparedness, whether in response to natural disaster or terrorist attack. The White House claimed throughout the hearings that it was protecting the confidentiality of presidential advisors.

Award for Worst Fumble — Chemical Security

Despite ongoing bipartisan efforts to craft balanced chemical security legislation, which had made progress through appropriate committees in both the House and Senate, Congress passed a chemical security amendment to the 2007 DHS spending bill. The language is a retreat from stronger, bipartisan bills pending in both houses. The agreement exempts approximately 3,000 drinking water and waste water facilities, keeps DHS from requiring safer technologies, and fails to preserve state and local governments' authority to set stronger security standards than the federal government (such as those currently in place in New Jersey). In addition, the appropriations provisions failed to allow any substantive public accountability, meaning people living near chemical facilities won't be able to get answers to simple and reasonable questions such as: "Is my family safe?" and "What risks are there in living here?"

Award for Best Court Decision — Dismissal of Data Quality Act Case

An appeals court decision dealt a blow to what many consider frivolous challenges to sound science made under the Data Quality Act (DQA). On March 6, the U.S. Court of Appeals for the Fourth Circuit dismissed a lawsuit brought by the Salt Institute and the U.S. Chamber of Commerce under DQA. DQA has been used by industry to slow action on important health and safety regulations and pressure agencies to remove or revise information. The Fourth Circuit found that the act does not allow for judicial review and that the plaintiffs had not shown injury and thus lacked standing. The suit requested court intervention on a 2003 challenge by the plaintiffs with the National Heart, Lung, and Blood Institute (NHLBI), requesting underlying data on a sodium study the institute had conducted. The case set up a test of DQA's authority and was watched closely by both sides of the DQA debate.

Award for Worst Court Decision — Acceptance of Increased Use of State Secrets Privilege

Based on the 1953 U.S. Supreme Court ruling in *United States v. Reynolds*, the state secrets privilege allows the executive branch to declare certain materials or topics exempt from disclosure or review. The administration has repeatedly used the state secrets privilege to compel the courts to dismiss lawsuits brought by previous detainees, such as a German man who had been held in Afghanistan for five months after being mistaken for a suspected terrorist with the same name. The Justice Department also

claimed state secrets privilege when it asked the courts to throw out three lawsuits against the NSA's warrantless wiretap program. Additionally, the state secrets privilege was used to shut down a lawsuit by national security whistleblower Sibel Edmonds, an ex-translator for the FBI, who was fired after accusing co-workers of security breaches and intentionally slow work performance. While the state secrets privilege is likely a necessary power, many advocates believe the government is abusing the authority to avoid court review and scrutiny of its more questionable and potentially embarrassing actions. Unfortunately, many of the courts are accepting the government's claims with little questioning.

2006 Fiscal Policy Year in Review: Process Failures, Budgetary Gridlock

2006 was a busy year in federal fiscal policy. As in 2005, the regular budget process broke down almost entirely, increasingly urgent issues were neglected, and much time and attention were devoted to consideration of items and priorities seen by many as insignificant and misguided.

As a result, the nation continues to see its overall debt grow at an alarming rate, to the point where interest expense payments on it are the fastest-growing area of spending. Despite this, the President and Congress remained as focused as ever on enacting still more tax cuts, almost all of which strongly favor the wealthy, provide only marginal broader economic benefits, and dig the country into an ever-deeper deficit hole.

- Bankrupt Nation
- The Daily Opportunity Cost of Interest Expense
- Despite Short-Term Gains, CBO Forecasts Grim Long-Term Fiscal Outlook

There were a few bright spots, however: Congress continued to ignore the Program Assessment Rating Tool and enacted a bill to make federal spending more accessible and transparent to the public. Two dangerous budget process proposals were defeated, and OMB Watch launched a new searchable website containing easily accessible information on federal spending. What's more, there is hope for more advances and victories for responsible and equitable fiscal policy in 2007. But before that, we review all that was in 2006 federal fiscal policy.

Budget/Appropriations

A Budget Full of Cuts and Congressional Inaction
In February, the President proposed a FY2007 federal budget of $2.77 trillion, replete with funding reductions for important programs. The budget estimated a deficit of $354 billion by setting a discretionary spending cap of $873 billion and making deep cuts in student loan programs, the Community Development Block Grant, veterans' health funding, and other health care cuts. Months of congressional negotiations followed, but

only two appropriations bills passed, and the government is now operating under a long-term continuing resolution.

