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House Imposes New Ethics Rules

On Jan. 4, even before debate began on the Democrats' promised first 100 hours agenda, the House, by a 430-1 vote, approved rules changes aimed at ending the "culture of corruption" of the past Congress. The changes address relations between lobbyists and members of the House and are meant to curb abuses revealed in last year's scandals involving convicted lobbyist Jack Abramoff and several members of the House. On the next day, the House approved additional rules changes.

The new rules prohibit House members and their staff or designates from accepting meals and gifts from lobbyists or organizations that "retain or employ" them, or from the agent of a foreign principal. This eliminates the former maximum gift values of $49.99 per gift and $99.99 per year, but these amounts will still apply to gifts from non-lobbyists. Existing exemptions to the gift rules, such as widely attended events or personal friendships, will still apply, although many will be obsolete because the new ban extends to a lobbyist's employer. Employees who are not lobbyists can give gifts under

the limits if they are not reimbursed by their employers.

The most extensive changes to the rules involve congressional travel. The new rules provide that, beginning March 1, members of the House:

- cannot accept travel funded by lobbyists or the entity that retains or hires them, or a foreign agent, except for one-day/one-night trips to specific sites, where there is "de minimis" lobbyist involvement. The ethics committee will write rules to govern these situations, which are meant to allow trips to give speeches and attend forums or panel discussions.
- may not travel with a lobbyist present on any segment of the trip. It is not clear if this also applies to the destination event if the lobbyist travels separately.
- cannot pay for non-commercial, non-charter air travel from personal or campaign funds, or use their official allowance for these private jet flights.

Travel expenses that can be paid for by non-lobbyist groups include:

- trips paid for by colleges and universities
- pre-approved trips paid for by non-lobbyist organizations where the expenses are reasonable and the event is official. The sponsor of the trip will be required to certify they have met the requirements for permissible travel, and the House member must file a report within 15 days of the trip, which will be publicly disclosed by the clerk of the House.

The House ethics package also includes a provision meant to end the notorious "K Street Project," where members of Congress used their influence to force lobbying firms and others to consider political affiliation in hiring decisions. The new rule prohibits members "from threatening official retaliation against private firms that hire employees that do not share the Member's partisan political affiliation." The package also requires House employees to participate in annual training on the ethics rules.

The Senate's approach will be similar, but changes are included in legislation instead of new rules. S. 1, sponsored by Majority Leader Harry Reid (D-NV) and Minority Leader Mitch McConnell (R-KY), is based on the ethics bill passed by the Senate last year (S. 2349). However, it will be tougher, calling for a complete ban on gifts and travel paid by lobbyists, rather then increased disclosure. It also includes changes to the Lobbying Disclosure Act (LDA) aimed at increased transparency, including disclosure of grassroots lobbying by lobbyists and firms already required to disclose under LDA. (The House will be taking up similar legislative lobbying reforms, probably in February.)

The Senate is expected to begin a week-long debate on these issues Jan. 9. Amendments to strengthen the bill are expected, with Sens. Barack Obama (D-IL) and Russell Feingold (D-WI) poised to introduce their own bill. It would have stricter travel rules and call for creation of an Office of Public Integrity, which would be an independent

enforcement body.

The LDA changes would increase the frequency of reporting and make reports available to the public electronically. The grassroots disclosure provision is aimed at making large-scale efforts to engage the public on federal legislation more transparent. It would require groups already registered under LDA because of their direct lobbying expenses and firms that spend over $25,000 in a quarter conducting such campaigns on behalf of clients to disclose grassroots lobbying costs.

This proposal has come under fire from some conservative free speech and direct mail operations, but their analysis misinterprets the bill. For more information, see OMB Watch's analysis of the proposal.

Court Upholds Wisconsin Group's Right to Air Grassroots Lobbying Ads

On Dec. 21, 2006, in a victory for grassroots lobbying rights, a federal court ruled that three radio ads Wisconsin Right to Life (WRTL) wished to broadcast in the months before the 2004 election should have been allowed because they did not expressly advocate election or defeat of a federal candidate. The 2-1 decision held that a campaign finance rule banning broadcasts referring to a federal candidate aired during the campaign is unconstitutional as applied to WRTL's lobbying ads, but limited its ruling to the facts of this case. The Federal Election Commission (FEC) and sponsors of the Bipartisan Campaign Reform Act of 2002 (BCRA) appealed to the U.S. Supreme Court and joined in WRTL's request to expedite the case.

WRTL's ads called for Sen. Russell Feingold (D-WI) to oppose judicial filibusters when the issue was before the Senate in the fall of 2004. Under BCRA, "electioneering communications," broadcasts that refer to federal candidates within 60 days of a general election or 30 days of a primary, cannot be paid for with corporate funds, including treasury funds of nonprofit organizations. In August 2004, WRTL filed a lawsuit challenging application of the electioneering communications rule to its ads as a violation of its First Amendment rights. Although the lower court ruled WRTL could not challenge the law, in January 2006, the Supreme Court overturned that decision, saying constitutional challenges could question application of the ban as applied to specific ads. The case was then sent back to the lower court to determine whether or not the ads in question were genuine grassroots lobbying communications that would not be subject to the rule.

Content not Context

The December ruling found that WRTL's three ads addressed a legitimate public policy issue, did not refer to the election, and did not contain language promoting or attacking a federal candidate, and therefore were not subject to the electioneering communications

ban because they did not contain "express advocacy" opposing the re-election of Feingold. The court held that ads about a public policy issue that do not link the issue to a candidate/officeholder's fitness for office cannot be banned. The court said without a link, it is unclear if the ad was intended to have an impact on the election.

For that reason, the majority opinion said the court should limit its review to the specific words of the ads and not examine other factors to determine whether they were intended to influence the election. The court rejected the FEC's arguments that they should look beyond the content of the ad and consider the context and WRTL's intentions in airing it, since WRTL, a 501(c)(4) organization, had opposed Feingold's re-election. In rejecting any assumption that experts can decipher the impact of any ad on an election, the opinion states; "Indeed, to the untutored viewer's eye, the ads, on their face, neither reveal either Senator's thinking on the issue, nor reference Senator Feingold's upcoming election contest. Therefore, plaintiff contends that these ads are a textbook example of genuine issue ads that are neither express advocacy nor its functional equivalent."

The court refused to carve out a general exemption for grassroots lobbying ads, saying exceptions can only be made by the courts on a case-by-case basis. However, it is likely the Supreme Court will rule on the issue before the next blackout, which is Dec. 15, 30 days before the Iowa presidential caucus. The FEC and congressional sponsors of BCRA have appealed to the Supreme Court, and on Dec. 29, 2006, WRTL filed a motion to expedite consideration of the FEC's appeal. U.S. Solicitor General Paul D. Clement's response on behalf of the FEC also urged the court to hear the case during its current term. The court has set a case conference for Jan. 19.

The issue has been hotly debated since the law passed in 2002, and those on both sides of the issue hope the Supreme Court will put the controversy to rest. This most recent ruling drew responses from critics of the law as well as reform groups that want to limit use of soft money in campaigns. Election law expert Bob Bauer praised the decision on his blog, saying the court was right to limit its review to the content of the ad itself and refuse to consider the context. Otherwise, "the proceedings become an intrusive process in which political operatives and consultants are put under oath and questioned about what they meant and intended and thought." Bauer says, "Such a review might also make a sensible citizen's blood run cold." Critics of the decision, such as Prof. Rick Hasen have called the decision a "see no evil approach." Hasen worries that the court's approach will "bring us back to the days before Congress passed McCain-Feingold," allowing broad circumvention of the electioneering communications rule.

House Begins Session with New Process Rules

On Jan. 5, the House approved new rules covering civility, legislative process and fiscal responsibility, the second of two rules packages in as many days that the Democrats passed since taking over the chamber. The new rules should help restore some transparency, fiscal responsibility and fairness to the legislative process in the House and

represent an important first step in restoring faith in the congressional process. But further reforms are still warranted.

In a 280-152 vote, the House passed the "fiscal responsibility" section of the rules package (Title IV), concerning legislation that relates to the federal budget. The package included the return of pay-as-you-go (PAYGO) budgeting rules to the House, where legislation had not been subject to any form of PAYGO since 2002. The new PAYGO rule will require that any new mandatory spending or tax breaks are offset by mandatory spending cuts or tax increases.

The House vote also extended and strengthened an earmark disclosure rule that the last Congress had adopted. The new rule requires that appropriations, authorizations, and tax bills identify the sponsors of earmarks they contain. Earmark sponsors now must also provide a justification for the earmark they have requested, and must publicly certify that neither they nor their spouses will benefit financially from the earmark. The rule adopted by the last Congress had only applied to appropriations bills, and did not require justification of the earmark or certification of who might benefit from it.

The earmark disclosure lists will be available to the public electronically through committee publications or in the Congressional Record. It is unlikely that the information will be in any type of searchable database or if the lists will be available online before the bill in question is voted on. Additionally, according to the rules, any request for an earmark that makes it into a bill is to be subject to "public inspection." It remains unclear how the public inspection process will work.

Another important provision in the budget package bans "reconciliation" bills, which are not subject to Senate filibuster, that increase the deficit. Congress had used the fast-track reconciliation process to pass a deficit-increasing tax bill in 2006 — a practice that runs contrary to the original purpose of reconciliation rules. Unless there are enough votes to waive this provision, it will end the use of reconciliation as a vehicle for passing tax cuts unless they are paid for with other tax hikes or entitlement cuts.

The House also adopted, in a 430-0 vote, the "civility" section of the package (Title III). This section made changes to legislative procedures, particularly regarding conference committees, where delegates from each chamber work out differences in a bill. The new rules require that members receive 48 hours notice of conference committee meetings, and that all information about these meetings is made available to all conferees. It also bars any changes to conference reports after conferees have signed the report. Unfortunately, the provision does not address public access to the conference committee process or any information or decisions made during those meetings.

Other rules in the "civility" title concern debate and amendment procedures. Notably, one rule prohibits the Speaker of the House from holding a vote open longer than fifteen minutes, a technique used to pressure members to change their votes.

Though promising, these rules are lacking somewhat in force and scope. The rules package is not a law and because of that, it will apply only to the House and will lapse in two years, at the end of this legislative session. Each rule is enforced by a point of order that can be overruled by special rules or orders of the House. Finally, there are additional disclosure and transparency changes that could be made to House rules that would open up legislative and budgetary processes to the public, such as opening conference committees to the public.

The Senate will consider separate legislation this week that would adopt similar reforms, including banning gifts, meals, and travel from registered lobbyists, but as legislation, instead of rules changes, the Senate proposals would need to be passed in the House and signed by the president.

Will Congress Stick with PAYGO?

On Jan. 5, the House took a significant step in the direction of fiscal responsibility, adopting pay-as-you-go (PAYGO) budget rules by a 280-152 margin. PAYGO rules bar consideration of legislation including tax cuts or entitlement expansions that would have the net effect of increasing the deficit. While a necessary step toward putting the country back on the right fiscal path, PAYGO rules may make fulfilling the policy goals of the new Democratic Congress significantly more difficult to achieve.

The new PAYGO rules are internal to the House and will create a procedural hurdle called a budget point of order against legislation that violates its terms. Any such violation would not automatically trigger a point of order, and any point of order raised could be waived by a simple majority of the House.

The Senate currently has a weaker version of a PAYGO rule, one that exempts tax cuts while requiring new entitlement spending to be offset. In recent years, Republicans have passed numerous sizable tax cuts without offsetting the cost with alternative tax increases or spending cuts. These tax cuts have contributed significantly to the recent fiscal decline of the federal government. Like the House, Sen. Majority Leader Harry Reid (D-NV) and other key Democrats have pledged a return to PAYGO constraints in the new Congress and are likely to enact a true, two-sided PAYGO rule early in the year.

This may present a problem for the Democrats' agenda. Assuming that both chambers operate under the new House PAYGO rule or a similar statute and resist temptations to waive the rule or create exceptions, Democrats face serious constraints on many of their campaign promises and policy goals. Some of the more popular items among those goals are:

- "patching" and/or permanently reforming the Alternative Minimum Tax (AMT)
- closing the "doughnut hole" on Medicare prescription drug coverage
- cutting interest rates on student loans by roughly 50 percent

- making permanent the research and development tax credit
- addressing shortfalls in children's and veterans' health benefits

Enacting these goals will involve daunting costs. A mere patch on AMT (i.e. holding those not currently liable under it harmless) would cost $70 billion in FY2008. Full AMT repeal - the reported highest priority of House Ways and Means chair Rep. Charles Rangel (D-NY), and Senate Finance Committee chair Sen. Max Baucus (D-MT) and ranking member Sen. Charles Grassley (R-IA) — could cost up to $1.6 trillion over ten years. To close up the Medicare doughnut hole would cost an estimated $400 billion over ten years. There are certainly more goals, with additional costs, but the picture is clear: PAYGO complicates, if not compromises, the Democratic congressional agenda.

There are additional problems with shortfalls in certain "capped entitlement" programs. Under traditional entitlement programs, the baseline grows with demographic and inflationary changes, so funding for these programs continues to grow, even with PAYGO rules. However, for capped entitlements, such as the State Children's Health Insurance Program (S-CHIP), there are no automatic increases due to demographic and inflationary changes. The entitlement is capped at a specific amount. Any increases in spending to keep pace with the number of people served will require new spending and face PAYGO rules. Thus, to continue spending at current levels, PAYGO will require finding offsets to pay for capped entitlements. This is particularly problematic for the S-CHIP program, which, despite a stop-gap measure passed by Congress in December 2006, still faces funding shortfalls that will threaten coverage for children in 17 states this year.

Because of these challenges, early on Democrats tried to rein in expectations in a few areas. For instance, senior House Democratic aides said the promise to cut in half interest rates on student loans will have to be phased in over five years instead of being passed immediately in order to minimize the costs.

But the enormity of the agenda taken as a whole may imperil the whole PAYGO principle, causing Congress to abandon the fiscally responsible mechanism. Rep. John Spratt (D-SC), the chair of the House Budget Committee, issued this enigmatic statement last week after the House voted to reinstate PAYGO: "That's not to say that you couldn't come back later in a budget resolution and have some sort of a dispensation from the rule for a certain-sized tax cut." This sounds like a potential slippery slope back to the fiscal practices of most of this decade.

Some have suggested that only restoring the statutory form of PAYGO, which lapsed in 2001, could bind Congress to follow its own rules. But statutory PAYGO would also constrain Congress' ability to extend the 2001 and 2003 tax cuts President Bush is bent on making permanent, and so might draw his veto.

Further complicating matters, Office of Management and Budget director Rob Portman

said during a speech in Cleveland last week

> "Because spending is the real problem, the Administration supports a stronger version of 'PAYGO' than Democrat leaders have offered. The Administration supports 'PAYGO' for ALL spending, not just so-called mandatory spending. It should also apply to the annually appropriated funds that most of us think of as government spending."

With such divergent views on PAYGO, Congress and the Administration might be headed for statutory stalemate.

For all the perils surrounding PAYGO in 2007, its passage reflects an important departure from recent Congress' disregard for the deficit, and a 180-degree turn away from the "Cheney doctrine" that deficits do not matter.

No one, whether inside of Congress or out, regards PAYGO as a panacea for the deficit or the country's long-term fiscal problems. The new rule itself will not guarantee that the Congress and the President act in a fiscally responsible manner, or that any deficit reduction will, in fact, occur. But if nothing else, the action taken in the House last week is an important acknowledgement of the serious deficit problems facing the nation and that future legislation ought not exacerbate it.

EPA Finalizes Rules for Toxics Release Inventory

Just before the holidays, the U.S. Environmental Protection Agency (EPA) delivered industry an early present — a final rule relaxing reporting requirements for the Toxics Release Inventory (TRI), the country's flagship database on toxic pollution. The agency has moved forward with these changes despite findings in an OMB Watch report, *Against the Public's Will* (released Dec. 14, 2006), that the American public is overwhelmingly opposed to a reduction in reporting on toxics.

EPA has essentially maintained its original proposal in the final rule with only minor changes. The rule increases the reporting threshold for the majority of the 650-plus TRI chemicals tenfold, from 500 lbs. to 5,000 lbs., with a restriction that only 2,000 lbs. of the chemical may be released directly to the environment. Also, for the first time in the 18-year history of TRI, EPA is permitting reduced reporting for the most dangerous category of toxic chemicals, persistent bioaccumulative toxins (PBTs). These ill-conceived changes will leave more people in the dark about what chemicals are in the air they breathe and water they drink.

EPA officials have claimed that the proposed rule does not de-list chemicals from the TRI program, but, according to the agency's own calculations, a 2,000-lb. threshold would likely eliminate detailed reporting for at least 16 chemicals. An initial OMB Watch analysis of the 2004 TRI data indicates that EPA may be underestimating the reporting

loss for chemical pollutants. OMB Watch projects that EPA's reporting changes would have eliminated all detailed reporting on 39 chemicals and the reporting on more than half the pollution created for another 28 chemicals.

"This is a clear case of the agency disregarding the will of the American people," said Sean Moulton, Director of Federal Information Policy for OMB Watch. "The EPA has no scientific or health data supporting these changes — nothing to ensure public safety. The agency is only interested in saving polluting companies a few dollars, at the expense of public health."

"Americans who live near industrial facilities want to know what's going into their air and water," stated Rep. Frank Pallone, Jr. (D-NJ) at a press event organized by OMB Watch. "This [OMB Watch] report shows that the public supports the original intent of the TRI program — to give communities the right to know what kinds of toxic chemicals are being dumped in their backyards. ... [W]e will take every step necessary to stop [the changes] in Congress."

EPA's finalized rule:

1. Fails to take into consideration the overwhelming opposition to EPA's ill-conceived ideas to reduce TRI reporting as clearly evidenced in OMB Watch's report.
2. Leaves the public at greater risk of exposure to dangerous pollution and cripples state governments' ability to track toxic chemicals.
3. Provides minimal savings to companies (estimated by EPA to be between $430 and $790 per chemical).

Against the Public's Will documented opposition to EPA's TRI proposals from 23 state governments and more than 120,000 average citizens, 60 members of Congress, 30 public health organizations, 40 labor organizations and 200 environmental and public interest organizations.

In the months following the close of the public docket, EPA received other strong criticism and resistance to the changes to TRI reporting:

- The House of Representatives passed an appropriations rider preventing EPA from implementing the rule changes;
- Sens. Frank Lautenberg (D-NJ) and Robert Menendez (D-NJ) placed a hold on a Bush administration nominee to protest the proposals;
- EPA's Science Advisory Board formally, in a letter offering the agency unsolicited advice, opposed the proposals; and
- The Environmental Council of States, an association of state governmental environmental agencies, passed a resolution urging EPA to withdraw its proposals.

The OMB Watch report and statements from Lautenberg, Pallone, and Rep. Hilda Solis (D-CA) are available at our TRI Resource Center.

Chemical Security Program Leaves the Public Vulnerable

On Dec. 28, 2006, the Department of Homeland Security (DHS) issued an interim final rule for the creation of a chemical facility security program. However, the program appears to provide little means for increasing security and shrouds important assessments in a veil of secrecy that will prevent any public accountability or oversight.

Congress gave DHS the authority to create a safety certification program in the Department of Homeland Security Appropriations Act of 2007, signed into law on Oct. 4, 2006. The chemical security provisions of the bill were the result of a backroom deal that excluded bipartisan agreements worked out in the House and Senate. As previously reported in the *Watcher*, House and Senate Democrats deemed the backroom agreement between Sen. Susan Collins (R-ME) and Rep. Peter King (R-NY) to be "inadequate chemical security measures promoted by the chemical industry."

According to the interim rule, DHS will assess the risk level of every chemical facility. The standards by which such an assessment is made, though, will remain secret. For the highest risk facilities, DHS will require the submission of a security plan, which will then be reviewed and approved by DHS. A major weakness, however, is that only the highest risk facilities are subject to scrutiny. Critics say that other deficiencies associated with the program are that facilities can be approved by third parties (including state governments and private sector entities) without individualized oversight and approval of DHS, and at no point will facilities be required to use safer procedures or technologies.

Public interest and environmental organizations, including OMB Watch, have also called for a chemical security program that keeps communities informed about the risks they face and steps being taken to protect them. Information regarding whether or not certification of a facility's plan is granted or denied would create pressure on unsafe facilities to improve their status. The proposed rule, though, would exempt a great deal of information from public disclosure. DHS proposes the creation of a new category of sensitive but unclassified information (SBU), despite the numerous documented problems associated with SBU. The interim rule would prevent all information marked as Chemical-terrorism Security and Vulnerability information (CVI) from being disclosed to the public.

This new information category would severely restrict access to a wide range of information. Not only would the detailed security plans, the notes from DHS audits and information on vulnerability points at uncertified chemical facilities be subject to CVI markings, but basic information regarding whether or not a facility is a high risk facility and whether or not a plant is safe and certified by DHS would also be rendered secret. Such information is not detailed enough to be used by terrorists but would be of

immense value to the public in ensuring health and safety. There is also vagueness surrounding who can mark information CVI, what information will qualify as CVI, and how the program will be managed. The rule establishes a decentralized authority to mark information as CVI, which, coupled with the lack of specific criteria for evaluation and absence of any mention of training, could easily lead to excessive use of the CVI marking.

The 9/11 Commission and others have repeatedly noted that the safety of chemical facilities across the country has been a point of weakness in protecting against a potentially catastrophic terrorist attack. Though it has been over five years since 9/11 and though there were strong bipartisan agreements worked out in Congress, the federal government has done little to improve the safety of chemical security facilities across the country. The 110th Congress has an opportunity, however, to improve a bill passed at the end of the last term and encourage a robust DHS chemical security program that is universal and uniform in coverage, requires the use of safer technologies and procedures, and provides strict oversight and public accountability.

EPA Library Closures on Hold

The U.S. Environmental Protection Agency (EPA) has performed an about-face on its plan to close numerous libraries run by the agency. EPA has closed five regional libraries but has announced that the agency will not close any of its remaining 22 libraries until it can present its plan to Congress.

The EPA began closing several libraries and destroying or recycling large amounts of paper data this fall in response to a proposed $2.5 million cut in the budget for the library system. The agency has already closed libraries in Chicago, Washington DC, Dallas and Kansas City and limited public access in four others.

On Nov. 30, 2006, shortly after the elections that placed Congress in Democratic control, four Representatives wrote to EPA Administrator Stephen Johnson expressing serious concerns about the library closures. In their letter, Reps. John Dingell (D-MI), Bart Gordon (D-TN), Henry Waxman (D-CA) and Jim Oberstar (D-MN), requested that "destruction or disposition of all library holdings be immediately ceased."

EPA officials have assured the lawmakers that plans to close additional libraries have been placed on hold pending congressional review. The agency has defended its plan with explanations that the closures are part of a modernization effort to digitize information and make it available online. Critics counter that digitization efforts are limited and much information will be lost. Scientists have vehemently opposed the library closures, saying much of the information being locked in storage or destroyed isn't yet and may never be available online.

The critics are supported by findings in a recent report from the Congressional Research Service (CRS). In the report entitled *Restructuring EPA's Libraries* the CRS notes that

within EPA's plans "which materials will be retained, dispersed, or discarded, and the amount of time and funding needed to complete this [restructuring] process, are uncertain."

Another letter from House Democrats, dated Sept. 19, 2006, has initiated a formal investigation of the EPA library closures by the Government Accountability Office (GAO). The letter, signed by Waxman, Gordon, and Dingell, asked GAO to investigate several specific issues, including the impact the closures will have on services, the process and criteria EPA used to develop its plan, and if the public and other users of the libraries had the opportunity to provide input on the plan. The eventual GAO report on EPA's activities may shed more light on the areas of concern to lawmakers.

OIRA Back Door Open to Dudley?

Susan Dudley is likely to be named as a senior consultant in OMB's Office of Information and Regulatory Affairs (OIRA), according to a BNA story published Jan. 8. If true, Dudley would be in a position to influence OIRA decisions about regulations across all government agencies. Dudley was nominated by President Bush in 2006 to be the administrator of OIRA to replace John Graham, who resigned in February of that year. Thanks to widespread opposition from the public interest community, Capital Hill, and individuals, the Senate failed to hold a vote on her nomination before the end of the 109th Congress because she lacked sufficient support in committee.

OMB Watch and Public Citizen released a report, *The Cost is Too High: How Susan Dudley Threatens Public Protections*, documenting Dudley's extreme views based on her writings and comments as a scholar at the Mercatus Center, an industry-financed, anti-regulatory think tank. Opposition also arose over potential conflicts of interest because her husband has responsibility for regulatory issues at EPA. Her nomination signaled an attempt by Bush to push further the anti-regulatory agenda that Graham started as OIRA administrator from 2001-2006.

If Bush names Dudley to such a senior consultant position, it would be another example of his actions not matching his rhetoric on the importance of bipartisanship. The opposition to Dudley may have prevented Bush from making a recess appointment after the 109th Congress adjourned in December, but a decision to bypass the nominating process altogether is a figurative finger in the eye to the new Congress. Rather than offering a candidate with less extreme views about the regulatory process and seeking a compromise nominee, Bush would, if he pursues this appointment, be continuing his "my way or the highway" approach to congressional relations, albeit by backdoor methods.

According to the BNA story, Dudley would be an advisor to the current acting administrator, a position she could hold for the remainder of the Bush presidency. This might also be a temporary assignment as Bush could still make a recess appointment to

make her the administrator, allowing her to serve until the end of his administration. There are few congressional recess days scheduled as a strong work ethic has been embraced by the Democrats. Civil service law might also allow moving Dudley from the senior advisor role to acting administrator, but her time in that position would probably be limited.

EPA: Home for the Holidays

While legislators were leaving Washington and families across America spent time celebrating the holidays, the U.S. Environmental Protection Agency (EPA) continued to issue rules and contemplate regulations. Several issues received little attention from media and lawmakers despite their potentially significant impact on the nation's public health and welfare. Here is a brief summary of some of EPA's work during late December and early January.

EPA and OMB Ease Disposal Requirements on Certain Hazardous Substances

EPA and the White House Office of Management and Budget (OMB) continue to argue over the provisions of a waste regulation rule, according to BNA news service. EPA will likely reissue the rule, originally proposed in October 2003, soon if the two administrative entities can reconcile their differences.

The proposed rule would reclassify certain hazardous waste substances as solid waste. Though both classes of substances are regulated under the Resource Conservation and Recovery Act (RCRA), hazardous substances are subject to more stringent disposal requirements.

The impasse occurs not over the rule itself, but over how states are to interpret its impact. Under RCRA, states must have in place waste disposal programs that are "no less stringent than" federal programs. These are to include comprehensive recycling programs.

EPA asserts the proposal — which clearly eases disposal requirements for the waste management industry — is less stringent than existing regulations. However, OMB claims that, because the resulting increase in solid waste would increase the amount of waste subject to recycling, the proposed rule is a more stringent regulation. Therefore, in OMB's view, all states should implement the proposed rule.

BNA reports that an EPA official described the rule as in its "final administrative review." OMB was to complete its review of the proposed rule by Jan. 8, but an OMB official tells OMB Watch the review period has been extended by 30 days.

EPA Rules that Drinking Water Facilities Assess 25 New Contaminants, not Perchlorate

On Dec. 21, EPA issued a final rule which will expand the list of chemicals, from 90 to 115, that drinking water utilities are required to monitor. EPA uses the monitoring data to identify opportunities for drinking water regulation.

However, while the proposed list of chemicals included perchlorate, the final list does not. Perchlorate, a chemical commonly found in rocket fuel, interferes with thyroid function and is a possible carcinogen.

No federal or state regulation of perchlorate currently exists. On Jan. 4, Sens. Barbara Boxer (D-CA), Dianne Feinstein (D-CA) and Frank Lautenberg (D-NJ) introduced legislation addressing perchlorate contamination.

According to BNA news service, an EPA official commented the agency is examining other sources of perchlorate exposure such as food, as well as assessing the health impacts of the chemical.

EPA Proposes Relaxed Controls for 'Major Source' Air Polluters

On Jan. 3, EPA published a proposed rule potentially allowing "major source" air pollutant emitters to be downgraded to "area source" emitters. Major sources are those emitting more than 25 tons of hazardous air pollutants per year. Major sources are subject to maximum achievable control technology (MACT), which often results in a significant reduction in air pollution. Area sources are not subject to the MACT standard.

Under the current rules, major sources retain that designation permanently — a policy EPA refers to as "once-in, always-in." The proposed rule would repeal the current policy. EPA argues the proposed rule would encourage all facilities to maintain pollution levels below 25 tons per year.

However, critics argue more pollution will ultimately occur if the number of facilities subject to the MACT standard decreases. The proposed rule raised the ire of Boxer. In a press release, she stated: "We need less, not more, cancer-causing air pollution. This proposal will allow thousands more pounds of cancer-causing air pollution to be emitted each year." Boxer went on to promise action during the 110th Congress: "I have said that the days of rollbacks without scrutiny are over, and I meant it."

Boxer's comments may raise the public profile of this issue and cause EPA to consider her objections before the agency issues a final rule. The public comment period on the proposed rule lasts until March 5.

EPA Takes Preliminary Step on Valuating Ecosystems

The federal government's regulatory process requires agencies to perform cost-benefit analyses when formulating new rules. This requirement often complicates the work of the EPA due to the complexity and abstractness of some environmental benefits. With

this in mind, the EPA released its "Ecological Benefits Assessment Strategic Plan" the week of Dec. 18. The plan attempts to "help improve Agency decision making by enhancing EPA's ability to identify, quantify, and value the ecological benefits of existing and proposed policies."

The plan's intent is to influence EPA managers, analysts, and scientists, and is not itself a rule. The directive contains both short-term and long-term objectives and focuses on incorporating "ecological benefits" into EPA cost-benefit analysis. It is unclear at this early stage whether EPA's objectives would more accurately value intangible aspects of the natural environment.

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Senate Passes Ethics and Lobbying Reform Bill

On Jan. 18, the Senate passed its first major piece of legislation, S. 1, the Legislative Transparency and Accountability Act of 2007. The sweeping measure covers congressional travel, gifts, and lobbying activity and increases disclosure. However, senators rejected proposals to create an independent ethics panel and to require big dollar grassroots lobbying campaigns to disclose their spending. Grassroots lobbying disclosure and other proposals now move to the House, which has passed its own ethics rules, but has yet to act on amending the Lobbying Disclosure Act.

Travel and Gifts

Congressional travel reform followed last year's revelations of lavish trips and "junkets" that allowed lobbyists undue influence with lawmakers. S. 1 prohibits organizations that employ lobbyists from arranging or paying for congressional travel, but charities and

religious organizations are allowed to pay for travel with approval from the Senate Ethics Committee, which will determine whether the trip is educational and whether the funding comes from a lobbying firm. Travel on corporate aircraft is still allowed under the legislation, but it will now become more expensive as Senators will have to pay the full charter rate. One-day trips and travel paid by universities are permitted.

Members will also be required to file travel gift reports, which will be available in an online database by the beginning of 2008. Gifts from lobbyists and organizations that hire lobbyists are strictly banned, and gifts of event tickets from non-lobbyists must be reported at their full value.

Lobbying Changes

S. 1 contains important measures that change lobbying rules and provide more transparency in the system. It increases the frequency of reporting from semi-annually to quarterly and lowers the threshold of expenditures for reporting. In addition, current paper reports will be replaced with electronic reports, which will be publicly available on an Internet database. Other changes to the Lobbying Disclosure Act include:

- All campaign fundraising activity by lobbyists, including bundling (contributions from their clients and others) must be disclosed. According to the *New York Times*, "Of all the bill's provisions, it was the disclosure requirements for bundled checks that met the stiffest resistance behind the scenes in the Democratic caucus because of the potential to make it harder for incumbent lawmakers to tap K Street lobbyists as surrogate fund-raisers, aides involved in negotiations over the bill said, speaking anonymously because the talks were confidential."
- Lobbyists cannot host events that pay tribute to members of Congress, even at party conventions.
- The revolving door prohibition, which bars former members of Congress from lobbying during a "cooling off period," will be extended from one year to two and will be broadened to include "lobbying activity," not just direct lobbying contacts. As Sen. Russell Feingold (D-WI) said on the Senate floor, "They must refrain from running the show behind the scenes. They won't be able to strategize with and coordinate the lobbying activities of others who are trying to influence the Congress. Members who have just left Congress should not be capitalizing on the clout, access, and experience they gained here to lobby their colleagues, whether they are doing the lobbying themselves or instructing others."
- Members of Congress will not be allowed to negotiate employment involving lobbying while they are in Congress, and senior congressional staff will be required to notify the Senate Ethics Committee within three days of negotiating for future employment. Spouses of members of Congress will be prohibited from lobbying, unless they were registered lobbyists prior to their spouse's election or more than one year prior to marrying the Member.
- S. 1 increases the penalty for government officials who falsify their personal financial disclosure forms, from $10,000 to $50,000, and establishes a

maximum one-year prison sentence. The penalty for failing to comply with lobbying disclosure laws is also increased, from $100,000 to $200,000.

It was disappointing that senators voted to strip a provision that would have required grassroots lobbying disclosure, which was aimed at big money grassroots lobbying campaigns, and the Senate missed an opportunity for greater accountability by not adding a requirement for independent enforcement of ethics violations. These and other reform proposals now move to the House, which will be taking up legislative changes on lobbying reforms, possibly in February. The two versions of this legislation will then need to be reconciled through a House-Senate conference committee.

Misinformation Campaign Defeats Grassroots Lobbying Disclosure in Senate

When the Senate passed S. 1, the Legislative Transparency and Accountability Act of 2007, on Jan. 18, it left out a provision that would have required big dollar federal grassroots lobbying campaigns to disclose their spending and the identity of their clients. The provision was taken out after an intensive campaign by opponents that was primarily based on inaccurate information or interpretations that were at odds with the stated intentions of the sponsors. Supporters of the provision, including OMB Watch, have promised to pursue it when the House considers its amendments to the Lobbying Disclosure Act (LDA). OMB Watch has proposed clarifications to the language that are intended to eliminate contradictory interpretations and ensure that the disclosure requirements are limited to big dollar campaigns. In the meantime, misinformation spread by some conservative groups and advertising firms have scuttled an effort to prevent corruption in Congress by bringing greater transparency to the lawmaking process.

Sec. 220, the grassroots disclosure provision of S. 1, would have required organizations that are required to register under the LDA - those that have an employee who spends more than 20 percent of his or her time on *direct* lobbying and spend $10,000 or more per quarter on *direct* lobbying - and spend over $25,000 per quarter on *grassroots* lobbying to disclose information about their grassroots lobbying activities. In addition, it would require entities that accept fees for grassroots lobbying on behalf of another to register and report if their grassroots lobbying fees exceed $25,000 per quarter.

The complex language in the bill, coupled with the complexity of the LDA, created substantial confusion and led to widely differing interpretations of who would be required to report federal grassroots lobbying. For example, despite the stated intent of the sponsors, the Congressional Research Service (CRS) report on identical language in last year's ethics bill interpreted Sec. 220 of S. 1 to say it "Excludes paid efforts to stimulate grassroots lobbying from the exemption from the registration requirement (thus, requiring LDA registration for such activities, regardless of low income or expenses)." However, a spokeswoman for Sen. Joseph Lieberman (ID-CT), a sponsor of

the provision, told the *Congressional Quarterly* on Jan. 17, "There's nothing in this measure that will stop, deter or inhibit anyone from petitioning the government. We're talking about disclosure...when large sums of money are spent by professional organizations."

This did not stop conservative groups from attacking the bill with wildly misleading rhetoric. For example, direct mail guru Richard Viguerie at GrassrootsFreedom.com said, "The Senate would make exercising your First Amendment rights a crime." As a result, groups like Concerned Women of America lobbied against Sec. 220, calling it "a very real and serious threat that would restrict Americans' constitutional right to learn about pending bills and contact their congressmen about them."

Statements from supporters such as the Center for Lobbying in the Public Interest pointed out that Sec. 220 would create a more level political playing field, since "Under current tax law, public charities and other nonprofit organizations are required to file reports on their grassroots lobbying with the Internal Revenue Service. Private sector groups and their lobbyists are not." The Alliance for Justice also urged the Senate to support Sec. 220, noting that the language had been revised from earlier versions so that it "dramatically lessened the impact on nonprofit organizations" and noted that "the addition of the grassroots lobbying provision will not change the registration thresholds under the federal Lobbying Disclosure Act." In a Jan. 12 statement, OMB Watch said, "Disclosure of big dollar grassroots campaigns will bring transparency to the process, so the public will know who speakers are and whose interests they represent."

On Jan. 11, Sen. Bob Bennett (R-UT) and 13 co-sponsors introduced an amendment to strip the grassroots lobbying disclosure provision from S. 1. Support came from a surprising source - Sen. John McCain (R-AZ), who had proposed a similar grassroots lobbying disclosure provision in December 2005. In his announcement of Sec. 105 of the Lobbying Transparency and Accountability Act of 2005, McCain explained how the abuses uncovered by the Senate Indian Affairs subcommittee demonstrated the need for disclosure of big grassroots spending on federal legislation, saying,

*"**It requires greater disclosure of the activities of lobbyists, including for the first time, grassroots lobbying firms**....During its investigation, the Committee also learned about unscrupulous tactics employed to lobby Members and to shape public opinion. We found a sham international think tank in Rehoboth Beach, Delaware, established, in part, to disguise the true identity of clients. We saw phony Christian grassroots organizations consisting of a box of cell phones in a desk drawer. I would submit that in the great marketplace of ideas we call public discourse, truth is a premium that we cannot sacrifice. Through these practices, the lobbyists distorted the truth, not only with false messages, but also with fake messengers. I hope by having, for the first time, disclosure of grassroots activities and the financial interests behind misleading front groups, that such a fraud on Members and voters can be avoided."*

Despite opposition to the Bennett amendment from government reform groups and

many nonprofits, it was approved by a 55-43 vote, with all Republicans and eight Democrats supporting it. The House could take up LDA amendments in February or March, and any grassroots lobbying disclosure provision should be clarified to ensure that only large-scale grassroots campaigns are affected. That way, the debate can be about the merits of grassroots lobbying disclosure.