- Initial Analysis of the President's 2007 Budget
- Budget Gimmicks in Bush's FY07 Proposal
- Budget Failures: Cutting to the Core
- Congress to Have Short Year; Appropriations Work Likely to Suffer
- Congress Squanders Year As Appropriations Remain Unfinished
- Lame Duck Session Holds Little Hope for Appropriations Bills

Congress Increased Debt Ceiling Again With Hardly a Mention
An unexpected surge in tax revenues, reflecting better-than-expected short-term corporate profitability, held the official FY2006 budget deficit to $248 billion. But that deficit figure doesn't tell the entire story because Social Security and Medicare trust funds, which are in temporary surplus, are being used to pay other bills. Count those liabilities, as Congress should, and the debt went up by almost $550 billion in 2006.

Congress took action to increase the country's debt limit for the fourth time in the last five years to almost $9 trillion. The Senate passed the increase 52-48, while the House skipped a debate (and vote) entirely by increasing the limit through a special rule that sidestepped a recorded vote.

- Honest Debate Is Needed Around Vote to Increase Debt Limit
- House Passes Budget, Slips in Increase to Debt Ceiling
- Treating Deficit Addiction
- Treasury Reports Quarter-Trillion Dollar Deficit; President Still Obscures Fiscal Problems

Budget Process

FY2006 Reconciliation Bill Finally Pushed Through Congress
In its budget resolution in 2005, Congress called for a bill that would allow for special fast-track protections for $34 billion in cuts to mandatory programs and more than twice that amount in additional tax cuts, primarily for the wealthy. In the end, it took well over a year for Congress to pass this bill that, contrary to the original purpose of the reconciliation process, actually *increased* the deficit. Students saving for college, low-income Medicaid beneficiaries, and Americans working abroad were a few of the groups of people worse off under the law.

- Final Budget Bill Passed; Tax Bill Sent to Conference
- Dishonest Budget Gimmick Enables Passage of Irresponsible Tax Cuts
- Who Wins With The Tax Bill? Bush Raises Taxes On Students, Expatriates

PAYGO Fails By the Narrowest Margin
Congress again considered restoring true Pay-As-You-Go (PAYGO) rules that would

force any increases in mandatory spending or tax cuts to be deficit neutral through the full budget window. The Senate voted on reinstatement of true PAYGO rules during the FY2007 budget resolution debate, and it failed in a 50-50 vote. However, given the change in control of Congress next year, and statements from the Democratic leadership, prospects for PAYGO are now considerably brighter in 2007.

- Sen. Coburn Caves on PAYGO; GOP Opposes Fiscal Responsibility
- House Dems Plan Loong Sloow Rolll-Out of Ethics Package

Dangerous Process Changes Fail to be Enacted
Two dangerous budget process proposals underwent serious consideration throughout the year, but in the end, were defeated in Congress. President's Bush proposal to reenact the line-item veto and conservative attempts to create sunset commissions were both framed as fiscally responsible reforms by their supporters, but would have turned out to be anything but. The defeat of these proposals preserved an important level of checks and balances between the executive and legislative branches of government on budgetary issues.

- President Restarts Push for Line-Item Veto
- Harmful Budget Process Plans Could Become Reality

Continuing Resolution Locks in Funding Shortfalls
The unique configuration of the continuing resolution will hold funding for almost half of FY2007 at low levels that are likely to have dire consequences for programs. The Social Security Administration has mentioned the possibility of furloughing every employee. Without adjustments, funding will not keep pace with demand for low-income housing vouchers. School breakfast and lunch programs would face a $1 billion shortfall, cutting off 1.2 million participants, and the Veterans Health Administration would have to absorb the $3 billion increase to maintain hold-harmless funding levels elsewhere.

- To Be Continued: Budget Irresolution
- Same Old Congress, Same Old Budgetary Gimmicks
- The Longest CR
- Continuing the Resolution ... into the New Year

Dishonest Budgeting and Deceptive Analysis
The Bush administration's FY2007 budget promoted dishonest and manipulative budget practices that have decreased the transparency of the federal budget and distorted the debate about important long-term policies. Such practices include skewing budget analysis in order to reinforce and support political goals, omitting certain costs of proposed policies and actual war costs from budget projections, and assuming the extension of the president's tax cuts. In doing so, the White House has misled Congress and the American people about the fiscal health of our country and our capacity to meet current and future financial obligations.

- More Dishonest War Budgeting from White House
- Budget Gimmicks in Bush's FY07 Proposal

Wealth and Income Inequality

Congress Fails to Increase Minimum Wage For Ninth Straight Year
Despite numerous efforts in the Senate, Congress closed out its ninth consecutive year without passing an increase to the federal minimum wage. Many states, tired of waiting for leadership from the federal government, have instituted their own minimum wage increases, including six states that passed ballot initiatives in the midterm elections.

- States Continue to Lead on Wages Where Feds Have Failed
- Not a Happy Anniversary

Economy Improves, Fails to Benefit Most Americans
The gap between the rich and the middle class widened again this year. Key economic indicators showed that income for high earners vastly outpaced everyone else. Expanding wages showed up in unexpected bumps in federal tax receipts that were driven by high-earners, corporate profits, and a banner year on Wall Street. But average workers' wages were held stagnant as the median wage failed to keep up with productivity gains. Average pay for corporate chief executive officers is now 369 times that of average workers (up from 36 times in 1976).

- Income Inequality Has Intensified Under Bush
- Income, Poverty Stats: Two Tales of the Economy
- Wealth/Income Trends Reported In Wall Street Journal
- NY Times Fronts Inequality Findings

Federal Tax Policy

Efforts to Repeal, Slash Estate Tax Fail in the Senate
For the fourth time in five years, the House of Representatives passed a bill to permanently repeal the estate tax. The Senate, however, held fast against repeal as well as a host of "compromise" measure to slash the estate tax by over half a trillion dollars over ten years, rejecting both stand-alone repeal and the compromise.

- Senate Rejects Estate Tax Repeal; Frist Likely to Turn to Costly 'Compromise'
- Last-Minute Attempt to Add Estate Tax to Pension Reforms Fails
- Senate Defeats Estate Tax Giveaway...Yet Again

Package of "Extenders" Finally Passes Congress
The popular set of tax breaks that expired at the beginning of 2006, known as the Extenders — featuring a varied package of middle class and business tax credits — proved too politically appetizing to pass on a stand-alone basis. Senate Majority Leader Bill Frist (R-TN) pulled the Extenders off of the tax reconciliation and pension bills, then

affixed them to the poison pill of the estate tax. Eventually, the extenders package passed the full Senate during the lame-duck session and will become law before the end of the year.

- Senate Finally Passes 'Extenders' Tax Cut Package

Accountability and Transparency in Federal Spending

Federal Funding Accountability and Transparency Act (S. 2590)
In the most significant spending disclosure efforts in several years, OMB Watch worked with Sens. Tom Coburn (R-OK) and Barack Obama (D-IL) to pass the Federal Funding Accountability and Transparency Act. The Act mandates increased government accountability and public access to federal spending data, through a free, public, searchable website of all federal spending, including government contracts and grants that will be available to the public by January 1, 2008.

- Battle Brewing on How to Track Contract and Grant Bucks
- Spending Transparency Bill Passes Senate, House Approval Imminent

FedSpending.org
One of the major OMB Watch initiatives of 2006 was the launch of a new website - FedSpending.org. A massive undertaking, the site combines data from the Federal Procurement Data System on federal contracts and the Federal Assistance Award Data System on federal assistance such as grants, loans, insurance, and direct subsidies like Social Security. FedSpending.org enables the public to exercise its right to know how the federal government spends our money so citizens are able to hold elected officials accountable for the national priorities Congress sets.

- OMB Watch Launches Fedspending.org
- FedSpending.org

Earmark Reform
"Earmarks" — lines of funding legislation in appropriations bills members of Congress designate for specific projects in their districts — became a dirty word in Washington in early 2006, evoking visions of a $250 million "bridge to nowhere," questionable projects bearing the name of a congressional sponsor, Jack Abramoff, casinos, and a cash-for-favors culture. A sham to some, a harbinger of progress to others, the GOP-led House adopted an internal rule that required sponsors of earmarks to be identified by name in the given spending measure. The rule stayed on the House books until the adjournment of the 109th Congress, but was largely ignored, disappointing many reformers.

- Earmark My Word: Boehner Promises House Action This Week
- Understanding the New Earmark Rule
- Clearer Marks On Earmarks

Government Performance and Management

PART Fails to Provide Unbiased Program Assessments
The Program Assessment Rating Tool (PART) continued to fail as a tool to provide an unbiased, useful mechanism to grade programs across the federal government. Instead, the program was seen by many as a thin veneer of accountability and good government, thrown up to deflect attention and criticism from controversial, politically biased judgments. OMB Watch continued our work monitoring the impact of PART and educating Congress and the public about its implementation, and Congress continued to exercise good judgment by largely ignoring the results of the PART.

- OMB Watch Congressional Testimony Opposing PART
- New PART Score Showcase More Contradictions of Program
- PART and the FY06 Federal Budget
- PART and the FY07 Federal Budget

Problems with Management and Oversight At Federal Agencies
2006 was filled with reports of contractors that engaged in illegal dealings with government officials, questionable management and policy decisions within government agencies, and a general lack of accountability throughout the public and private sectors. The release of FedSpending.org this fall has helped to bring increased attention to the lack of oversight of government contracting and management decisions, but much more is still needed to help enact policies to improve government performance and effectiveness while promoting and protecting the common good.