Supreme Court to Hear Challenge to Ban on Broadcasts (Again)

The long-running debate over whether grassroots lobbying broadcasts should be exempt from the federal ban on "electioneering communications" may finally be resolved in 2007. On Jan. 19, the Supreme Court agreed to hear *Federal Election Commission v. Wisconsin Right to Life* during its current term, making a final decision before the 2008 elections likely. The case challenges the McCain-Feingold campaign finance rule barring corporations, including nonprofits, from paying for broadcasts that mention federal candidates 60 days before a general election or 30 days before a primary. The Supreme Court decision is likely to determine how the Federal Election Commission (FEC) uses its power to create exemptions to the rule and may generate action in Congress as well.

In 2006, the high court ruled that Wisconsin Right to Life (WRTL) could challenge the law as it applies to its grassroots lobbying ads, sending the case back to a lower court to review the facts in order to determine whether the First Amendment was violated. In 2004, WRTL ran radio ads asking the public to contact the state's U.S. Senators about judicial filibusters. Sen. Russell Feingold (D-WI) was running for re-election at the time, so WRTL had to discontinue the ads, even though they did not refer to the election, name any political party or characterize Feingold's position on the filibuster issue. In December 2006, the lower court ruled in favor of WRTL, saying the rule is unconstitutional as applied to them.

However, the court did not create an exemption for all grassroots lobbying ads, ruling that the issue must be brought before the courts on a case-by-case basis. This is not a realistic solution to the problems created by the electioneering communications rule, since the courts move so slowly and many nonprofits could not afford to litigate the issue. But if the Supreme Court rules in favor of WRTL, the FEC may invoke its powers under the Bipartisan Campaign Reform Act of 2002 (BCRA) to create an exemption in line with the court's decision. In 2006, when OMB Watch joined a group of nonprofits that asked the FEC to create a grassroots lobbying exemption, the agency decided to defer action until it has further guidance from the courts.

The Supreme Court order set out a schedule that will have all briefs submitted by April 18, followed by oral argument, making a decision possible by late June. In a press release, WRTL attorney James Bopp, Jr. of the James Madison Center for Free Speech said a favorable ruling will protect "the First Amendment right of citizens to lobby their members of Congress about upcoming legislative action, even in the proximity of

elections."

The case is being appealed by the FEC and the sponsors of BCRA, including Sen. John McCain (R-AZ). In contrast to his willingness to bar broadcasts of grassroots lobbying messages in this case, McCain voted against disclosure of grassroots lobbying costs for big dollar federal lobbying campaigns in S. 1, the Senate ethics and lobbying reform bill passed Jan. 18.

Senate Passes New Rules on Earmark Disclosure

The Senate on Jan. 18 passed a comprehensive lobbying and ethics reform bill — S. 1, the Legislative Transparency and Accountability Act of 2007 — that included an overhauled earmark disclosure rule. After nearly two weeks of floor debate featuring reversals, stalemates, and a brief filibuster, the Senate voted 96-2 to pass the bill, widening the definition of earmarks and increasing their public disclosure requirements. S. 1 must be passed by the House and signed by the president before any of it, including the Senate rules changes, can take effect.

Senate Majority Leader Harry Reid (D-NV) and Minority Leader Mitch McConnell (R-KY) initially introduced an earmarks package modeled on the House disclosure rules adopted last fall. They did, however, add a key provision, requiring that prior to consideration of any bill, amendment, or conference report, a separate list identifying all earmarks must be made available to all Senators and be posted on the Internet at least 48 hours in advance. The Senate version is perceived as far weaker than the earmark rules changes adopted by the House in early January.

In response, Sen. Jim DeMint (R-SC) offered an amendment to expand the scope of earmarks subject to disclosure rules. Reid suffered a setback on the bill on Jan. 11, when he lost a vote to bypass consideration of the DeMint amendment. DeMint's proposal, nearly identical to House Speaker Nancy Pelosi's (D-CA) language in the House rules package, survived by a 51-46 margin (60 votes were needed to set the amendment aside). Reid then used parliamentary strong-arm tactics to not hold a final vote, giving the perception he was going to lobby his own caucus to vote against the DeMint provision. In a surprise reversal the next day, Reid endorsed the DeMint amendment, after Sen. Dick Durbin (D-IL) made minor changes to the original DeMint language. In the end, the Senate supported a much stronger earmark disclosure requirement than what was originally in the bill.

While it seemed this agreement freed the bill from gridlock and ensured its passage, another amendment, unrelated to the underlying bill, almost derailed the entire effort. The GOP filibustered a vote to limit debate on the bill when Sen. Robert Byrd (D-WV) objected to a line-item veto or "enhanced rescission" proposal offered by Sen. Judd Gregg (R-NH). Byrd objected briefly even after Gregg agreed to pull his measure and re-

introduce it at a later date.

The final bill included several significant provisions, including another DeMint amendment to allow the Senate to strike from conference reports earmarks that had not been included in either chamber's version of the bill. Though little noted, this amendment creates a special point of order for Senators to surgically remove such earmarks and send the bill back to the House otherwise intact. Originally part of last year's Senate ethics and lobbying bill that was adopted but never enacted, the DeMint amendment would halt the longstanding congressional practice of “air-dropping” items into legislation on the verge of being cleared for the president’s signature.

Under S. 1, disclosure rules also kick in earlier in the legislative process than before, at the point where earmarks are formally added to a bill at the committee level. At that point, the committee is directed to disclose the sponsoring lawmaker, the intended recipient, the earmark’s purpose, and include a certification that it will not yield a financial benefit to the sponsor or the sponsor's family. This information must be made available online in a searchable format on the committee's website.

An amendment by Majority Whip Richard Durbin (D-IL) that mandates disclosure of earmarks contained not only in the language of a bill proper but also in prints or reports accompanying the legislation passed unanimously. A proposal by Sen. Tom Coburn (R-OK) to prevent lawmakers' immediate family members from benefiting from earmarks was adopted by voice vote. Like the corresponding House provision, the bill handles tax expenditures by defining earmarks as tax deductions, credits, exclusions or preferences to ten or fewer beneficiaries.

S. 1 also made other reforms to the daily legislative processes that will open up Congress to more public scrutiny. Among these changes are a requirement that all conference reports be made available to all members and online to the general public for a period of 48 hours before consideration, and a requirement that all committees and subcommittees have to release a transcript, video, or audio recording of all meetings within 14 days. S. 1 also expressed the sense of the Senate that conference committees should hold regular, formal meetings of all conferees that are also open to the public, give adequate notice of the time and place of those meetings, and allow full and complete debates of the matters before conference committees.

The debate on S. 1 saw a temporary dissolution of the bipartisan mood that prevailed in the Senate at the opening of the session, especially during the GOP filibuster and the impasse when Byrd opposed future Senate consideration of the Gregg amendment. But Reid broke the logjam, clearing the way for what he grandly called the "most significant legislation in ethics and lobbying reform we've had in the history of this country." Others compared it to the most significant changes since Watergate.

The fate of the bill is not yet clear, as many of the provisions affect the House, which has yet to consider such legislation. Democrats were able to quickly enact rules changes in

the House, but moving legislative changes on earmarks may be more difficult. House leaders have not yet said when they might consider the Senate bill or what the scope of the House version would include.

Congress Commits More Time to Doing Its Job

After one of the shortest legislative sessions on record, the 110th Congress has scheduled substantially more days in session for 2007. Hoping to avoid the "do-nothing" label that haunted the 109th Congress, Democratic leaders are hoping the additional time will not only allow for the adoption of their initial "100 hours" agenda, but also the timely completion of all appropriations bills before the start of the next fiscal year. Despite the additional days in session, however, it may still be difficult for Democrats to enact their priorities.

After Democrats won back control of both the House and Senate in the 2006 elections, the incoming leadership of the House promised to put an end to the typical three-day workweeks that left little time for actual legislative business in 2006. Incoming Majority Leader Steny Hoyer (D-MD) said the first step was to return to a full five-day work week, including scheduling votes on Mondays. This change gives members a reason to return to Washington at the start of the week or risk missing votes.

Hoyer and the Democratic leadership crafted a legislative schedule for 2007 that included a 28 percent increase in the number of days in session (from 125 to 160), and more importantly, a 54 percent increase in days where legislative votes will be held (from 72 to 111). The Senate has a net of three more days in session through Labor Day and is likely to have a schedule similar to the one published by the House for September and October.

The extra time in Washington seems to be making a difference already. After the election, House Democrats pledged to enact legislation to address critical priorities within the first 100 legislative hours. House Speaker Nancy Pelosi (D-CA) vowed that, "Democrats will get to work immediately to restore civility, integrity, and fiscal responsibility to the House, while increasing prosperity, opportunity, and security for all Americans." Since Jan. 4, they have passed six bills as part of that "100 hours agenda" (H.R. 1 - H.R. 6) by healthy majorities - attracting at least 24 Republicans on each bill.

The Senate, traditionally a slower moving body, has also had similar success, passing a major overhaul to ethics and lobbying rules last week in its first bill (Click here and here for summaries of that bill). The Senate will move to debate a raise to the minimum wage this week and hopes to pass an increase by the end of January.

Despite the increased days in session and early success, it may be equally hard for the Democrats to fully enact their top agenda items and all the FY 2008 appropriations bills on time. With only a one-vote majority in the Senate and a president from the other

party in the White House, Democrats will have to craft moderate legislation that not only attracts sufficient support to overcome a possible filibuster in the Senate, but that will also be acceptable to President Bush. This tenuous balance may create long delays and roadblocks centered around controversial issues such as supplemental funding of the Iraq war, stem cell research, tax policy, and adequately funding domestic programs to meet the increasing needs in communities around the country.

While the Democrats may not be able to pass as many of their top priority items as they would like, the increased time Congress will spend working in Washington will certainly allow them the opportunity to conduct more thorough oversight of government and investigate troubling and unacceptable performance in a wide variety of areas and topics.

Congressional oversight has been almost nonexistent during the Bush presidency, continuing a downward trend that started in the late 1960s. Joel Aberbach, a political scientist at UCLA reported the overall number of oversight hearings in the House fell from 782 during the first six months of 1983 to 287 during the first six months of 1997 — a drop of 63 percent. The falloff in the Senate between 1983 and 1997 is equally large — 59 percent (from 429 to 175). Last fall, Norm Ornstein and Thomas Mann cited a steady drop in committee and subcommittee meetings and hearings overall as one of the main impediments to proper congressional oversight. "In the 1960s and 1970s, Congress held an average of 5,372 committee and subcommittee meetings every two years; in the 1980s and 1990s, the average was 4,793; and in 2003-4, it was 2,135."

A longer legislative session has provided the opportunity for Democrats to stay true to their campaign pledges to conduct rigorous oversight and pass appropriations and other legislation in a timely manner, but does not assure them success in either endeavor. It still falls to the leadership and committee chairs to actually hold hearings, find compromise and move legislation before the new Congress can truly be judged a better functioning institution than the last one.

The Fiscal Impact of House 100 Hours Agenda

On Jan. 18, the House Democrats succeeded in passing the final piece of their six-part "100 hours" agenda. The combined fiscal impact of the bills — which implement 9/11 Commission recommendations, close energy tax loopholes and more — is significant: the Congressional Budget Office (CBO) has estimated $21.1 billion in savings and revenue over the next ten years if the bills are signed into law.

H.R. 1: Implementing the 9/11 Commission Recommendations Act of 2007
H.R. 1 makes a number of changes to homeland security policy, all of which will have a negligible impact on federal finances. It does, however, issue new cargo inspection requirements that will impose some costs on businesses that are responsible for screening airplane cargo and shipping containers.

CBO estimated 10-year cost: $0

H.R. 2: Fair Minimum Wage Act of 2007

H.R. 2 changes the Fair Labor Standards Act (FLSA) to increase the federal minimum wage in three steps, from $5.15 per hour to $7.25 per hour over the next two years.

According to a CBO estimate dated Jan. 11, H.R. 2 would have no significant effect on the direct spending and revenues of the federal government. Because a very small number of federal employees are paid the federal minimum wage, the act would have a minor effect on the budgets of federal agencies that are controlled through annual appropriations.

There is speculation that a package of tax "sweeteners" for small business, the Small Business And Work Opportunity Act of 2007, may be combined in the Senate with the minimum wage increase. According to Citizens for Tax Justice, the biggest tax break is an extension and expansion of the Work Opportunity Tax Credit. Other breaks would allow restaurants and retail stores bigger tax write-offs and expand the number of businesses allowed to use the more advantageous cash method of accounting.

In a change from recent tax policy, the tax package is entirely offset. The biggest offset would restrict an especially egregious form of tax shelters known as sale-in, lease-out (SILOs). These arrangements, which can involve an American bank buying something like a subway or sewer system in another country and "leasing" it back to the foreign government for tax advantages, were already banned in 2004, but that ban would retroactively apply to deals made before 2004 under this provision.

CBO estimated 10-year cost: $0

H.R. 3: Stem Cell Research Enhancement Act of 2007

This bill has no associated fiscal impact. It directs "the Secretary [to] conduct and support research that utilizes human embryonic stem cells in accordance with this section." There is no new program that would require additional federal expenditures.

CBO estimated 10-year cost: $0

H.R. 4: Medicare Prescription Drug Price Negotiation Act of 2007

H.R. 4 enables the federal government to negotiate with private companies over the price of prescription drugs purchased for the Medicare Part D program. CBO estimates this new power will not produce lower drug prices because drug companies will still have the upper hand at the bargaining table.

Rep. Henry Waxman (D-CA) has disputed this projection. Waxman's committee produced a report that found the new bill would save between $61 billion to $96 billion. The report reached this estimate by extrapolating from the cost of prescription drugs purchased by a Veteran Affairs Department prescription drug program. This comparison may be inexact, however, because the VA program uses negotiating tools that H.R. 4

does not grant to Medicare.

CBO estimated 10-year cost: $0

H.R. 5: College Student Relief Act of 2007

H.R. 5 changes some of the ways the federal government regulates student loans. It imposes reduced student loan rates, increased fees for lenders, and a reduced share of default collections retained by nonfederal guaranty agencies. Over ten years, these changes are projected to add $7.1 billion to the federal Treasury. Nearly all of the new savings will be realized after 2013, when student loan interest rates are scheduled to return to the pre-law level.

CBO estimated 10-year savings: $7.1 billion

H.R. 6: CLEAN Energy Act of 2007

According to a CBO estimate, through changes related to the development of federally owned resources, particularly oil and natural gas in submerged lands on the Outer Continental Shelf (OCS) and conservation of resources fee levies, H.R. 6 would reduce direct spending by $2.6 billion over the 2007-2012 period and by $6.3 billion over the 2007-2017 period.

In addition, the Joint Committee on Taxation (JCT) estimates that, since income from oil, natural gas or any associated primary products would no longer qualify for an income tax deduction, the legislation would increase revenues by $2.9 billion over the 2007-2012 period and by $7.7 billion over the 2007-2017 period. The outlay savings and revenue increases from enacting H.R. 6 would total $5.5 billion and $14.0 billion, respectively, over those periods.

CBO estimated 10-year savings and revenue: $14 billion

Congress Can Shape War Policy through Appropriations Process

President Bush's plan to increase troop levels in Iraq has stirred up debate recently over the extent to which Congress can direct war policy. While some have gone so far as to suggest that Congress has the authority to do no more than make symbolic statements, in truth, the appropriations process gives Congress significant — albeit restricted — power to shape the course of war policy.

Using the Power of the Purse

One of Congress's strongest tools for guiding war policy stems from the "power of the purse," which gives Congress the power to introduce legislation allocating funding for federal programs and policies. Fundamentally, this power means that Congress has a

strong hand in approving or denying funding to implement military policy.

Current military action is being funded through the appropriations process. As such, Congress allocates a certain amount of money to be spent on the war effort in a given fiscal year. When the military runs out of that money, it must ask Congress for another appropriation, at which point Congress gets a new opportunity to "turn on" or "turn off" funding for the war effort.

The power to "turn off" funding for military policy can be applied either bluntly or precisely. Congress can turn off funding entirely by deciding not to pass any funding for the war at all. Alternatively, it can turn off funding *within* an appropriations bill for certain purposes or timeframes. These restrictions are phrased negatively and are explicitly geared to restrict the funds for certain uses (i.e., funding in this account shall *not* be used for this specific purpose...).

The same principle applies for "turning on" funding. Congress can pass an appropriations bill that provides a lump-sum of funding with no directions. Or, within an appropriations bill, Congress can proactively direct funding for an express purpose or timeframe. It can mandate that a specific amount of money be used for a specific purpose only. Or it can condition funding allocation on some other event or benchmark being met. If this guiding language is included in the text of the legislation, it carries the force of law and is binding on the president. If it is included in report language that accompanies the bill, it is not binding.

Restrictions on Purse-Power

The power of the purse is not unlimited. First and foremost, an appropriations bill that includes new authorizing language is subject to a point of order. "Legislating on appropriations" means the appropriations bill limits, directs or conditions funding in a way that does not comport with enacted authorizations, which enable or create government policy but often do not fund them. The Congressional Research Service summarizes this restriction:

> Under Senate and House rules, limitations, as well as other language in the text of appropriations legislation, cannot change existing law (paragraphs 2 and 4 of Senate Rule XVI and clause 2(b) and (c) of House Rule XXI). That is, they cannot amend or repeal existing law nor create new law (referred to as legislation or legislation on an appropriations bill). Limitations also may not extend beyond the fiscal year for which an appropriation is provided.

In other words, Congress cannot turn on funding for policies that are not already written into law without waiving a point of order. When this does happen, it is what's known as an "unauthorized appropriation." In addition, language in appropriations bills cannot change the terms of enacted authorizations.

This obstacle is not as restrictive as it may appear. Points of order are not self-enforcing,

as a member must raise a point of order for it to take effect. In the House, points of order can be waived by special order of the Rules Committee. In the Senate, a 3/5ths majority is necessary for a waiver. And this point of order has limited application. It does not apply to *limitations* that proscribe or prescribe funding certain activities, unless they explicitly amend, repeal or enact authorizing legislation.