- Strange Happenings at the IRS Could Affect Enforcement
- FedSpending Spotlight: Skyrocketing Contracts, Less Competition
- Congress Continues Insufficient Oversight of Federal Contracts
- Oversight of Iraq Reconstruction Funds Still Needed
- "Anything Goes" at Interior Department. Anything.
- Efforts to Undermine Contract Oversight at GSA
- Contractors, FEMA Still Bungling Hurricane Relief
- House Saves Program for Measuring Results of Government Assistance

Attempts to Roll Back, Delay Regulatory Protections Common in 2006

Throughout the past several years, attempts to roll back regulatory safeguards and delay new rulemaking have been common. 2006 proved to be no different, and several important issues garnered attention. Among these were sunset commission legislation, the nomination of Susan Dudley, and proposals to further complicate the regulatory process.

In Congress

When the do-nothing Congress did act on regulatory policy issues in 2006, it continued the trend that it followed in recent years: favoring industry-backed proposals on environmental, public health and safety rollbacks. Highlights included:

- **Sunset Commission Legislation** - Industry efforts to put safety, health and environmental regulations on the chopping block resulted in two major House bills which would have established sunset commissions. Under this legislation, independent commissions of unelected officials would decide which federal programs and agencies live and die and which get changed. Commission recommendations would then get fast-track authority through Congress without opportunity for public input or modification. Opposition from many quarters - veterans, state and local groups, and OMB Watch and our partners - helped prevent Congress from acting on these bills in September when votes were scheduled.
- **Paperwork Reduction Act Reauthorization** - Efforts to begin the reauthorization of the Paperwork Reduction Act (PRA) featured anti-regulatory approaches favored by industry. The House committee with oversight focused on tools used in the regulatory process to delay or stop regulations, such as emphasizing cost-benefit analyses over other requirements, and setting automatic expiration dates on any ten-year old regulations unless they can be justified again through the regulatory process. Although reauthorization never fully got going, it is likely to be part of the congressional agenda in 2007.
- **Susan Dudley Confirmation Hearing** - The Senate held a confirmation hearing in November on Susan Dudley to be the next administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). Dudley bobbed and weaved around tough questions posed by Senators. However, her rich trail of articles and speeches demonstrated an anti-regulatory zealotry possibly unmatched in OIRA nominees. Yet evasiveness in answering questions at the hearing left a disquieting unease with Democrats and possibly some Republicans on the oversight committee. The result was that the oversight committee did not even vote on moving Dudley's nomination to the Senate floor, leaving open the prospect of a Bush recess appointment that would circumvent Congress.

In the White House

Most attacks on the regulatory process came from the Bush White House, with strong industry backing. John Graham, the previous administrator of OIRA, resigned in February, leaving an unmatched anti-regulatory legacy. Bush then nominated Dudley to replace Graham.

Another White House initiative launched by OMB was a Risk Assessment Bulletin, released for comment in January 2006. It proposes to change regulatory analyses within agencies, which would result in real danger to public safeguards. Risk assessments would become so burdened with activities outside the normal assessment processes that agencies would be paralyzed by analyzing information on the universe of potential risks.

The Bulletin was even criticized by agencies that have had their own rollback agendas. For example, EPA argued that the populations normally considered in these assessments would change from the usual focus on those most vulnerable to a more generalized sample. These changes would be in direct conflict with laws governing clean air, safe drinking water, and pesticides, for example, which explicitly require the agencies to consider the harm imposed on susceptible populations, including the elderly and children. Release of the final Bulletin has been delayed as a result of public comments but is supposed to be released before the end of 2006.

Around the same time that OMB was releasing the Risk Assessment Bulletin, it was also collecting comments on its *Proposed Bulletin on Good Guidance Practices*. This proposal set new requirements that include lengthy high-level review by senior agency staff of any guidance document deemed "significant." Agencies would also be required to get OMB's approval for what has traditionally been an agency function. The result would be more delays in agencies' ability to protect the public. Further action on the proposed bulletin has been on hold since Graham left OIRA, but it is likely to be on the White House agenda for 2007.

Attacks on public health and safety haven't focused solely on analytic tools. For example, similar attacks on food safety regulations occurred within the Department of Agriculture (USDA) and the Food and Drug Administration (FDA). In April, Center for Science in the Public Interest, OMB Watch and Consumer Federation of America issued a report and press release pointing to the special interest lobbying aimed at these two agencies and OMB in the midst of an outbreak of mad cow disease. The lobbying halted reforms such as a nationwide animal identification system and FDA's regulations regarding animal feed ingredients. The report, *Cow Sense: The Bush Administration's Broken Record on Mad Cow Disease*, identified ten closed-door meetings among OMB staff, the meat and feed industries, and the number of senior level USDA officials who were former industry insiders. The national ID system was to be fully implemented by 2009, but USDA in November backed away from a specific deadline.

The 110th Congress

The leaders of the next Congress say they intend to re-establish the oversight role missing for years under one-party control of the Presidency and Congress. Some new committee chairs are masters of oversight. Others have already started to fight back against Bush appointees and have outlined agendas to address formerly forbidden issues.

The Democrats have their work cut out for them, however. It's doubtful the White House will abandon its attempts to alter the regulatory process by initiating proposals to delay, dismantle and paralyze public protections. Although the mid-term elections might slow executive actions in the regulatory area, the public interest community should also watch for actions designed to entrench this administration's philosophy of governance.

2006 Roundup: Federal Developments Impacting Nonprofit Speech Rights

Although 2006 brought nonprofit organizations a somewhat hostile legal climate for grassroots advocacy, nonprofits provided leadership on issues in public policy debates and helped get voters to the polls and protect their rights. Nonprofits exposed government surveillance of groups that dissent and resisted efforts to silence debate or use federal grants as a wedge to control speech. To level the political playing field, nonprofits supported efforts to increase transparency in Congress. Some in the sector also called for frozen funds of charities designated as supporters of terrorism to be released for charitable purposes.

Issue Advocacy

Ethics and Lobby Disclosure

While both the House and Senate passed bills to reform ethics practices in Congress and increase disclosure by lobbyists, no conference committee was formed because of disagreement over an additional item included in the House bill. This provision would subject independent political committees (527s) to the same regulations as political parties and candidate campaigns. It is expected to be dropped in 2007 so that the measure can move forward. The bills that evolved in 2006 would increase lobby disclosure. While the House included costs of grassroots communications by lobbying firms and coalition membership, the Senate jettisoned this provision. Since charities and unions must already disclose grassroots lobbying expenditures, disclosure by others would help level the political playing field by exposing sham groups that front for special interests.

- Lobby Reform Bill Squeaks Through House

Nonprofit Accountability

An October report from Senate Finance Committee Ranking Member Max Baucus (D-MT) found instances of serious abuse in interactions between five tax-exempt organizations and disgraced lobbyist Jack Abramoff and his associates. The report recommends a broad expansion of the definition of lobbying, increased disclosure requirements and enhanced penalties for violations. Senate Finance Committee Chair Charles Grassley (R-IA) also expressed concerns about nonprofit accountability. In a letter to the Association of Community Organizations for Reform Now (ACORN), Grassley stated that "misuse of tax-exempt organizations for political and lobbying activities is a widespread problem." The letter followed news reports that voter registration drives sponsored by ACORN are being investigated by federal authorities after allegations that fraudulent voter registration cards were submitted in four of its 17 state efforts. At year's end, the ACORN investigation remains open, and advocates are watching the case to ensure that its outcome does not have widespread, negative

ramifications for the nonprofit sector.

- Report Details Abramoff Abuse of Nonprofits, Recommends New Rules
- ACORN Voter Registration Drive Investigated

IRS Political Activities Compliance Initiative (PACI)

In early 2006, the Internal Revenue Service (IRS) announced that it would step up enforcement of the ban on partisan activities by charities and religious organizations — and would provide quick resolution on investigations. Though several investigations from the 2004 election remained unresolved, the IRS did take action on some issues.

The IRS dropped its investigation of the NAACP, finding that the group did not violate the ban on partisan electioneering when its chairman, Julian Bond, criticized several Bush administration policies during a speech given at its 2004 national convention. Investigators also increased their scrutiny of religious organizations, which led Sen. James Inhofe (R-OK) to introduce S.3957, the Religious Freedom Act of 2006. The legislation's vague language is intended to allow religious groups to make partisan statements. The bill did not pass in the 109th Congress, but the issue is likely to re-surface in 2007.

- IRS Investigations of Political Activity Heat Up
- IRS Drops Case Against NAACP
- First Church Electioneering Bill Introduced in Senate
- Ohio Church Complaint Raises Questions of Fairness in IRS Enforcement

IRS Report and Response

In February, the IRS released its assessment of its 2004 enforcement program, which found that a significant number of charities investigated had violated the ban on partisan election activity. At the same time, the agency released guidance on permissible activities and published new enforcement procedures for expedited handling of referrals alleging violations. According to the documents, the agency's goal is to deter any ongoing violations. However, OMB Watch published a report in July that suggested that the IRS's PACI program threatens the constitutional rights of nonprofit organizations and churches to speak out on issues of the day.