What's more, there is ample evidence of unauthorized appropriations surviving year after year. The Congressional Budget Office produces a report each year itemizing unauthorized appropriations that continue to pass each year. Therefore, the point of order must be waived from time to time.

Yet there are other ways this power is limited, such as through the presidential veto. Just like any other bill, appropriations bills are subject to a possible veto, which can be overturned only by a two-thirds majority in the House and Senate. Further, the president could also choose to not comply with directives included in an appropriations bill. Someone must then enter litigation to force presidential compliance. If such a dispute were to enter the courts, Congress's authority would likely be affirmed. Many constitutional law experts have asserted Congress has the constitutional authority to construct rules that guide military affairs.

Opportunities to Influence Policy

So when can Congress use this power? Three opportunities will soon present themselves: the extension of the FY 2007 Continuing Resolution in late January or early February, the enactment of the FY 2007 supplemental war appropriations request expected in February, and the enactment of FY 2008 Department of Defense appropriations bill later in 2007. All of these legislative vehicles will send funding to the war efforts in Afghanistan and Iraq, and all can be amended should Congress so choose.

Congressional prerogative over war policy in appropriations bills would have precedents as well. The Center for American Progress has compiled an expansive list of examples where Congress has shaped war and foreign policy through the appropriations process. Thus, if Congress wants to make binding changes in war policy, the appropriations process affords ample opportunity.

Transparency Makes Early Appearance in the New Congress

In the 110th Congress, transparency provisions have quickly moved into a central role in efforts to bring about greater oversight and accountability. From lobbying reform to national security oversight, the new Congress has made legislative strides toward a more open government.

National Security

Since 9/11, the Bush administration has liberally exercised executive powers to track and unilaterally act on potential terrorist threats. Accompanying the increase in executive powers has been the excessive use of secrecy and controversies created over government spying and other data collection efforts. The new Congress recognizes that transparency is a central part of greater oversight and accountability in this area. The new Congress has called for greater oversight of government contracts in Iraq, and efforts have been made to ensure that the executive exercises transparency in its collection and analysis of personal information. The Federal Agency Data Mining Reporting Act of 2007 (S. 236) was introduced by Sens. Russell Feingold (D-WI) and John Sununu (R-NH) to require the government to report on any efforts to use data mining technologies and to circumvent privacy protections already in place.

Whistleblower Protection

Whistleblower protections have long served to ensure greater transparency in government practices and to uncover government abuse. However, court decisions and lackluster support from government agencies have weakened whistleblower protections over the years. Sen. Daniel Akaka (D-HI) introduced the Federal Employee Protection of Disclosures Act (S. 274) with bipartisan support to prevent retaliatory actions against government employees who expose government fraud, waste or abuse. "If we fail to protect whistleblowers," Akaka stated, "then our efforts to improve government management, protect the public, and secure the nation will also fail."

Ethics Reform

The Democrats were, to a great extent, swept into power on the promise to reform corrupt processes in Washington, which catered to lobbyists and subverted the public interest. In its first month of operations, the Senate passed a package of ethics reform measures, a central theme of which is greater transparency and disclosure. The Legislative Transparency and Accountability Act (S. 1) includes the following transparency provisions:

- Conference reports are required to be made available on the Internet at least 48 hours before they are considered.
- Information on approved travel and lodging gifts and the meetings involved in such travel must be posted on the member's official website.
- Greater lobbying disclosure requirements along with the requirement that such lobbying disclosure forms be submitted in an electronic format so that they can be provided to the public on the Internet in a searchable database.
- Requirement that all earmarks be publicly available on the Internet along with their intended justifications at least 48 hours before they are considered.
- Requirement that all committees and subcommittees have to release a transcript, video or audio recording of each meeting within 14 days.

These provisions will go a long way toward ensuring greater transparency and

accountability in government practices. Though the Legislative Transparency and Accountability Act passed the Senate 96 to 2, it will need to pass the House and be signed into law by the president.

As Congress continues to exercise its oversight responsibilities, we expect to see the continual articulation of the need for transparency and open government. It is likely that Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) will reintroduce bills to improve the government's implementation of the Freedom of Information Act, which they have previously proposed. On the House side, Rep. Henry Waxman (D-CA), a longtime proponent of government openness, is also expected to introduce legislation addressing public access. Dating back to the financial reforms of the New Deal, the requirement to disclose information about an institution's practices has proven to be an effective method of preventing abuse and waste and promoting efficiency.

NSA Warrantless Spying Program Shut Down, but Questions Remain

President George W. Bush will not reauthorize the National Security Agency's (NSA) Terrorist Surveillance Program (TSP) through secret Executive Order, according to the U.S. Department of Justice (DOJ). Attorney General Alberto Gonzales announced in a Jan. 17 letter to lawmakers that DOJ will instead seek court orders from the Foreign Intelligence Surveillance Court (FISC), and that henceforth, the program will operate in compliance with the Foreign Intelligence Surveillance Act (FISA). While the announcement and the increased accountability are welcomed by many of the program's critics, many questions remain unanswered.

The discovery that President Bush authorized the NSA to spy, without warrants, on the international communications of U.S. citizens was reported by *The New York Times* in December 2005. The battle over authority and oversight that ensued between the Bush administration and Congress played out for much of 2006. Many members of Congress were outraged that the White house did not inform relevant congressional committees on intelligence and judiciary about the program. The Bush administration vigorously fought to keep details of the program secret and tried, without success, to pass legislation that would have retroactively legalized the spying program.

There are currently over thirty court cases challenging various aspects of NSA's TSP and data-mining program. It is unclear what the fate will be of the cases challenging the legality of the NSA program and whether this change in policy by the Bush administration will affect those cases. One court, the U.S. Court for the Eastern District of Michigan, has already found the surveillance program to be in violation of the First and Fourth Amendments and the separation of powers doctrine. The government has appealed the ruling to the U.S. Court of Appeals for the Sixth Circuit, and based on the new FISC oversight policy, has already moved to dismiss the case, arguing that it is now moot. The current NSA cases may go forward despite the change in policy since the

president still maintains that he has the right to wiretap without a court order.

It is also unclear what role Senate and House judiciary and intelligence committees in the Democratically-controlled Congress will play. In a Senate Judiciary Committee hearing shortly after the Justice Department announcement, Gonzales dodged questions concerning specifics of the program and the FISC decision. Of central concern is whether or not the FISC order granted broad authorization for the whole program or only particular wiretaps. Both the *New York Times* and the *Washington Post* have reported that the FISC orders are a hybrid between the two. If the former, the order and the program may still violate the Fourth Amendment, which requires particularized orders for surveillance. Gonzales rebuffed efforts by Sen. Patrick Leahy (D-VT), chairman of the Senate Judiciary Committee, to obtain the text of the decision issued by FISC. Similarly, Sen. Charles Schumer's (D-NY) efforts to discover specifics of the program's operations and of the order's requirements met with little cooperation from Gonzales. These evasive tactics appear to indicate that while the administration has submitted the NSA surveillance program to FISC oversight, it is not prepared to accept congressional oversight as well.

Serious questions concerning the specifics of the NSA program and the FISC decision need to be answered in order to ensure proper oversight and accountability. Moreover, the president's claim to maintain the power to wiretap without a warrant should be scrutinized by the courts in the NSA cases. Without judicial resolution on the issue, the president could secretly resume warrantless wiretaps on American citizens. In fact, the warrantless wiretapping of American citizens could be occurring right now in a program outside of TSP.

President Bush Amends Federal Regulatory Process

On Jan. 18, President George W. Bush issued amendments to Executive Order 12866 on Regulatory Planning and Review. The most notable of the changes will require federal agencies to: implement a stricter market failure criterion for assessing the need for regulation; require agencies to develop a summation of total costs and benefits each year for all proposed regulations; install a presidential appointee as agency Regulatory Policy Officer; and subject "guidance documents" to the same White House Office of Management and Budget (OMB) review process as regulations. Bush's amendments do not have the force of law but significantly change E.O. 12866, which figures prominently into the nation's regulatory process. The amendments will impact the way in which federal agencies go about creating rules and enforcing laws.

The first of Bush's amendments places greater emphasis on the identification of a "specific market failure" before an agency can assess whether or not to regulate. This amendment gives examples of market failures as externalities, market power and lack of information.

The previous text of the E.O. called for agencies to identify a problem in need of regulation and only suggested market failure as an example. The amended text calls first for identification of a "specific market failure" and then other "specific problems," such as the failure of public institutions. The amendment occurs in a section titled "Statement of Regulatory Philosophy and Principles."

Agencies will also now be required to evaluate all of their proposed regulations as a whole, according to the amended E.O. Under the status quo, agencies are to prepare a Regulatory Plan each year. The Plan is to include the most significant regulations upon which an agency will endeavor. Each proposed regulation is to include a cost-benefit analysis, as well as cost-benefit analyses for reasonable alternatives.

Bush's amendments require one additional obligation of federal agencies in the preparation of their Regulatory Plans. Agencies are now to prepare an "estimate of the combined aggregate costs and benefits of all ... regulations planned for that calendar year to assist with the identification of priorities."

Another amendment changes the status of an agency's Regulatory Policy Officer. Under the E.O., each agency is to have a designated Regulatory Policy Officer reporting directly to the agency head. According to the original E.O.: "The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations."

Bush's amendments do not alter the responsibilities of the Regulatory Policy Officer, but do require each agency to designate a presidential appointee to that position. Each agency will have 60 days to comply with this requirement.

Several amended sections of the E.O. move agency "guidance documents" closer in status to that of agency rules. Federal agencies use the term "guidance document" to classify statements that clarify or interpret rules. Agencies often use these statements to guide agency regulators in the hands-on enforcement of rules. Unlike agency rules, they are not mandatory.

Bush's amendments subject guidance documents to the same review process as agency rules. In effect, this means agencies will submit guidance documents to OMB's regulatory arm, the Office of Information and Regulatory Affairs (OIRA), where administrators will scrutinize them in the same way as they do regulations. OIRA will manage guidance documents in order to ensure a stated need for, and consequences of, the proposed guidance.

Much in the same way as it treats regulations, OIRA will subject "significant" guidance documents to a more strenuous review. Among other criteria, "significant" regulations and guidance documents are those expected to cause an annual effect of $100 million or more on the economy. OIRA will exert greater influence in the issuance of significant guidance documents by requiring an advanced draft of the statement. OIRA also reserves

the right to request consultation with the agency before final issuance of the guidance document.

These amendments mark the second time Bush has altered E.O. 12866, and are by far the most significant amendments made to the E.O. since President Clinton issued it in 1993. The E.O. sets the regulatory philosophy for the federal government, mandates the use of market tools for promulgating regulations, and calls for the OIRA review of agency rules. Though the Administrative Procedure Act outlines the formal rulemaking process, in practice, formal rulemaking procedures are rarely used; E.O. 12866 has been the basis for the regulatory process since Clinton used it to replace two Reagan administration executive orders.

There had been rumblings about modifying the E.O. over the past year or so as OMB had proposed changes in the way guidance documents are handled by agencies. However, it was a surprise to see the amendments include the addition of the market failure criterion.

Bush's amendments will affect the regulatory process in several ways. First, the new emphasis on a market failure criterion codifies a free-market ideology in the E.O. Though this criterion is not a requirement, its appearance in the "Statement of Regulatory Philosophy and Principles" allows it to set the tenor for the entire federal regulatory process. Presumably, OMB will need to provide information to agencies on how to interpret this new analytic requirement. Many in the public interest community fear this addition to the E.O. will become another means to reducing public protections.

Second, aggregating the costs and benefits of rules may change the standard by which proposed rules are prioritized. This amendment may make cost-benefit analysis the preeminent tool for determining which regulations to pursue even when the comparison of rules crosses agency lines. Former OIRA administrator John Graham, current nominee Susan Dudley, and other proponents of free-market solutions have suggested aggregating total costs and benefits as a step toward a regulatory budget. A regulatory budget is a way of choosing where to regulate based upon economic impact, rather than public need.

Third, the new Regulatory Policy Officer requirement mandates the designation of a political appointee to the position of regulatory chief within each agency. Many agencies already have political appointees reviewing and approving proposed rules. Yet the amendment to the E.O. suggests a further politicizing of the regulatory process. The Officer is to report directly to the agency head, often a cabinet-level Secretary.

Last, OIRA's stricter controls on guidance documents may hinder an agency's ability to enforce law by slowing down the process by which agencies issue these guidelines. This amendment provides OIRA with an opportunity to take a greater role in agency procedures.

With that in mind, the same day that Bush issued these amendments, OMB issued its "Final Bulletin for Agency Good Guidance Practices." The Bulletin sets forth policy and procedures agencies should follow internally when formulating guidance documents. The Bulletin works in concert with Bush's amendments, outlining ways in which agencies can write guidelines that better meet the new E.O. procedures.

OIRA's role in the issuance of agency guidance documents is likely to be the most significant of Bush's amendments. Rick Melberth, Director of Regulatory Policy for OMB Watch, says, "By mandating a review of interpretive documents like guidance documents and manuals, OIRA is adding another means of delaying agency actions required by Congress and further threatening public health and safety protections."

National Research Council Strongly Objects to OMB Risk Assessment Bulletin

A Jan. 11 National Research Council (NRC) report found the Office of Management and Budget's (OMB) Proposed Risk Assessment Bulletin to be "fundamentally flawed." The report contained concerns similar to those raised by OMB Watch and Public Citizen in comments submitted in August 2006. OMB asked NRC to review the document after its release in January 2006. NRC suggested the Bulletin be withdrawn completely. Following the release of the report, OMB announced that it will go back to the drawing board to "develop improved guidance for risk assessment."

The Bulletin contained a set of guidelines to govern all risk assessments and included technical standards for all federal agencies to use when conducting risk assessments, as well as other scientific documents. The OMB guidelines would apply to risk assessments conducted as part of issuing or revising health, safety and environmental rules, as well as important scientific studies.

The Council found that OMB's new definition of risk assessment was "too broad and in conflict with long-established concepts and practices." The Bulletin defined a risk assessment as a document instead of a process and the goals outlined, when considered together, indicated "that a risk assessment should be tailored to the specific need for which it is undertaken." The emphasis, according to the NRC evaluation, was on efficiency over quality and stated that the goals outlined did not "support the primary purpose of the bulletin — to enhance the technical quality and objectivity of risk assessments."

The report also recommended that OMB leave technical risk assessment guidelines and standards to each federal agency because one size does not fit all when it comes to risk assessments. The Council stressed concerns over "the likely drain on agency resources, the extended time necessary to complete risk assessments that are undertaken, and the highly likely disruptive effect on many agencies."

As OMB has done with other regulatory tools, the risk assessment approach called for in this release would have created unnecessary delays in the rulemaking process by adding to the already cumbersome process that OMB oversees. The ability of government agencies to protect the public would be compromised by attempts to manipulate science and the risk assessment process. For example, the proposed standards called for the use of central estimates or tendencies instead of statistical ranges. Using this approach puts the most vulnerable populations, who fall outside these "central estimates," at risk in some analyses.

In May 2006, the NRC held a public meeting at which it took comments from a range of organizations interested in the Risk Assessment Bulletin. OMB Watch, the Natural Resources Defense Council, Resources for the Future, and several medical experts gave presentations regarding the impacts of OMB's risk standards. Also submitting comments were representatives from several federal agencies who conduct risk assessments. The NRC used these comments and their own analysis to reach the conclusions in the report.

The rebuke by the NRC is one of the strongest commentaries issued on the trend over the last six years to centralize power over the regulatory process within OMB and move it away from agencies responsible for protecting health, safety and the environment. The administration has consistently used regulatory tools to manipulate science for its own ends, attempted to impose a one-size-fits-all framework on the agencies' use of these tools, and shift the criteria for defining when regulations are necessary away from a health or safety problem and toward market-based criteria. The strongly-worded NRC evaluation should provide a Congress interested in executive oversight with a strong example of the dangers of this regulatory trend.

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In This Issue

OMB Watch Releases Analysis of Bush FY 08 Budget Request

During the week of Feb. 5, OMB Watch issued a multipart analysis of President George W. Bush's Fiscal Year 2008 budget request to Congress. In an overview of the president's budget, OMB Watch examined the overall impact of the request and found that it puts tax cuts ahead of domestic needs. The budget uses gimmicks and omissions to mask the true impact of the president's proposals and allows him to project an artificially balanced budget.

Also available are several fact sheets on specific issues within the budget: the Program Rating Assessment Tool, budget process and the IRS budget and the tax gap.

House Passes FY 2007 Spending Resolution that Restores

Some Funding

On Jan. 31, the House cleared a $463.5 billion joint resolution that boosts spending or maintains service levels in health, education and housing programs while staying under a tight budget cap. The resolution also makes $10 billion worth of cuts in 60 programs and eliminates earmark language from bills that were drafted but not passed during the last Congress. If the Senate passes the resolution, the new Congress will finish the FY 2007 budget bills, which the last session of Congress failed to do.

The bill (H.J. Res. 20) was considered under a rule that blocked amendments, which angered Republicans who wanted to change the resolution. One slighted Republican — House Appropriations Committee Ranking Member Jerry Lewis (R-CA) — urged all members of the appropriations committee to vote against the bill on these procedural grounds, but 57 Republicans ended up voting in favor of the bill. It passed 286-140.

The resolution marks the beginning of the end of a dysfunctional budget year. The last session of Congress succeeded in passing only two of 11 appropriations bills for FY 2007. It opted instead to punt the unfinished appropriations bills to the current Congress by passing a stop-gap continuing resolution (CR) that flat-funded or cut many programs for several months. The House resolution is a mixture of the nine unfinished appropriations bills with a limited number of funding boosts in specific program areas.

H.J. Res. 20 is similar in many ways to some of the priorities contained in appropriations bills proposed in the 109th Congress. The resolution would keep the total amount of appropriations under the $873 billion spending cap that the last Congress set. And the resolution takes its funding formula from the December 2006 CR.

But the joint resolution also signals a departure from the policies and priorities of the last Congress. Many programs the 109th Congress tried to cut will now get additional funding to maintain their current level of services, and some will get funding that boosts services. Programs providing health care, housing and educational assistance are some of the ones that will see increases. Significant changes include:

- $1.7 billion more for HIV/AIDS, tuberculosis, malaria;
- $3.6 billion more for VA healthcare;
- $1.4 billion more for Section 8 housing assistance;
- $600 million more for the National Institutes of Health;
- $600 million more for Pell Grant student loans.

To add this funding and stay under the appropriations cap, the resolution would move funding out of other programs. Defense programs would take the bulk of the cuts, though the upcoming supplemental appropriations bill for ongoing military expenses may include some additional funding to restore those cuts. Funding cuts that would reduce services include:

- $3 billion less for military base-relocation;
- $700 million less for foreign aid;
- $700 million less for Iraq reconstruction.

The majority of the rest of $10 billion in offsets will come from canceling budget authority that had not yet been used in housing and transportation programs — saving $5 billion under the discretionary cap. This change will not affect services.