- Report Finds IRS Program Could Hamper Free Speech for Organizations

Voter Guides and Vagueness

Lack of clarity about standards for permissible voter guides became an increasing problem in 2006. A November enforcement decision by the Federal Election Commission (FEC) on a Sierra Club voter guide from 2004 expanded regulation of voter guides if the FEC determines the guide's overall content implies support or opposition to

federal candidates - even if the guide does not explicitly endorse or oppose candidates. By moving away from the clear cut standard subjecting only "vote for" or "vote against" statements to federal campaign finance rules, the FEC has moved in the direction of the problematic IRS "facts and circumstances" test. The result of this and other cases could be a widespread reluctance by nonprofits to provide voters with materials that mention one's conscience or values, or to use elections to hold politicians accountable for their records.

- FEC Expands Regulation of Voter Guides
- Catholic Group Responds to IRS Complaint By Forming New Group

Get Out the Vote and Voter Protection

A growing body of state laws and regulations governing voter registration drives and the voting process created barriers to voting that discriminate against minorities, new citizens and the elderly. Nonprofits were instrumental in challenging these new voter suppression tactics, including filing several successful lawsuits. For example, federal courts struck down state rules limiting the ability of nonprofits to register voters in Florida and Ohio.

- Roundup: Recent Nonprofit Efforts to Protect Voting Rights

Campaign Finance Rules Continue to Infringe on Issue Advocacy by Charities

In December 2005, the Federal Election Commission (FEC) eliminated exemptions for 501(c)(3) organizations to Bipartisan Campaign Reform Act (BCRA) rules that restrict television, radio and cable advertisements that mention a federal candidate 30 days before a primary or 60 days before a general election, setting the stage for a series of attempts to protect genuine grassroots lobbying broadcasts. In response, the AFL-CIO, Alliance for Justice, the U.S. Chamber of Commerce, the National Education Association and OMB Watch filed a petition in February 2006 that asked the FEC to allow nonprofits, corporations and unions to fund grassroots lobbying advertisements if a strict set of conditions that prohibits references to elections were met. In August, the FEC voted down a proposed rule that would have exempted such broadcasts.

In a related issue, the U.S. Supreme Court held that the rule on "electioneering communications" can be challenged as applied on a case-by-case basis. The Court's decision opened the door for the Wisconsin Right to Life Committee (WRTL) to pursue its claim that BCRA is unconstitutional as applied to its grassroots lobbying communications.

- Law Meant to Regulate 'Sham' Issue Ads Instead Silences Citizens Groups
- FEC Deadlocks on Grassroots Lobbying Broadcast Exemption
- Grassroots Lobbying Issue Hits the FEC and the Courts

Government Grants and Advocacy Rights

In two separate cases, federal courts struck down a United States Agency for International Development (USAID) requirement that public health groups must pledge their "opposition to prostitution" in order to continue receiving federal funds for their HIV prevention work as a violation of the First Amendment. DKT International and the Alliance for Open Society International had challenged the requirements. While the court's decision applies directly only to the organizations involved in the litigation, it could have a broader impact.

Another court case provided much needed clarification on how federally funded programs should be separated from faith-based activities. These standards are the first clear guidance on what constitutes adequate separation between federally and privately funded activities, and could be adapted to separate federal programs from lobbying activities, which must be paid for with private, not federal, funds. Under the terms of a February settlement between the ACLU and the Department of Health and Human Services (HHS), HHS agreed to withhold a grant to Silver Ring Thing (SRT), a Pennsylvania-based nonprofit that runs faith-based sexual abstinence education programs for teens across the country. The settlement agreement included steps SRT must take to separate government-funded activities from religious activities before it can be eligible for any more federal funding. These steps include guidance on separate and distinct programs, cost allocation, separate presentations, use of religious materials and invitations to religious programs.

- USAID Pledge Requirement Again Found Unconstitutional
- HHS Gives Guidance on Keeping Federal Funds Out of Religious Programs

Civic Participation and the Right to Dissent

Surveillance of Organizations that Dissent

As information on the scope of government surveillance continues to accumulate, the ACLU has requested a congressional investigation into use of counterterrorism resources for surveillance of nonviolent domestic organizations by the Pentagon's Threat and Local Observation Notice (TALON) database, the FBI and Joint Terrorism Task Force. The surveillance of antiwar, religious, animal rights and environmental groups was exposed by ACLU Freedom of Information Act requests. At least two Senate committees have shown interest in examining the issue.

- ACLU Seeks Congressional Hearings on Monitoring of Antiwar Groups

Charities and Anti-Terrorist Financing Policies

Several discreet issues related to charities and anti-terrorism policies emerged in 2006. These developments may be especially important to U.S.-based nonprofits that seek to

respond to natural disasters, famine, and refugee crises in foreign countries.