Making good on a prior pledge, House appropriators stripped the resolution of all new earmark language but not the funds that the language had directed. Agencies have the option of using these funds for the same purpose as earmark language would have directed. The Energy Department, for example, has announced that it intends to use funding to continue projects that had been initiated by earmarks in previous appropriations.

The legislation is now headed for the Senate, where it may encounter more amendments and procedural roadblocks. Some Senators have already announced they intend to amend the resolution, which may delay its passage. If the resolution stalls in the Senate, another short-term CR may be passed. Congress has until February 15th to pass either the resolution or an extension of the CR.

Senate Passes Minimum Wage Increase with Tax Cuts Added

On Feb. 1, the U.S. Senate wrapped up nearly two weeks of debate with a 94-3 vote to approve S. 2, the Fair Minimum Wage Act of 2007. The bill raises the federal minimum wage to $7.25 an hour by 2009 and extends $8.3 billion of existing small business tax breaks. The fate of the bill remains uncertain because House Democrats are reluctant to provide tax breaks for small business in exchange for passing a minimum wage hike.

The House passed a version of the bill on Jan. 10 as one of the first items on Speaker Nancy Pelosi's (D-CA) "First 100 Hours" agenda this year. The bill passed, 315-116, with 82 House Republicans joining all the House Democrats voting in favor. Under the bill, the federal minimum wage is to rise to $5.85 an hour 60 days after enactment, then to $6.55 an hour one year after that, and $7.25 an hour two years later. That was a clean bill without additional riders. Twenty-nine states have a required minimum wage higher than that of the current federal level — with seven of those states already above the proposed $7.25 an hour.

After the minimum wage increase passed the House, Senate Finance Committee chair Max Baucus (D-MT) repeatedly insisted that the House's "clean" minimum wage bill did not have the 60 votes needed for passage in the Senate. Baucus then produced the $8.3 billion tax cut package to help convince some Republicans to support the increase in the minimum wage. House Democratic leaders opposed this move, arguing that businesses

have been the beneficiaries of one tax cut after another over the last several years, but the minimum wage has not been raised a penny since 1997. On Jan. 16, the day before the Committee was due to vote on the tax cuts, Baucus announced $8.3 billion in offsets to pay for the tax cut package. The next day, the Committee unanimously approved the package (see itemized provisions and scoring).

As floor debate on S. 2 started and the number of amendments filed — all by GOP Senators — soared to over 150, frustration mounted in some quarters. Said Senate Health, Education, Labor, and Pensions Committee chair Ted Kennedy (D-MA), "We have now had amendments that have been worth over 200 billion dollars... health-savings amendments that will benefit people with average incomes of $112,000... But we still cannot get two dollars and fifteen cents -- over two years."

In the final vote, only three Senate conservatives opposed the measure: Sens. Tom Coburn (R-OK), Jim DeMint (R-SC), and Jon Kyl (R-AZ).

The $8.3 billion in tax cuts mainly offer depreciation and expensing advantages to small companies, including Main Street retailers that own their own stores, and to S-corporation owners, who are generally self-employed. They also include a tax credit for companies to give an incentive to hire certain populations, such as welfare recipients, veterans and food-stamp recipients.

S. 2's major tax break provisions are:

- **Work opportunity tax credit** — extends the credit for five years, through 2012. The bill would modify the credit to also apply to the hiring of veterans disabled after the Sept. 11 terrorist attacks. *(estimated cost: $3.6 billion over 10 years)*
- **15-year depreciation of improvements on leased property** — extends the reduced period of depreciation for three months, through March 31, 2008. *($2.7 billion)*
- **Small-business expensing** — Section 179 deductions for small-business expenses up to $112,000 (indexed for inflation) annually would be extended through 2010, regardless of tax rules requiring gradual write-offs of capital investments. *($257 million)*

Sticking to the principles of pay-as-you-go, the tax cuts are paid for mostly by closing loopholes on offshore tax shelters, by capping deferred compensation payments to corporate executives and by removing the deductibility of punitive damage payments and fines. There are also increased expensing allowances and depreciation, and accounting rules for small businesses — not necessarily cuts targeted to business owners affected by a minimum wage increase. The exception is restaurateurs, who are frequent employers of low-wage workers and would be beneficiaries of many of the tax cuts.

It's now up to House Ways and Means Chairman Charles Rangel (D-NY) and the House

Democratic leadership to determine the next steps. House Democratic leaders oppose linking the small business tax cuts to the minimum wage and have already indicated that any tax legislation, according to the constitution, must originate in the House. Rangel has allowed the bill to "sit at the desk," which means the House has not accepted it, and therefore, it does not trigger constitutional problems. Even if Rangel were willing to accept the tax cut trade-off, he is reportedly not happy with some of the revenue raisers used to pay for the Baucus package, since they are items Rangel may have wanted to use for other purposes.

Senate Democratic leaders remain publicly hopeful that a resolution with the House can be reached quickly. Stay tuned.

Media, Congress Begin to Examine Bush's Executive Order on Regulatory Process

President George W. Bush's Executive Order amending the regulatory process in significant ways didn't immediately garner the attention one might have expected from the mainstream media and Congress. The order set in motion changes that could further delay or hinder public health, safety, environmental, and civil rights protections. It was issued by the White House, with a press release, Jan. 18, and only OMB Watch and Public Citizen rang the alarm bells, calling attention to changes that give OMB's Office of Information and Regulatory Affairs (OIRA) even broader powers over agency actions.

Although a few independent media outlets and Inside Washington publications picked up the story, it wasn't until the *New York Times* published an article on Jan. 30 that other mainstream outlets began paying attention. The order was published in the *Federal Register* on Jan. 23 and takes effect 180 days later. The *Times* article quoted Henry Waxman (D-CA), chair of the House Oversight and Government Reform Committee, who stressed the danger of ignoring agency experts' opinions about health and safety regulations in favor of special interests.

Why should the regulatory process and Bush's changes to it matter? Over the past 30 years, we have made significant progress through strong public safeguards. Our air and water are cleaner; our food, workplaces, and roads are safer; and civil rights protections have improved. These protections have saved many thousands of lives and improved the quality of life for all Americans — without hobbling industry or the economy. In short, regulations matter.

Yet there is still much to do, especially after six years of putting the needs of the administration's supporters over the needs of the public. Food borne illnesses kill an estimated 5,000 and sicken 76 million. Nearly 6,000 workers die as a result of injury on the job, with an additional 50,000 to 60,000 killed by occupational disease. And asthma — linked to air pollution — is rising dramatically, afflicting 17 million, including six

million children.

Why were major media outlets so slow to give the order some coverage? Much attention at the time was focused on a new Congress getting organized and working on an ambitious agenda, as well as the increasing problems in Iraq. The mainstream media also often overlooks regulatory issues. All this allowed administration officials to make these changes relatively quietly.

Now Congress is paying attention and exercising its oversight responsibilities on this and other matters. The House Science and Technology Committee's Subcommittee on Investigations and Oversight is planning a hearing on the impact of the order on Feb. 13. There may be other hearings to learn the full impacts of

- placing political appointees deeper inside regulatory agencies;
- requiring "market failure" criterion as a basis for formulating health and safety protections;
- requiring agencies to aggregate total costs and benefits of their annual regulations; and
- subjecting agencies' guidance documents — generally interpretive statements used to clarify regulatory obligations to industry or explain technical matters — to the same lengthy review process OMB uses for regulations.

If OIRA so chooses, the impacts of delaying regulations and guidance could affect a broad range of public protections. For example, the Centers for Disease Control and Prevention (CDC) just issued guidance regarding actions businesses, urban governments, and school districts should take if an influenza pandemic occurs before a vaccine becomes available. The CDC planning document's wide-ranging recommendations could easily have a significant economic impact, which would trigger a review by OIRA under the new requirements and cause months of delays.

We welcome the congressional attention to an issue with significant implications for health, safety, environmental and civil rights protections. Congress has the opportunity to reassert itself in the battle with the administration over the proper role of agency implementation of legislation. Further centralizing power in the executive branch when Congress has a constitutional role in agency actions is not good government, despite what supporters of the order have argued. The electorate sent a clear message in November that it was time to stop putting special interest priorities ahead of public needs. We need Congress to show the administration that it is paying attention.

Congress Steps Up Oversight of Executive Branch

Congressional Democrats are stepping up their oversight of the Bush administration. Several of the steps Congress has taken, or is likely to take soon, have implications for the federal government's regulatory policy. One recent oversight hearing reflected

concerns over scientific integrity within the White House. The impetus for two other hearings, and one potential hearing, is concern over the Bush administration's failure to enforce laws passed by Congress.

On Jan. 30, the House Oversight and Government Reform Committee held an oversight hearing regarding political interference in the work of government climate scientists. Committee Chairman Rep. Henry Waxman (D-CA) and ranking minority member Rep. Tom Davis (R-VA) have made several requests for documents from the White House Council on Environmental Quality (CEQ) related to the White House's influence on the work of government climate scientists. The requests date back to the 109th Congress. CEQ did not fulfill the requests.

Waxman argues that the White House has exerted its influence in order to downplay the threat of global climate change. In his opening statement, Waxman said, "We know that the White House possesses documents that contain evidence of an attempt by senior administration officials to mislead the public by injecting doubt into the science of global warming and minimizing the potential dangers." Waxman's claim was backed up by a joint report by the Union of Concerned Scientists and the Government Accountability Project introduced at the hearing. According to the online news source *Environment & Energy Daily* (subscription required), Waxman now expects CEQ to be fully cooperative and does not anticipate the need to use the committee's power of subpoena to gather the information the committee needs.

On Feb. 6, the Senate Environment and Public Works Committee held an oversight hearing on the U.S. Environmental Protection Agency (EPA). The Committee, chaired by Sen. Barbara Boxer (D-CA), prodded EPA on several issues including political influence over air pollution standards, perchlorate contamination, and requirements, eased by EPA in December 2006, for facilities reporting toxic chemical discharges.

In her opening statement, Boxer gave reason as to why the committee had brought together such a variety of issues in one hearing: "These EPA rollbacks have common themes: they benefit polluters' bottom line, and they hurt our communities by allowing more pollution and reducing the information about pollution available to the public."

On Jan. 31, the House Judiciary Committee held an oversight hearing on presidential signing statements. In the hearing, a counselor from the Department of Justice and a Georgetown University law professor defended President Bush's use of signing statements. Former Rep. Mickey Edwards and the president of the American Bar Association criticized signing statements on the grounds they pose a danger to constitutional checks and balances.

Presidents often issue such statements when signing a bill into law. Historically, presidents have used signing statements to express their personal opinion on a bill. However, Bush has received criticism for his practice of using signing statements to

reserve the right to *not* enforce certain aspects of laws passed by Congress.

In his opening statement at the hearing, Rep. John Conyers (D-MI) called signing statements "extra-constitutional conduct by the White House." He added, "That conduct threatens to deprive the American people of one of the basic rights of any democracy — the right to elect representatives who determine what the law is, subject only to the President's veto."

Congress has expressed further interest in investigating the administration's activities in enforcing laws. On Feb. 1, Rep. George Miller (D-CA), Chairman of the House Education and Labor Committee, wrote a letter to Secretary of Labor Elaine Chao criticizing the Department of Labor (DoL) for its slow implementation of the Mine Improvement and New Emergency Response Act (MINER Act), which was passed in response to the mine disasters in West Virginia and Kentucky early in 2006. Bush signed the act into law in June 2006, but critical elements of the law have gone unenforced, according to Miller's letter. Miller promised to take a "thorough look" at federal mine safety policy, and pledged committee oversight in 2007.

The tenor of these investigations indicates congressional Democrats' dissatisfaction with the way the Bush White House manages agency practices. The recent controversy surrounding Bush's amendments to Executive Order 12866 on Regulatory Planning and Review may trigger further congressional oversight. Overall, this spate of investigations is a clear sign that Congress will no longer sit idly by while the Bush administration shifts more and more power to the White House.

Federal Contractors: The Invisible, Unaccountable Agency

The incredible growth in the amount of money spent by the federal government on contractors, with almost no corresponding increase in oversight or management, was highlighted in a recent *New York Times* article, "In Washington, Contractors Take on Biggest Role Ever." According to the article, the amount spent on federal contracts has doubled since 2000, from $207 billion to $400 billion. The lack of sufficient government oversight has led to a virtual free reign for contractors, who are not answerable to the public and have not been called to account by the federal government.

Federal contractors, while legally obligated to provide a particular service or product, are essentially invisible and unaccountable to the public. Agencies must answer questions from the public and provide documentation on actions if requested under laws like the Freedom of Information Act. But companies, even those accepting hundreds of billions of federal money, are not required to be transparent or responsive to the public in any way. There is no requirement that companies accepting federal contract money also accept any responsibility to be open and forthcoming with the public or Congress.

The *New York Times* article is the first in a series. The article highlighted how various

functions that were previously performed by government are now being outsourced. Some would say this outsourcing is a way to give the impression that government is smaller than it really is, since there are no analyses that identify the number of contractors providing agency functions. Others have argued that "inherently governmental" activities should never be contracted out; however, they are increasingly being done so. Finally, some have noted that people who treasure public service are leaving government to work as a contractor, doing the same work they may have done in government, but being paid considerably more money.

The increasing amount spent on contracts and the diminishing amount of accountability contributed to the effort during the last Congress to pass the Federal Funding Accountability and Transparency Act (P.L. 109-282). The bill, now law, was co-sponsored by Sens. Tom Coburn (R-OK) and Barack Obama (D-IL) and mandates that the Office of Management and Budget (OMB) create and maintain a searchable database of all federal spending by 2008. This new tool will be the first step to bring greater attention to how the government spends billions each year.

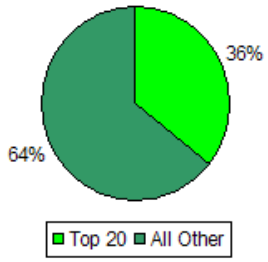
While the government website isn't supposed to available until next year, OMB Watch used currently available data to launch a website called FedSpending.org that allows users to search more than $12 trillion of federal spending over six years. The site includes tutorials on using the site that explore many of the issues raised in the *Times* article, including the growth of federal contracts, the decreasing use of competition, and the intense concentration of federal contract money among a relative few companies.

Using FedSpending.org, OMB Watch found there were 168,317 contractors in 2005, but that just 20 companies accounted for 36 percent of the $382 billion contracted out (see chart below). This concentration of resources in the hands of a few companies raises a number of questions, particularly about accountability.

Top 20 Companies Account for 36% of All Contracts in FY 2005

Total # of Contractors
168,317

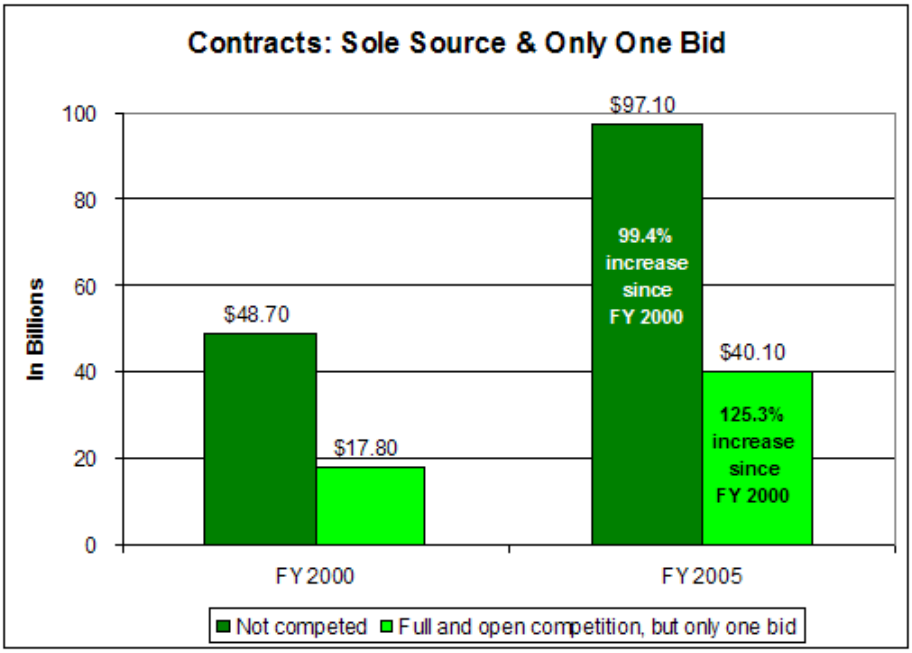
Total Amount of Contracts
$381.93 Billion



Contractor	$ Billions	%
LOCKHEED MARTIN, INC	$24.90	6.52%
THE BOEING COMPANY	$19.56	5.12%
NORTHROP GRUMMAN SYSTEMS CORP	$14.97	3.92%
ADVANCED INFORMATION ENGINEERI	$10.78	2.82%
RAYTHEON AIRCRAFT COMPANY	$9.05	2.37%
HALLIBURTON CO.	$5.91	1.55%
MISCELLANEOUS FOREIGN CONTRACTORS	$5.82	1.52%
UNITED TECHNOLOGIES SERVICES INC	$5.02	1.31%
L 3 COMMUNICATIONS CORPORATION	$4.67	1.22%
CONAGRA, INC.	$4.37	1.14%
UNIVERSITY OF CALIF SYSTEM	$4.37	1.14%
MCKESSON AUTOMATION SYSTEMS IN	$4.33	1.13%
COMPUTER SCIENCES CORP.	$4.12	1.08%
BECHTEL GROUP, INC.	$4.01	1.05%
CARLYLE GROUP	$2.68	0.70%
ITT FLUID TECHNOLOGY CORP	$2.61	0.68%
BAE SYSTEMS/ROCKWELL COLLINS D	$2.57	0.67%
GE CAPITAL INFORMATION TECHNOL	$2.53	0.66%
HONEYWELL, INC.	$2.35	0.62%
HUMANA, INC.	$2.22	0.58%
Total	$136.83	35.8%

OMB Watch also found that between 2000 and 2005, there has been a rapid increase in contracts that have not been competed, but instead awarded as sole-source contracts. During that period, sole-source contracts have doubled in size (see graph below). Additionally, the number of contracts that have had open competition but only one bidder has also risen rapidly since 2000.

This may be part of the reason that the House Oversight and Government Reform Committee will be holding four days of hearings, from Feb. 6-9, on waste, fraud, and abuse of taxpayer dollars. The first two hearings will address contracting issues related to the war in Iraq. The third hearing with address contracting issues related to the Department of Homeland Security. The final hearing will focus on fraudulent, abusive, or wasteful pharmaceutical pricing practices that affect federal health programs.



If the trends of increasingly outsourcing government activities and decreasing the amount of oversight such contractors receive are to be reversed, Congress is going to have to use tools such as FedSpending.org and the Coburn-Obama law as first steps to broader reforms. Changes that might help include placing stricter limits on what activities can and can not be outsourced, stronger requirements for competition, contractor requirements for disclosure of compliance with federal laws, and other information.

TRI Changes are Major Issue at EPA Oversight Hearing

The Environmental Protection Agency's (EPA) changes to the Toxics Release Inventory (TRI) were a prominent issue at the Senate Environment and Public Works Committee's (EPW) Feb. 6 EPA oversight hearing. The three-panel hearing also addressed the closure of EPA libraries, the elimination of perchlorate testing, and the agency's current consideration of revoking the air quality standard for lead.

The EPW hearing is EPA's first under the new Democratically controlled Congress and probably set a tone for future hearings. It included much sharper questioning of EPA decisions and actions than was typical under the Republican controlled hearings of the last few years. EPA Administrator Stephen Johnson, after a brief opening statement claiming significant improvements in protecting the environment, was almost immediately placed on the defensive with tough questions about EPA's library closures and raising thresholds for toxic reporting.

Sen. Frank Lautenberg (D-NJ) was among the most aggressive committee members on the subject of EPA's TRI changes. Lautenberg questioned Johnson on the importance

EPA placed placed on input from its own Science Advisory Board, state agencies and the general public—all of which weighed in heavily against the changes to TRI. Johnson responded that these perspectives were considered by the agency but that EPA had an opportunity to improve environmental performance and create incentives to reduce toxic pollution. When questioned further on how EPA could be sure toxic pollution would drop under the changes, Johnson was unable to provide any specific evidence or analysis.

In the second panel, John Stephenson, Director of the Natural Resources and Environment Department at the Government Accountability Office (GAO), testified about preliminary findings from its investigation of the EPA's proposals to reduce TRI reporting. Stephenson testified, "EPA did not adhere to its own rulemaking guidelines when developing the proposal to change TRI reporting requirements." The GAO investigation found at least three questionable actions by EPA, including the forced consideration of an option that a workgroup rejected earlier in the process, shortcuts in impact analysis and insufficient opportunity for a full agency review by other EPA offices.

Stephenson also made clearer the enormous impact the changes would have to information on local toxic pollution. GAO concludes "that the TRI reporting changes will likely have a significant impact on information available to the public about dozens of toxic chemicals from thousands of facilities in states and communities across the country." Stephenson's testimony also noted that EPA's claims that the impact of the changes were minor because the changes would only effect one or two percent of toxic pollution tracked under TRI "runs contrary to the legislative intent of EPCRA and the principles of the public's right-to-know."

Protecting small businesses came out as a major theme in justifying the EPA's rollback of the TRI program. Thomas Sullivan, General Counsel for the Small Business Administration's Advocacy Office, and Nancy Klienfelter, a small business owner and member of the National Federation of Independent Businesses, both testified that the reduced TRI reporting would be a significant benefit to small business. However, several Senators questioned the benefits available. Sen. Amy Klobuchar (D-MN) confirmed with Johnson that some of the TRI information would still have to be reported under another provision that provides first responders with emergency planning information. Klobuchar found it difficult to understand that significant time savings could be achieved from just reporting the information in one place instead of two.

During his questioning of Johnson, Lautenberg also stated that he would be introducing legislation shortly that would restore the TRI program's previous reporting thresholds. Later, Sen. Barbara Boxer (D-CA), chair of the committee, also stated that since the EPA had finalized the TRI changes, legislative action might be needed.

OMB Watch Critical of Proposed Chemical Security Rule

In response to the Department of Homeland Security's (DHS) proposed interim chemical security rule, OMB Watch will submit comments to DHS that argue for increased transparency and stronger protections at thousands of facilities across the country.

Chemical facilities pose one of the greatest threats to our nation's security. The U.S. Army's Surgeon General states that 2.4 million people are at risk of death or injury as a result of an attack on a chemical plant in the United States, and the U.S. Public Interest Research Group estimates that 41 million Americans live in "within range of a toxic cloud that could result from a chemical accident at a facility located in their home zip codes." In order to prevent an attack that could approximate another 9/11, we need to ensure that the highest security is in place at chemical facilities.

Section 550 of the Department of Homeland Security Appropriations Act of 2007 requires DHS to develop a temporary program for instituting security performance standards for high risk chemical facilities. DHS's proposed regulations will require certain high risk facilities to develop site security plans and submit them to DHS for approval.

While the statutory language in Section 550 passed by Congress contained serious flaws, DHS compounded this poor legislation with even poorer regulations. In comments to DHS, OMB Watch will outline several problems with the proposed regulations. In particular, the regulations contain excessive secrecy provisions that create impediments to effective oversight and information sharing, and the regulations institute a temporary federal program that preempts state regulations.

Excessive Secrecy

Limiting the free flow of information increases the danger faced by a terrorist attack upon a chemical facility. In testimony before the Committee on Homeland Security, Lee Hamilton, former Vice Chair of the 9/11 Commission, stated, "Poor information sharing was the single greatest failure of our government in the lead-up to the 9/11 attacks." Instead of fixing this problem, DHS heads in the opposite direction by proposing the creation of a new category of controlled information called Chemical-terrorism Security and Vulnerability Information (CVI). DHS states that CVI will be strictly limited to those persons with a "need to know." OMB Watch strongly objects to this paradigm for information sharing as it violates the fundamental democratic principle of a "right to know."

In order to prevent a potentially catastrophic event or to recover from such an event, DHS needs to invest time and effort into developing robust information exchange procedures. The proposed regulations should specify how the information which is collected will be combined and shared with other information and ongoing counterterrorism and security programs at other departments and agencies. OMB Watch

encourages DHS to create the infrastructure to increase information sharing, not by limiting information to those who "need to know," but by creating an environment and culture at DHS which understands the need to share information with state, local and private actors and with the public. Information restrictions should be limited to only the most detailed and specific information. DHS should specify in the regulation precisely what reports and information submissions will be withheld from public disclosure, rather then creating an open-ended category.

People who live near chemical facilities have a right to know if they are living in harm's way. Moreover, DHS should provide information to inform the public, Congress, and public interest groups on the status of chemical security and the improvements being made. OMB Watch recommends that the following information be made public:

- The number and identity of chemical facilities covered by the program;
- The number and identity of facilities who have been certified by DHS;
- The number and identity of facilities who have had their site security plans denied by or are waiting for approval from DHS;
- The best practices of site security plans for chemical facilities on a sector-by-sector basis;
- The approval and denial of site security plans for particular facilities but not the details regarding vulnerabilities.

State Preemption

The proposed interim regulation states that no state law or regulation can have any effect if it conflicts with DHS's regulation. If a state regulation is stronger than the federal regulations, DHS argues, it could frustrate Congress's intent. Therefore, according to DHS, the state regulation should be granted no effect. This is an overly expansive interpretation of DHS's authority under Section 550.

Moreover, certain states face unique threats due to the proliferation of chemical facilities in densely populated regions. In New Jersey, there are six industrial facilities that could endanger the lives of one million people and fifteen that could endanger 100,000 or more people. The FBI has called a two-mile stretch of New Jersey the "most dangerous two miles in America." As a result, New Jersey has stronger chemical security measures that require facilities that use the most toxic chemicals to investigate whether they could reduce or replace those chemicals. DHS's chemical security regulations could affect New Jersey's requirements by setting the federal standard as a ceiling.

OMB Watch will raise a number of other concerns in its comments to DHS, including the failure to consider inherently safer technologies and the failure to include a role for worker and community participation in the oversight of site security improvements. Section 550 requires DHS to issue finalized regulations by April 4.

FEC Tells Court that Case-by-Case Regulation of Independent PACs Works

On Feb. 1, the Federal Election Commission (FEC) published new guidance for its 2004 rule defining when independent political committees are subject to federal campaign finance rules and contribution limits. The document responds to a court order seeking stricter regulation of 527 groups. In the guidance, the FEC cites its 2006 enforcement action against six groups as proof that its case-by-case approach — used to determine whether a group's "major purpose" is to influence federal elections — is workable. It remains to be seen whether the court will accept this approach, which moves the FEC toward a vague standard similar to the "facts and circumstances" test used by the Internal Revenue Service (IRS) to define prohibited partisan activity by charities and religious organizations.

In 2004, the FEC rejected arguments by campaign finance reform groups and Reps. Chris Shays (R-CT) and Martin Meehan (D-MA) urging it to subject groups exempt under Section 527 of the tax code to the same regulatory regime as campaigns and political parties. In response, Shays and Meehan took the issue to federal court, and although the court declined to order a new rulemaking proceeding, it ordered the FEC to explain why 527 tax exempt status should not trigger federal campaign finance regulation.

The FEC's new "Explanation and Justification" explains that the IRS tax exempt status criteria are broader and serve a different purpose than the Federal Election Campaign Act (FECA). As a result, the FEC says it will focus on two criteria in FECA that establish whether a group is to be regulated as a federal "political committee": whether the group has received contributions or made expenditures of $1,000 or more that expressly advocate for or against federal candidates *and* whether the group's "major purpose" is to influence federal elections.

After the Supreme Court upheld the McCain-Feingold law, express advocacy is no longer limited to "magic words" like "vote for" or "vote against". Instead, the standard has become vague, counting expenditures for communications that are "unmistakable, unambiguous, and suggestive of only one meaning" as intending to support or oppose federal candidates. In addition, the definition of a group's "major purpose" is not clear, since the FEC says it will make that determination on a case-by-case basis, looking at factors such as the wording of fundraising appeals, spending patterns, and public and internal statements of purpose. The FEC says this "fact-intensive analysis" is necessary, and that "any list of factors developed by the Commission would not likely be exhaustive in any event."

The result is that any organization could become the subject of a FEC investigation into its campaign activities compared to its non-campaign activities, with FEC staff deciding what the group's "major purpose" is. The FEC says uncertainty can be addressed by looking at its past enforcement decisions, since "Any organization can look to the public

files for the Political Committee Status Matters and other closed enforcement matters, as well as advisory opinions and filings in civil enforcement cases, for guidance...."

According to the FEC, nonprofits can ask for Advisory Opinions or make their own best judgment about whether they should register as a regulated political committee. The FEC also says that if a nonprofit disagrees with an FEC Advisory Opinion, the group can appeal, and if a nonprofit is investigated, it can appeal the outcome or settle and pay fines. This will provide little comfort to nonprofits without the resources to hire the legal expertise needed to wade through these complexities.

In December 2006, three 527 organizations were fined a total of $630,000 for failure to register as political committees. They included Swift Boat Veterans and POWs for Truth, the League of Conservation Voters and MoveOn.org. The FEC also cited action against the Leadership Forum, Freedom Inc. and League of Conservation Voters 527 fund as proof that their case-be-case approach to enforcement is adequate.

Courts Defining When Government Funds Cannot Support Faith-Based Programs

The U.S. Supreme Court will soon hear oral arguments about whether taxpayers have the right to challenge the constitutionality of government funding for conferences supported by the White House Office of Faith-Based and Community Initiatives that are alleged to promote religious groups over secular ones. Meanwhile, several recent court decisions involving separation of government-funded and religious programs provide some clarity to vague federal regulations.

Because the Establishment Clause of the U.S. Constitution prohibits government funds from being used to pay for programs that include religious content or require participation in religious activities, federal regulations require religious and government funded programs to be separated in time and place. However, there has been little concrete guidance on how federal grantees implement this standard and little oversight. Since the Bush administration began its push to increase participation of faith-based organizations in federal grant programs, there has been a series of legal challenges to specific programs brought by nonprofits concerned about separation of church and state.

Supreme Court to Hear Case Challenging White House Faith-Based Office

On Feb. 28, the Freedom From Religion Foundation (FFRF) will argue before the Supreme Court that it should be allowed to challenge the constitutionality of the Bush administration's use federal funds for conferences the group says promote grant opportunities for religious organizations over secular ones. In December 2006, the Supreme Court granted review of *Hein v. Freedom From Religion Foundation Inc.* (U.S. No 06-157), after the U.S. Court of Appeals for the Seventh Circuit overturned a lower

court order dismissing FFRF's challenge.

The Bush administration argues that because Congress has not earmarked appropriations directly for the faith-based offices, there is no basis to sue over the discretionary use of federal tax dollars to promote religion. However, according to a recent FFRF news release, its brief "documents the tens of millions of dollars which have gone to the faith-based offices, often with direct Congressional oversight, since many Cabinets have placed the faith-based offices in their budgets, which are reviewed and debated by Congress." If the Supreme Court rules in favor of FFRF, the case will go back to the lower court, which will consider the constitutional issues.

Court Discontinues Funding for Michigan Teen Ranch

On Jan. 17, the Sixth Circuit Court of Appeals in Michigan upheld the decision of a lower federal court against Teen Ranch, a Christian ministry treatment center for abused and delinquent children. The court found the organization routinely used state funds for religious instruction during treatment. In 2003, the state stopped sending funds to the program, and the Michigan Family Independence Agency stopped placing at-risk teens in their program after a routine review showed the program was proselytizing with federal funds. A plan to correct the problem submitted by Teen Ranch failed to address the proselytization issue. Instead, the group issued a statement saying, "Incorporating religious teachings into on-going daily activities of youth and their treatment plans touches at the core of why we were founded, why we are here today, and why we will continue to include such programming for children in our care."

Teen Ranch sued claiming that their religious freedom, freedom of speech, and right to equal protection were denied when the funds were discontinued. They argued that since Michigan pays for the program on a per-child basis, it should be treated as a voucher program, which, under federal regulations on "indirect funding", would allow religious content in the program. However, Judge Damon Keith said that requires "true private choice" of program provider by those receiving treatment, and children at Teen Ranch had no real choice over their program placement. He also pointed out that the other 34 faith-based youth providers in Michigan had not violated rules against proselytizing.

Ruling Allowing Spiritual Screening in VA Chaplain Programs Appealed

FFRF will appeal a Jan. 8 federal district court ruling dismissing its lawsuit against the Department of Veterans Affairs (VA). In *FFRF v. Nicholson*, the group challenged the constitutionality of the VA's hospital chaplaincy program because the program broadly integrates faith while providing medical care. The VA has a required policy that each patient undergoes a spiritual assessment. One of the treatment programs referenced in the lawsuit is from Sheridan, Virginia. "The Sheridan VA Medical Center provides a drug and alcohol treatment program entitled the Spiritual Recovery Support Group (hereinafter SRSG). The purpose of SRSG is to provide intervention and support to

veterans suffering from low self-esteem because of 13 significant spiritual injuries."

The court said the VA program is permissible because it is voluntary. The opinion states, "Voluntariness lies at the heart of each and every aspect of VA's chaplaincy program being challenged by plaintiffs. In terms of its clinical chaplaincy program and integration into patient care, VA chaplains do not incorporate religious content into either their pastoral care or spiritual counseling unless that is the patient's wish." The court concluded that the VA's purpose is to promote the health of patients and that because patients could choose whether or not to work with chaplains, the program is therefore permissible. FFRF's appeal argues that patients do not have a choice in undergoing the spiritual screening, which it says asks intrusive questions about religious beliefs and practices.

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In This Issue

Congress Holds Hearings on Bush's Changes to Regulatory Process

Congress held back-to-back hearings Feb. 13 on President George W. Bush's Executive Order that amended the federal regulatory process. The first hearing primarily addressed the content of the amendments and the Good Guidance Practices Bulletin, both issued Jan. 18. The second hearing focused more on the legal and institutional challenges Bush's amendments raise.

In the first hearing, held by the House Committee on Science and Technology's Subcommittee on Investigations and Oversight, Chairman Brad Miller (D-NC) focused on the significant consequences of the changes and how centralizing executive power over the federal agencies will affect Congress's ability to protect public health and safety.

Three of the witnesses agreed that the amendments would lead to:

- significant delay in issuing regulations and guidance documents that the regulated community needs to comply with legal requirements;
- additional burdens on agencies already experiencing budget and personnel cuts and an increase in the analyses required in the regulatory process; and
- additional power for the Office of Information and Regulatory Affairs (OIRA) over the substance, timing, and review of critical public protections.

The House Committee on the Judiciary's Subcommittee on Commercial and Administrative Law held the second hearing. Chairwoman Linda Sanchez (D-CA) asked why the amendments and bulletin would encourage agencies to use more formal rulemaking avenues while other members focused on what Congress can do to mitigate the effects. Rep. William Delahunt (D-MA) addressed the pattern of presidential encroachment on congressional powers the amendments represent, calling it "institutional combat."

Witnesses at this second panel expressed alarm at the legal authority that could be given to presidentially appointed Regulatory Policy Officers (RPO) without the approval of Congress and without Senate confirmation. Also, the substitution of criteria like "market failure" for specific criteria Congress establishes in legislation is a legislative power grab by the executive branch and raises separation of powers issues that could lead to constitutional challenges.

The panel members addressed actions Congress could take to challenge the amendments. Options include:

- exploring appropriations riders to limit the implementation of some of the changes like market failure analyses;
- increasing congressional oversight of OIRA and especially the guidance it will issue to direct agencies in implementing the changes;
- urging the Senate to exert its advise and consent role over presidential appointees because nearly all of these appointees in regulatory agencies are confirmed by the Senate; and
- exploring legislative responses, such as exempting independent agencies from the guidance requirements or inserting specific authorizing legislation that limits the scope of or requires specific regulatory criteria.

Most of the supporters of Bush's amendments argued that there was nothing new in the changes and/or that they were just extensions of existing practices. They also said that the changes were necessary to codify "good government" practices. Some of the more disingenuous arguments in support of the amendments were that including a section on the formal rulemaking process (a trial-like hearing) was merely a reminder to agencies that a formal process existed, not encouragement to use it; that market failure was integral to the Clinton-era executive order that Bush's action amended; and that

presidentially appointed RPOs are not new.

If these claims are true, opponents argued, then why did Bush issue an executive order? Perhaps without a compliant Republican Congress, he can't achieve these administrative changes legislatively or by acquiescence. Also, the reach of the order is well beyond the guidance bulletin's, making additional action necessary. For example, requiring RPOs, aggregated costs and benefits assessments, and market failure criteria are mandates the guidance bulletin could not accomplish on its own.

As with the Iraq war, ethics in government, contractor responsibility, and the federal budget, there is no longer just one voice echoing from Capitol Hill. There may be limited changes Congress can make to mitigate the effects of the amendments, but the hearings indicate a willingness to shine some light on executive actions aimed at protecting special interest backers of the administration, and to exert the authority of Congress.

The amendments and the guidance bulletin go into effect in late July, and only then will we be able to gauge the real impacts of the changes. In the meantime, look for OIRA to issue guidance to agencies clarifying the new amendments, probably by amending Circular A-4, *Regulatory Analysis* which is the current directive used by the agencies. We urge Congress to give tough scrutiny to any guidance issued and continue oversight of these important regulatory issues.