- In September, the Treasury Department released the third version of its Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities, after allowing public comments on the Dec. 2005 revision. Although the Treasury Department placed greater emphasis on the voluntary nature of the guidelines, the fundamental problems that led the nonprofit sector to call for withdrawal of the Guidelines remain unchanged.
- In a letter sent Nov. 6, a group of nonprofit sector leaders asked the Treasury Department to release frozen funds belonging to charities designated as supporters of terrorism "to trustworthy aid agencies that can ensure the funds are used for their intended charitable purposes." The Treasury Department has not responded.
- A November decision by a federal district court found that two portions of Executive Order 13224 (EO 13224), used to designate organizations as supporters of terrorism, are unconstitutional. The court said EO 13224 lacks standards for designating terrorist organizations, giving the President "unfettered discretion", so that designations could be "for any reason, including for.... associating with anyone listed... or for no reason." The opinion also struck down provisions allowing designation of people and groups "otherwise associated" with terrorism because EO 13224 "contains no definable criteria for designating individuals and groups."

- Treasury Releases Third Version of Anti-Terrorist Financing Guidelines
- Court Says Parts of Executive Order Used to Shut Down Charities are Unconstitutional

Access to Congress Via Email

A group of 105 organizations, spanning the ideological spectrum, sent a letter to House and Senate congressional offices asking them to disable the so-called "logic puzzle", designed to stop e-mail spam from reaching congressional e-mail inboxes. The organizations, led by Consumers Union, National Taxpayers Union, and Earthjustice, argued that constituents should not be required to show a basic knowledge of math or English to express their concerns to their elected members of Congress. According congressional offices, the purpose of the program is to cut down on the amount of mass emails the offices receive daily.

- Nonprofits Protest Barrier to Emailing Congress

2007 Presents Opportunities, Pitfalls for Advancement of Open, Responsible Government

With Democrats in control of Congress, 2007 will usher in an era of renewed

government oversight. At the same time, the slim majority in Congress means it is unlikely that 2007 will be a time for passing legislation unless it is truly bipartisan. For advocates of fairness, honesty, and accountability in government, it is likely to be a busy and exciting year. However, for those who hope for increased spending on low-income programs and social justice initiatives, it may prove disappointing.

Fiscal Policy

Many expect President Bush's budget for FY 2008 to propose slashing domestic spending and that the administration's tax cuts be made permanent. While these proposals may be "dead on arrival," Democrats are not likely to want to pass a budget that has a deficit higher than what the president proposes in his budget. Assuming the president's budget is austere, it will put even greater pressure on Democrats to constrain spending, especially since they are unlikely to propose tax increases.

Rep. David Obey (D-WI) and Sen. Robert Byrd (D-WV) will chair the House and Senate Appropriations Committees. Obey and Byrd may attempt to boost funding in fiscal year 2008 for some domestic discretionary programs including education, Community Development Block Grants, medical research and homeland security. Emergency supplemental spending requests from the administration are unlikely to end, but their fate at the hands of the committee is uncertain. There is some interest in budget reform that would put an end to serial emergency supplementals from the administration to pay for the Iraq war.

On entitlement spending, the pay-as-you-go requirements that Democrats will restart will make it very difficult to increase funding for entitlement programs since they will now have to be paid for, and the Democrats are not eager to propose tax increases. This will put immediate pressure on capped entitlements, such as the State Children Health Insurance Program, since to maintain the same number of children served this year will require additional spending for next year. Additional spending will require either more revenue or cuts in other entitlements.

Getting spending bills done will be a high priority. However, conservatives will most certainly interrupt the process as often as possible to demand more limited government. They did this when their own party was in control, but it was limited. Now there will be no limit.

Given remarks from Obey and Byrd on Dec. 11, one thing is almost virtually certain—FY 2007 funding, which is the current fiscal year, will be delivered through a long-term continuing resolution that will last until the end of the fiscal year. Both committee chairmen said such a move will allow them to focus on moving their agenda forward in the FY 2008 appropriations bills, but agencies and public interest organizations are concerned that a long-term CR would shortchange many important programs through Sept. 30, 2007. Obey and Byrd have alluded to "adjustments" they would make, but that

remains unclear.

With Rep. John Spratt (D-SC) and Sen. Kent Conrad (D-ND) taking over the Budget Committee in their respective houses, there will be greater emphasis on deficit reduction. They will likely make strong efforts to stick to new pay-as-you-go budget rules that require new tax cuts and entitlement spending to be offset by new revenue or spending cuts. They may also be interested in earmark reform and exploring ways to address the $345 million tax gap — the difference between what is owed in taxes and what the government actually collects. Finally, they may explore the idea of a discretionary spending cap.