FDA Drug Approval Process under Scrutiny

The U.S. Food and Drug Administration (FDA) is facing renewed criticism over the process by which it approves drugs for market. Recent reports indicate many drugs are approved before they are proven safe, and problems with the agency's structure and processes prevent it from fulfilling its mission. Subsequently, Congress has started using its oversight powers to scrutinize the agency, and the clamor for FDA reform is growing louder.

The Federal Food Drug and Cosmetic Act requires FDA to ensure the safety of new drugs before the agency approves the drugs for market. However, operating within a provision of the law, FDA often approves drugs before safety is established. The agency then requires drug manufacturers to further study drugs while they are on the market. These "post-marketing commitments" serve to streamline the drug approval process.

FDA recently revealed that many of the post-marketing commitments go unfulfilled. On Feb. 2, the agency published a report in the *Federal Register* detailing the progress of post-marketing commitments, which in Fiscal Year 2006 numbered 1,259. As *The NewStandard* reported, FDA said drug companies "had yet to initiate 71 percent of outstanding 'post-market' safety evaluations." Meanwhile, only 11 percent have been submitted. These drugs remain on the market, yet neither FDA nor drug makers have

proved their safety.

Congress also recently expressed concern over the FDA drug approval process. On Feb. 13, the House Committee on Energy and Commerce's Subcommittee on Oversight and Investigation held a hearing titled "The Adequacy of FDA Efforts to Assure the Safety of the Drug Supply." The hearing occurred in response to recent regulatory failures that allowed dangerous drugs on the market, such as the highly publicized Vioxx incident.

Hearing witnesses testified that the FDA drug approval process is subject to industry influence and that agency managers sacrifice sound science in the name of expeditious approval. Ann Marie Cisneros, a clinical researcher, accused the pharmaceutical company Aventis of being complicit in a fraudulent clinical research project which Aventis had sponsored.

The testimony of Dr. David B. Ross, a physician and former FDA pharmaceutical reviewer, told the story of the antibiotic Ketek. Dr. Ross claimed Ketek was approved despite persistent warnings of its danger: "FDA managers were so bent on approving Ketek that they suppressed evidence of fraud and pressured reviewers — including myself — to change their reviews."

The criticism leveled at FDA is not new. The Government Accountability Office (GAO), the investigative arm of Congress, issued a report in March 2006 identifying significant gaps in FDA's ability to monitor and regulate post-market drugs. The GAO report mentioned organizational structure, insufficient oversight and poor data availability as some of the major problems facing FDA. GAO recommended Congress expand FDA's regulatory authority for post-market drugs.

In September 2006, the National Academy of Sciences Institute of Medicine also identified problems at FDA. Most notably, "FDA and the pharmaceutical industry do not consistently demonstrate accountability and transparency to the public by communicating safety concerns in a timely and effective fashion."

The mounting evidence in the case for FDA reform increases the likelihood of congressional action. Congress will likely take up the renewal of the Prescription Drug User Fee Act (PDUFA), which is set to expire this year. The legislation gives FDA the authority to require drug manufacturers to pay fees that the agency then uses to conduct drug reviews. In his proposed FY 08 budget released in early February, President George W. Bush called for new industry fees to further finance FDA. User fees from regulated companies would account for 21.3 percent of FDA's budget and pay for nearly 60 percent of reviews, according to *USA Today*.

FDA critics are skeptical of the industry-paid user fees. In the House hearing, Dr. Steven E. Nissen, chairman of the Department of Cardiovascular Medicine at the Cleveland Clinic Foundation, chastised PDUFA: "We started down the wrong pathway when we

said that the regulated industry was going to pay the FDA to regulate itself."

In addition to PDUFA reauthorization, two Senate bills aim to enact reforms within FDA. A bill introduced by Sens. Charles Grassley (R-IA) and Christopher Dodd (D-CT) would separate FDA's drug safety office from its drug approval office, thus elevating FDA reviewers to the same status as managers who approve drugs, according to *Congressional Quarterly* (subscription). In an attempt to improve post-market regulation, a bill introduced by Sens. Edward Kennedy (D-MA) and Michael Enzi (R-WY) would focus more on the drug safety processes as they are currently used. Both bills are currently in committee.

It is unclear whether the drug approval process at FDA will be subject to reform. However, with the safety of many post-market drugs unknown, the issue is unlikely to go away. In his testimony, Ross chided his former employer: "Overall, there is a culture of approval [at FDA.]" He indicated that approval, not safety, is the top priority, adding, "If you can get a product on the market...then you find some way of doing it."

Grassroots Lobbying Survey Results Demonstrate Strong Support for Disclosure

In early February, OMB Watch conducted a week-long Internet survey on federal grassroots lobbying disclosure that asked respondents to express their support or opposition to a variety of disclosure principles. Over 1,100 people responded to the survey, and the results were clear: strong support exists for federal grassroots lobbying disclosure.

Of the respondents, 70 percent strongly supported federal grassroots lobbying disclosure in general, and another 18 percent moderately supported the concept. Only nine percent opposed disclosure. Even among nonprofit organizations, some of which were concerned about disclosure provisions, nearly 56 percent of respondents strongly supported disclosure.

Many of the principles described in the survey, such as reporting triggers, exclusions for communications with members and congregants, and exclusions for Internet communications — including bloggers — address concerns that surrounded the grassroots lobbying disclosure provision that was stripped from S.1, the Senate's lobbying reform and ethics bill that passed Jan. 18. The reactions of many survey respondents to the disclosure principles illustrate that if disclosure and transparency are the goals, we can gather and make public relevant information without imposing onerous reporting requirements and without chilling speech.

Court Upholds Islamic American Relief Agency Asset Freeze

On Feb.13, the U.S. Court of Appeals for the District of Columbia upheld a lower court decision that allowed the Treasury Department's Office of Foreign Assets Control (OFAC) to freeze the assets of the Missouri-based Islamic American Relief Agency. The court said the asset seizure was lawful because the court found the organization is an affiliate of a Sudanese group that was designated as a terrorist organization in 2004, making this the first case to allow such designation based solely on an alleged branch relationship. There was no finding that the U.S. group used funds to support terrorist activities, and no criminal charges have been filed.

In October 2004, OFAC designated the Sudan-based Islamic African Relief Agency (IARA), based in Sudan, as a "Specially Designated Global Terrorist." A few weeks later the Federal Bureau of Investigation raided the Islamic American Relief Agency's (IARA-USA) offices in Columbia, MO, shutting down a relief organization that provided disaster and war relief in Africa, Asia and Bosnia. The *Columbia Tribune* reported that tax records indicate IARA-USA provided nearly $23 million in such relief from 1992-2002. It was founded in 1985 by a Sudanese immigrant and named the Islamic African Relief Agency USA. In 2000, the U.S. group changed its name to the Islamic American Relief Agency and established a separate board of directors and finances.

In December 2004, IARA-USA filed suit challenging the asset seizure, claiming OFAC's action was not supported by the record and violated federal law and the U.S. Constitution. In September 2005, the U.S. District Court for the District of Columbia ruled in favor of OFAC, holding the "record supported OFAC's conclusion that IARA-USA was a branch of IARA," making the seizure lawful under Executive Order 13224 and the International Emergency Economic Powers Act, as amended by the PATRIOT Act. The court used incidents occurring prior to 2000, when IARA-USA changed its name and governance, to find a "branch" relationship between it and the IARA. It also did not allow IARA-USA access to documents used by the government.

In upholding the lower court ruling, the appeals court said a "highly deferential standard of review applies," and it would only overturn OFAC's action if it was found to be arbitrary or an abuse of discretion. The court noted, "We may not substitute our judgment for OFAC's." It acknowledged "that the unclassified record evidence is not overwhelming, but we reiterate that our review — in an area at the intersection of national security, foreign policy, and administrative law — is extremely deferential."

In its opinion, the court cited its previous decision upholding OFAC's action against the Holy Land Foundation, emphasizing that, when foreign affairs are involved, "We owe the executive branch even more latitude than in the domestic context." However, the ongoing criminal prosecution of members of Holy Land's board of directors has revealed questionable evidence supporting OFAC's claims.

The IARA-USA case is significant, since the court states that a charity can be shut down even when there is no allegation of direct support of terrorism if the organization has a

close enough relationship, history or other ties to a group that is designated by OFAC. The opinion notes, "IARA-USA argues that OFAC cannot block an entity's assets unless it determines that the entity poses an 'unusual and extraordinary threat to national security.' The district court rejected this argument, holding that the threat need not be found with regard to each individual entity....We agree."

The court also rejected IARA-USA's constitutional claims.

Bills to Regulate Independent 527s Reintroduced

Sponsors of the Bipartisan Campaign Reform Act (BCRA) have reintroduced legislation they pushed in 2005 and 2006 to subject independent section 527 political organizations to the same contribution limits and regulation as federal campaigns and political parties, with identical bills in the House (H.R.420) and Senate (S.463).

The bills, both called the 527 Reform Act of 2007 and sponsored by Sens. John McCain (R-AZ) and Russ Feingold (D-WI) and Reps. Christopher Shays (R-CT) and Martin Meehan (D-MA), would amend the definition of political committees under the Federal Elections Campaign Act of 1971 (FECA) so that any 527 organization (a nonprofit independent political committee that qualifies under section 527 of the Internal Revenue Code) is subject to federal election law requirements if it is a committee, club, association, or other group that spends $1,000 or more on:

- (1) a public communication that promotes, supports, opposes, or attacks a candidate for federal office during the year prior to the general election, or
- (2) certain voter drive activity. Such voter drive activity includes work on voter registration, voter identification, get out the vote efforts, and even "generic campaign activity."

Upon introduction of S.463, Feingold commented on the Senate floor: "We put a limit of $25,000 per year on the contributions that can be accepted for that non-federal account. This means no more million dollar soft money contributions to pay for get-out-the-vote efforts in the presidential campaign. Nothing in this bill will affect legitimate 501(c) advocacy groups. The bill only applies to groups that claim a tax exemption under section 527."

These lawmakers are relentlessly pressing for change, in both Congress and the courts. In light of the Federal Election Commission's (FEC) rejection of any plans to place 527s under the same regulations as campaigns and political parties, Shays and Meehan filed a federal lawsuit. A federal judge has set the end of May as a deadline to complete briefing in the ongoing case. In the meantime, the FEC has said it is taking a case-by-case approach to decide if 527s have a "major purpose" of influencing federal elections, which would subject them to increased regulation.

The 2008 presidential campaign gives this issue some urgency. This debate stems from the ambiguity as to what election law regulates and can be regulated. 527s are currently expected to play a large role in the 2008 Presidential election, but the rules will be unclear until the courts, Congress and the FEC provide clearer direction.

Congress Finally Finishes FY 07 Appropriations

It took four extra months and a new Congress, but on Feb. 14, lawmakers finished the FY 2007 appropriations cycle when the Senate passed H.J.Res. 20.

The $463.5 billion spending bill passed 81-15. The President signed the bill the next day, just in time to prevent a government shutdown.

Pressed for time, Senate leaders chose to pass the same version the House approved on Jan. 31, without considering amendments. Congress needed to finish the bill by Feb. 15, when a stopgap continuing resolution would have expired. And amendments could have also forced unpopular cuts across all programs. See this *Watcher* article for a rundown of the enacted bill.

The joint resolution wiped out about 9,300 earmarks that had been written into the FY06 appropriations bills or their report language. Only funding *directives* were excluded, with funding levels left the same. This move gives agencies the power to choose how this funding will be spent for FY07. In fact, agencies could decide to use the funding for the same purpose as the earmark directive had instructed.

Indeed, the Department of Energy has announced it will fund earmarked projected from past appropriations bills. Some representatives — notably Sen. Pete Domenici (R-NM) — have said they will ask agencies to fund canceled earmarks from drafted appropriations bills. In response, the Office of Management and Budget issued non-binding guidance to the agencies to disregard the FY06 earmarks and requests from Congress when they decide how to direct funding.

Enactment of the CR means the formal close of FY 2007 appropriations season. Lawmakers will soon turn to the regular FY 2008 spending bills. Appropriators are expected to act first, though, on the $100 billion FY 2007 war supplemental that President Bush requested at the same time that he sent his FY 2008 budget to Capitol Hill. Despite pleas from Congress and outside budget experts to break their reliance on supplemental funding requests for the war, it appears the administration has no intention of stopping this detrimental practice.

The supplemental is fast becoming a magnet for additional military and non-military funding items, some left unaddressed during the abbreviated debate at the end of the FY 07 appropriations process. Most notable among those items is funding for the Base Realignment and Closure (BRAC) commission. Lawmakers are also making plans to use

the measure to provide money for hurricane recovery and agriculture disaster relief, and perhaps even for the State Children's Health Insurance Program, which will face funding shortages as soon as May of this year. Sen. Dianne Feinstein (D-CA) said she may seek $1.2 billion in disaster relief for her state to deal with the recent frost damage to crops. And Oregon Senators, Republican Gordon H. Smith and Democrat Ron Wyden, want $400 million for a county payments program, of which their state is a primary beneficiary.

Squabbling Over Tax Cuts Continues to Delay Minimum Wage Increase

On Feb. 16, by a vote of 360-45, the U.S. House of Representatives passed H.R. 976, a ten-year, $1.3 billion package of offset tax cuts designed to accompany a $2.10 per hour increase in the minimum wage. On Feb. 1, the Senate adopted S. 2 — including its own set of offset tax cuts totaling $8.3 billion over ten years. The two tax packages differ markedly in size and content, and S. 2 includes the minimum wage hike while H.R. 976 comprises only the tax provisions, which could complicate the procedural road ahead.

In January, the House adopted a "clean" minimum wage increase without any tax cuts, 315-116. But House Ways and Means Chairman Charles Rangel (D-NY) finally relented to pressure from his Senate counterparts who insisted that a clean minimum wage bill would not pass in that chamber. Rangel and Ways and Means Committee ranking member Jim McCrery (R-LA) then drafted H.R. 976, the Small Business Tax Relief Act of 2007, which the Committee unanimously approved on Feb. 12.

Provisions of H.R. 976
H.R. 976's principal tax benefits include:

- one-year extension of the work opportunity tax credit (WOTC) expanded to cover veterans and high-risk youth (estimated cost: $695 million over ten years);
- one-year extension of tax code Section 179 small business expensing through 2010, with an increase in the deduction ceiling (estimated cost: $68 million)

The bill's main offsets include:

- disallowing the shifting of assets by parents to wealthy dependents qualifying for the lowest capital gains and dividend income (estimated revenue: $874 million);
- allowing the IRS an extra four months — 22 months instead of 18 months — to notify taxpayers of failure to comply with tax obligations before the service is required to suspend interest and penalties (estimated revenue: $506 million)

Not included in the Joint Committee on Taxation's scoring is H.R. 976's extension of a tip credit provision that restaurants get for paying Social Security taxes on employee tip income above the federal minimum wage. If the proposed minimum wage increase were

accounted for, the total price of the House tax cuts would rise by $552 million over ten years, to nearly $1.8 billion. The Senate bill includes no such provision.

Other Major Differences between H.R. 976 and S. 2

- Work Opportunity Tax Credit ("WOTC"): The House bill extends the WOTC for one year and expands it to include disabled veterans. The Senate provides for a five-year extension of the WOTC, also applying it to the hiring of veterans disabled after the Sept. 11 terrorist attacks. (Ten-year costs: House - $695 million; Senate - $3.6 billion)
- Leased Property Depreciation: S. 2 allows owners of leased property, restaurateurs and some retailers faster depreciation for improvements to leased property, extending the current provision for three months. (Ten-year costs: House - no such provision; Senate - $2.7 billion)
- Small Business (Section 179) Expensing: The House bill extends the so-called Section 179 expensing provision that allows small businesses to deduct from income as much as $112,000 for one year through 2010 and increases the maximum deduction to $125,000, indexed for inflation after 2010. The Senate bill provides only for a one-year extension, without an increase in the maximum, but allows it to override tax rules requiring gradual write-offs of capital investments. (Ten-year costs: House - $68 million; Senate - $257 million)

Business Interests Fighting Over Tax Cuts

Intense lobbying and counter-lobbying by various interests group within the business community has begun in earnest. In a Feb. 13 letter to Rangel and McCreary, the U.S. Chamber of Commerce praised the House for its "restraint . . . exercised in omitting onerous permanent tax increases from the package." The letter refers to provisions included in the Senate version that cap the deductions for deferred compensation for business executives and prohibit deduction of liabilities incurred in settlements.

But the National Federation of Independent Business (NFIB) and the National Restaurant Association are collaborating to lobby for inclusion of as many tax cuts in the final minimum wage bill as possible.

Procedural Problems May Cause Additional Delays

Because there is a constitutional requirement that tax measures must originate in the House, the next steps in reconciling the House and Senate versions of tax cuts to accompany the minimum wage increase could be complicated and take even more time. While business interests and the House and Senate continue to squabble over yet another round of tax cuts, the minimum wage increase remains unfinished, and millions of Americans who have gone over ten years without a pay raise are still struggling to make ends meet.

Congress Seeks to End IRS Privatization Program

Legislation has been introduced in the House and Senate that would halt an Internal Revenue Service (IRS) program that outsources certain tax collection responsibilities to private companies. The costly and dangerous program has been soundly criticized by Congress, the IRS National Taxpayer Advocate, and outside consumer groups since it began last fall.

The House bill, H.R. 695, co-sponsored by Reps. Chris Van Hollen (D-MD) and Steve Rothman (D-NJ), would repeal the authority to outsource tax collection, which Congress granted to the IRS in 2004. The bill has garnered 66 co-sponsors, including seven Republicans, since it was introduced on Jan. 24.

The Senate bill, S. 335, co-sponsored by Sens. Byron Dorgan (D-SD) and Patty Murray (D-WA) would accomplish the same by barring the IRS from using money to outsource tax collection. It currently has 17 co-sponsors, all Democrats.

These bills follow up on similar legislation that lawmakers failed to enact during the last session of Congress. The House came closest to repealing the program during the FY 07 appropriations process, when the appropriations bill that funds the Department of the Treasury was amended to repeal the privatization program. But that individual appropriations bill was never passed, and the amendment was not included in the FY 07 joint funding resolution, the legislative vehicle in which the Treasury Department appropriations were enacted.

The private collection program has been in operation since September 2006. Three private companies have received contracts to recover debts under $25,000 that the IRS has identified. IRS has not disclosed complete data on the program's expenses and revenues thus far, though GovExec.com reported the IRS had taken in $11 million as of end of December.

Private collection agencies can make up to a 24 percent commission fee on all the revenues they collect. IRS overhead expenses for revenue collection typically run at about three percent of total revenues — nearly one-eighth the cost of using private tax collectors.

Since its initiation, the program has been the subject of debate. In testimony before the Senate Budget Committee on Feb. 14, IRS Commissioner Mark Everson defended the program by claiming that the revenues would otherwise not be collected. Concerns about the program's costs, he said, are irrelevant.