Both Sen. Max Baucus (D-MT) and Rep. Charlie Rangel (D-NY), the chairs of the tax writing committees, are keen on investigating the tax gap as a means of closing deficits and bringing in much needed revenue for national priorities. One of their top agenda items may be the ever-growing Alternative Minimum Tax, which was originally designed to ensure super-rich Americans would pay some level of income tax. Without reform, the AMT will impact 23.4 million Americans in 2007 (up from 3.5 million currently), a few of whom will make as little as $50,000 per year.

While the change in control of the legislative branch makes it almost assured the estate tax will not be repealed in the 110th Congress, there is still a very real threat of a repeal-like proposal moving forward. Baucus has long been an opponent of the tax, and it will likely fall upon the House next year to act as a backstop against irresponsible and unfair proposals that give more tax breaks to the nation's wealthiest families.

Government Transparency and Oversight

Rep. Nancy Pelosi (D-CA), the incoming Speaker of House, has made it clear that transparency will be a watchword in the new Democratic controlled Congress, with several relevant reforms listed as part of the Democrats' first 100 hours agenda. For instance, we are likely to see requirements that earmarks — line items in appropriations bills that members of Congress designate for specific projects in their districts. Another likely rule change would require that bills be available to Members and the general public well in advance of any vote.

Rep. Henry Waxman (D-CA), who will chair the House Government Reform Committee, is likely to place a high priority on oversight and accountability. Waxman has shown tenacious interest in the manipulation and censoring of agency scientists as well as the extensive overuse of pseudo-classification categories, such as Sensitive But Unclassified, to restrict public access to many types of information important to protecting public health and safety. Waxman has also been concerned about the growth in government contracting and the increase in fraud and abuse that has come with that growth. It is likely that Waxman's committee will seek bipartisan solutions to these types of problems. Finally, Waxman has expressed concerns about the regulatory playing field being tilted heavily in favor of the regulated community's interest. It is quite likely that

Waxman will be keeping an eye on the regulatory process, including OMB's Office of Information and Regulatory Affairs.

In the Senate, Sen. Joseph Lieberman (ID-CT), will be chairing the government oversight committee. Like Waxman, Lieberman is a strong proponent of government transparency. He has been a leading voice on e-government initiatives to make government more accessible to the public. Lieberman has also been very involved in chemical security issues, calling for legislation to insure our chemical plants are safe and secure and that there is some level of public accountability to make sure such efforts are working. Despite long bipartisan efforts in both the Senate and House on chemical security, the Republican leadership decided to pass a weak set of chemical security provisions tacked onto the FY 2007 Homeland Security Appropriations bill, which passed at the end of the 109th Congress. Lieberman may be interested in taking up the issue again despite the provisions passed in the 109th, in order to craft a more complete program.

Improving agency implementation of the Freedom of Information Act (FOIA) is another access issue likely to see greater attention next year. Several bills proposed by Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) to improve the FOIA process received increasing bipartisan support during 2006, and President Bush's Executive Order 13392, issued Dec. 2005, solidified the government-wide commitment to improving FOIA. The order, which required agencies to develop FOIA improvement plans, has been considered by many to be a positive but insufficient improvement. It is likely that a legislative solution will be sought and the Cornyn-Leahy bills may very well be revived.

With transparency being the Democratic watchword, 2007 might be an opportunity to promote a proactive right to know agenda. While FOIA needs to be strengthened, many advocates have hoped that FOIA would be a vehicle of last resort for public access. Ideally, agencies would have an affirmative obligation to disseminate information rather than a passive one, as suggested by FOIA. It is conceivable that the new Congress may consider such ideas, starting in 2007.

Nonprofit Advocacy and Speech Rights

Nonprofit lobbying and advocacy rights may be taken up by Baucus' Senate Finance Committee, although it will not likely be a top priority. Baucus released a report regarding potential abuses by tax exempt organizations in relation to convicted lobbyist Jack Abramoff. In the report, Baucus called for examining lobbying rights of nonprofits. Additionally, the ranking member of the committee, Sen. Charles Grassley (R-IA), has raised concerns about nonprofit voter engagement, which could emerge again in 2007.

The incoming Congress has already indicated that lobby disclosure will be a top priority. The topic is part of the Democrats' first 100 hours agenda, and will likely include an expansion of information collected on campaign contributions and client fees, increased frequency of reporting, electronic report filing, certification of accuracy of filings, and

criminal penalties for false information.

Both Congress and the administration hold the potential to impact nonprofit speech rights when it comes to anti-terrorism policies. The Treasury Department seems determined to keep a tight grip on donations it has seized from a number of charities that the department claims are supporters of terrorism, and no one in the Bush administration has indicated any interest in releasing those funds for legitimate humanitarian efforts. Though Congress has expressed little interest in this issue in the past, there is a possibility that 2007 might be different, especially if there is judicial action challenging Treasury's stance on frozen funds and its terrorist designations.

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