Yet other experts disagree with Everson. In the National Taxpayer Advocate's (NTA) annual report to Congress, Nina Olsen argued the IRS may currently have the resources to pursue these uncollected taxes without private companies. (*The Office of the Taxpayer Advocate reports directly to the IRS Commissioner but is independent of the IRS. It serves as a type of ombudsman for taxpayers. The Office also recommends*

administrative and legislative changes within IRS, and can issue taxpayer assistance orders to help taxpayers.)

In the report, the NTA found that the three private collection companies that have received IRS contracts are only using 75 employees total. The IRS has assigned 65 of its employees to monitor and oversee those private companies — presumably enough staffing to do what the private companies are doing and at a much lower cost.

Furthermore, Congress has the option to give IRS more funding to collect unpaid taxes. The IRS did not request such funding in the FY 08 budget proposal, and nearly $100 million was cut from the enforcement budget at the IRS in the FY 07 joint funding resolution — another consequence of the 109th Congress' failure to complete appropriations bills on time.

The NTA has made abolishing the privatization program its second-highest priority for 2007. The NTA shares the concerns of many in Congress and outside advocacy groups that private collection agencies may have occasion and motive to take advantage of taxpayers who owe smaller debts, many of whom are elderly or disabled. It believes that IRS would handle these cases more efficiently and with less risk for the privacy rights of the taxpayer.

Take Action: Tell Congress to stop the wasteful IRS privatization program immediately!
OMB Watch and Citizens for Tax Justice are teaming up to mobilize support for these bills that will stop the IRS from continuing this privatization program. With your help, we can prevent the IRS from jeopardizing private and sensitive taxpayer information and wasting scarce resources by paying large fees to private corporations.

Send a letter to Congress today urging them to support H.R. 695 and S. 335 and end the IRS privatization program.

Congress, White House Going in Opposite Directions on TRI

On Feb. 14, Sen. Frank R. Lautenberg (D-NJ) and Reps. Frank Pallone (D-NJ) and Hilda Solis (D-CA) announced companion bills to restore the Toxics Release Inventory (TRI) and undo the U.S. Environmental Protection Agency's (EPA) recently finalized reporting rollbacks. At the same time, President George W. Bush issued an executive order which may exempt all federal facilities from reporting requirements, resulting in another severe attack on the TRI program.

Toxic Right-To-Know Protection Act

The Toxic Right-to-Know Protection Act will legislatively restore the stronger reporting

thresholds that were in place for almost twenty years. The bill would remove EPA's authority to alter the program's reporting requirements without the approval of Congress.

EPA finalized rules in December 2006 that weaken toxic reporting under the TRI program, despite enormous opposition to the changes. The changes will allow facilities to avoid detailed reporting of toxic pollution less than 5,000 pounds as long as less than 2,000 pounds are released to the environment. The EPA is also permitting facilities that manage up to 500 pounds of persistent bioaccumulative chemicals such as lead and mercury to avoid detailed reporting of the waste.

The proposed changes have been met with stiff resistance throughout the rulemaking process. Over 122,000 public comments were submitted in response to EPA's plans to cut TRI reporting, and more than 99.9 percent opposed the agency's proposals. During the previous session of Congress, Pallone and Solis introduced and passed an appropriations amendment that would have blocked EPA from moving forward with the reporting changes. Unfortunately, the Senate never had the opportunity to discuss a similar amendment since the Senate never acted on the EPA appropriations bill.

The House and Senate bills are identical. In the Senate, the bill (S. 595) is co-sponsored by Sens. Lautenberg, Barbara Boxer (D-CA), chair of the Senate Environment and Public Works Committee, and Robert Menendez (D-NJ). The House bill (H.R. 1055) has 47 additional cosponsors beyond Pallone and Solis.

Exemption of Federal Facilities from TRI

As members of Congress moved to repair the damage done to the TRI program, Bush issued an Executive Order that may exempt hundreds of federal facilities from reporting toxic pollution under the TRI program.

Federal facilities are not required by law to report to the TRI program; that requirement was established by President Bill Clinton in 1993 with E.O. 12856, "Federal Compliance With Right-to-Know Laws and Pollution Prevention Requirements". In 2000, Clinton issued E.O. 13148, "Greening the Government Through Leadership in Environmental Management", which set a series of environmental goals and requirements for federal agencies, including a reiteration of the requirement that federal facilities report under TRI. Because of this requirement, the earlier order (E.O. 12856) was deemed redundant and revoked, leaving E.O. 13148 as the sole order requiring federal facilities to report to TRI.

On Jan. 26, Bush issued E.O. 13423, "Strengthening Federal Environmental, Energy, and Transportation Management", which establishes goals for increased energy efficiency, reduced toxic waste, and other environmental improvements. However, the final section of Bush's new EO rescinds several previous executive orders, including Clinton's E.O.

13148, without reiterating that federal facilities must report under TRI.

Given that E.O. 13148 was the only order still in place requiring federal facilities to report under the TRI program, Bush's new order may exempt all federal facilities from reporting to TRI in the future. The exact impacts will also depend on what guidance the Council on Environmental Quality (CEQ) issues to agencies on implementing E.O. 13423. In 2004, the most recent year of TRI data, 313 federal facilities reported 90 million pounds of toxic chemicals released to the air, water and land.

The Toxic Right-to-Know-Protection Act would not establish a legislative requirement that federal facilities report under the TRI program. However, if the CEQ implementation guidance on E.O. 13423 does not maintain the reporting requirement for federal facilities, the legislation could be amended to undo that change as well.

FOIA Reform Kicks Off in the House

The House Subcommittee on Information, Census and National Archives of the Government Oversight and Reform Committee held a hearing on the Freedom of Information Act (FOIA) Feb. 14. The hearing served as an update on the implementation of Executive Order 13392, which requires agencies to develop and implement FOIA improvement plans, and as an opportunity to air the virtues and vices of FOIA and possible legislative solutions to improve public access to information.

Rep. William Lacy Clay (D-MO), chairman of the subcommittee, stated that he was committed to reforming FOIA to create greater public access to government information. "I am deeply concerned that this administration appears to be shielding information that ought to be accessible to the public," said Clay.

In the 109th Congress, the House and Senate seriously considered legislation to speed up FOIA and relieve agency backlogs. Two bills addressing FOIA, sponsored by Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT), were well-received in both the House and the Senate, though neither received a vote on the floor. 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.

In July 2006, federal agencies released their FOIA Improvement Plans, as required by Executive Order 13392. While the improvement plans met with considerable criticism, the executive order is still widely viewed as a significant acknowledgement of the importance of FOIA.

In testimony before the House subcommittee, the Government Accountability Office stated that, "Despite increasing the numbers of requests processed, many agencies did

not keep pace with the volume of requests that they received. As a result, the number of pending requests carried over from year to year has been steadily increasing; further, the rate of increase is growing."

In addition to FOIA backlogs, the hearing also stressed the significance of the John Ashcroft FOIA memorandum issued soon after 9/11 that encouraged agencies to consider the homeland security implications of released information and to restrict disclosure whenever legally possible. Under this new operating procedure, "secrecy is the default response," stated Anthony Romero, executive director of the American Civil Liberties Union, in testimony before the subcommittee.

To remedy the backlogs created by FOIA and reverse the culture of secrecy, Romero stated, "The first order of business should be legislative action to rescind the Ashcroft memo and restore the original purpose of FOIA by emphasizing the presumption toward disclosure."

Additionally, in his testimony, Clark Hoyt of the Sunshine in Government Initiative called for the creation of a FOIA ombudsman, "a champion for FOIA training and compliance, a place where individuals seeking to exercise their rights under FOIA can go for help short of filing a lawsuit."

Meredith Fuchs of the National Security Archive stated in her testimony, "Addressing delays will require a combination of (1) better reporting, so problems are identified before a decade elapses; (2) better tracking of requests by agencies, so that problems in the system can be fixed; (3) better leadership, including from the Chief FOIA officers appointed as a result of Executive Order 13,392; (4) more resources, including perhaps requiring agencies to fix FOIA budgets as a percentage of their growing public affairs' budgets; and (5) penalties for delay, including perhaps disallowing agencies from collecting any processing or duplication fees if they cannot meet the 20-day deadline."

Clay stated that the bills introduced in the 109th Congress would serve as starting points for a new FOIA reform bill and that he is looking for ways to improve upon them.

Congress Takes a Hard Look at Irresponsible Contractors

On Feb. 15, Sen. Byron Dorgan (D-ND) introduced the Honest Leadership and Accountability in Contracting Act, which is aimed at curbing abuse in government procurement and increasing competition and transparency. Concerns about federal contracts have been rising over the last few years as inquiries into contracts for Iraq reconstruction and Hurricane Katrina response have uncovered serious deficiencies or more questions.

Dorgan's bill (S. 606) would attempt to increase contractor accountability through several mechanisms. First, Dorgan proposes to use increased competition for federal

contract dollars to minimize waste and overspending. Provisions in the bill would require that large "umbrella" contracts valued over $100 million to be awarded jointly to at least two companies that would then compete for delivery orders worth more than $1 million. This approach could counter the troubling trend of increasing concentration of federal contract dollars within a small number of companies.

S. 606 would also hold contractors responsible for prior performance and activities. Scofflaw companies that have histories of violating labor, environmental, health and safety, and other laws would be prohibited from receiving federal contracts. Additionally, the bill would require that a website be established that provides information on contractors' compliance with laws, fines or misconduct charges. President Clinton attempted to put such contractor responsibility procedures in place through an administrative rule that President Bush repealed almost immediately upon taking office.

The bill would also attempt to reign in conflicts of interests by establishing restrictions on contracting officials going to work for companies to which they awarded contracts and requirements that appointees to positions that involve procurement have professional credentials and relevant expertise. Another provision would prohibit outsourcing oversight of federal contracts, a maneuver recently pursued by the General Services Administration, a major procurement agency for the federal government.

The bill is identical to legislation Dorgan introduced during the 109th Congress, which failed to advance. However, with Democrats in control of both the Senate and House and increasing attention on contractors, the bill could see movement this year. The bill has 23 Democratic co-sponsors.

DHS Receives Mixed Opinions on Proposed Chemical Security Rule

The Department of Homeland Security (DHS) received 89 comments, dominated by industry, in response to the proposed interim rule on chemical plant security. The rule establishes the first-ever federal chemical security program. Chemical companies and industry associations generally expressed strong support for the rule, whereas most public interest groups and government officials expressed great concern.

OMB Watch has performed a preliminary analysis of the comments, grouping them into industry associations and companies (55); government officials and agencies (15); environmental and public interest organizations (9); unaffiliated members of the public (5); university researchers (3); and unions (2).

Industry Comments

Fifty-five industry associations and companies commented on the proposed rule. For the most part, they were supportive of the changes and, in particular, appreciative of the flexibility granted in meeting risk-based performance security standards. Some

commenters expressed concerns over vague portions of the rule and asked for clarifications that would be beneficial for their industries. For instance, the American Petroleum Institute (API), an industry association representing approximately 400 oil and natural gas companies, stated that, "DHS must establish rules for 'high risk' facilities that threaten human health, national security, and/or economic security. If subjected to a terrorist attack, many API member company facilities would not likely pose any significant adverse impacts to human health, national security, or the economy. Therefore, API believes these facilities should not be designated as 'high risk'."

Government Comments

Fifteen government officials and agencies commented on the proposals. Most of these comments expressed great concern over the proposed rule. Many were worried that DHS's preemption provision would negatively impact state and local governments' ability to protect their populations from a chemical attack. The New Jersey Office of Homeland Security and Preparedness and the New Jersey Department of Environmental Protection stated, "It is also important not to penalize those pro-active states [that have implemented chemical security programs] and allow the states to retain the authority to adopt enhanced security requirements if states determine they are necessary."

Concerns were also expressed regarding the secrecy provisions of the proposed rule. Sen. Joseph Lieberman (I-CT), chairman of the Senate Homeland Security and Government Affairs Committee, commented that, "I am very concerned that these proposed rules do not strike the right balance and would instead lead to excessive secrecy that could damage, rather than promote, our security."

Public Interest, Union, and University Research Comments

Nine public interest organizations raised significant concerns with the proposed rule, as did comments from two unions and one law professor. Two additional comments from university researchers were submitted. One was neutral on DHS's rule, and the other included a mix of support for some provisions and opposition to other provisions. Public interest organizations expressed strong concern regarding the preemption provision and the rule's prevention of states from developing their own chemical security programs.

Also of concern were the secrecy provisions and DHS's refusal to consider safer technologies or procedures. OMB Watch and Public Citizen stated, "Instead of creating a new broad category of controlled information that could easily expand to include a wide variety of unintended health and safety information and slow sharing of important information, OMB Watch and Public Citizen recommend DHS identify a limited list of specific information that will be restricted from public access."

DHS is expected to review the 89 comments and finalize the interim rule by April 4. Given the interim nature of these regulations, it is possible that Congress may tackle the chemical security issue again this year and attempt to pass more comprehensive and

permanent provisions.

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War Spending Keeps Climbing, Says CBO

A new round of defense and emergency appropriations will raise the total amount of money spent on the wars in Afghanistan and Iraq to nearly $750 billion by the end of FY 2008, according to a recent report by the Congressional Budget Office (CBO).

Later in March, Congress will begin consideration of President Bush's FY 07 request for an additional $93.4 billion in emergency war funding. $70 billion in war funding has already been appropriated for FY 07, bringing the likely total for incremental war expenditures (or additional funds needed for the wars, including reconstruction) to $163.4 billion for the current fiscal year.

The Bush administration requested $141.7 billion in war spending for FY 08 and

projected $50 billion for FY 09. The CBO calculates that these requests will bring the total amount appropriated for the military campaigns to $746 billion. But costs will most likely exceed the FY 08 request, as the rate of spending in Iraq has accelerated each year of the war, mostly due to increasing equipment maintenance and repair costs.

The Congressional Research Service (CRS) estimates that total spending for the Iraq war alone will reach $456 billion by the end of FY 07 and that the Iraq campaign has received about seventy to eighty percent of all spending on the two wars. These figures from the CRS are only estimates because the Department of Defense has not released data on the disaggregated costs of each recent military operation. Indeed, there is no consensus among budget-monitoring government agencies as to how much money in total has been spent on the wars. The Department of Defense does not track budget outlays.

Taken as a whole, the wars are on track to rank among the most expensive in U.S. history. The Vietnam War, which lasted more than 10 years, cost $660 billion in today's dollars. The estimated rate of spending per month in Iraq is significantly higher than it was during Vietnam — $8.0 billion and $5.1 billion per month respectively, in today's dollars.

Spending for the Iraq and Afghanistan wars, however, will take up a much smaller percentage of annual gross domestic product (GDP). Current war spending accounts for about one percent of GDP, whereas during the Vietnam war, spending took up nearly nine percent.

Calculations of incremental costs exclude potential future costs, such as medical care for wounded veterans. A recent study by Joseph Stiglitz, who is an economics Nobel Prize winner and teaches at Columbia University, and Linda Bilmes, who teaches at Harvard, showed that total future costs for the Iraq war could exceed $2 trillion, largely because of expensive long-term costs for veteran health care.

These cost calculations and projections also exclude interest payments on the loans that have been used to finance the wars. Almost all war spending in Iraq and Afghanistan has occurred at the same time that taxes have been severely cut, causing the federal government to run substantial deficits and continue to incur larger and larger interest charges on the national debt.

In its report, the CBO also projected total incremental (excluding health care, etc.) costs of the war over the next decade. Under a model where troop levels gradually decline over six years, CBO estimates that another $764 billion will need to be appropriated through 2017, for a total of $1.5 trillion. If troop levels decrease faster, CBO predicts another $317 billion will be necessary, for a total of about $1.1 trillion in combined war expenditures.

Spending on the Iraq war in particular is far more than what the White House told the American people the costs would be. Around the time war was initiated, the Bush administration estimated that the war would cost between $100 billion and $200 billion.

In fact, former OMB Director Mitch Daniels said at the time that the estimate was very high.

Congress Set to Consider Largest Supplemental Funding Request in History

Congress will soon begin work on the largest supplemental funding bill ever requested — $99.6 billion — to continue to fund the wars in Iraq and Afghanistan, along with other items. The request was submitted to Congress by the president in early February, when the FY 2008 budget was released. If approved, this request would add $93.4 billion to the $70 billion Congress already appropriated for the "war on terror" in FY 2007 and bring the total cost of the wars to over $500 billion.

Specifically, the emergency spending bill provides funding for:

- ongoing military operations ($41.5 billion);
- repairing and replacing equipment ($26.7 billion);
- providing body armor ($10 billion);
- training and equipping Afghan and Iraqi forces ($9.8 billion);
- conducting intelligence activities ($2.7 billion);
- combating roadside bombs ($2.5 billion);
- miscellaneous items ($6.5 billion).

In addition to war funding, there is money allocated for State Department operations and aid to Pakistan, Lebanon, Kosovo, Sudan and Liberia, and $3.4 billion for continued relief efforts related to the 2005 Gulf Coast hurricanes. The $99.6 billion total makes this the largest emergency supplemental relief bill ever submitted to Congress.

The bill will be marked up by House and Senate Appropriations Committees during the week of Mar. 19 and the committee chairs, Rep. David Obey (D-WI) and Sen. Robert C. Byrd (D-WV), hope to have the bills ready for floor consideration the following week. The president has said he wants the bill on his desk by the end of April.

Democrats have been somewhat divided as to what, if any, conditions or restrictions should be placed on the war funding. One idea now endorsed by the House leadership is Rep. John Murtha's (D-PA) proposal to impose readiness, rest and training requirements for all troops sent to Iraq but allowing President Bush to waive the requirement if he offers a public rationale for the waiver. Whether anti-war House Democrats will support this proposal is an open question, but the caucus seems to have consensus on one area — adding additional funding to the supplemental. Members in both chambers have signaled their intention to add several billion dollars for a variety of projects. Most are unrelated to the war and their urgency is arguable. Among the projects likely to be added via amendment are funding for:

- **BRAC** — to house troops returning from overseas deployments as part of the 2005 base-closing round
- **Agriculture (Midwest)** — to cover losses from drought, floods and other agricultural disasters during the past two years
- **Agriculture (California)** — to cover losses from the recent frost that damaged citrus crops
- **Avian flu** — to prepare for a potential bird flu outbreak
- **Pacific Northwest timber** — to provide compensation to communities suffering from declining timber sales
- **SCHIP** — to provide $750 million to the children's health insurance program to stave off immediate program cuts

If all of these amendments are adopted, the bill could end up costing over $110 billion and provoke a veto threat from a president, who purports to seek a balanced budget by 2012.

Yet it is not only those in Congress who are thinking of adding funding to the bill. One House member, Rep. Neil Abercrombie (D-HI), chair of the House Armed Services Subcommittee on Tactical Air and Land Forces, charged in the *Boston Globe* on Mar. 5 that "the administration [itself] is misusing emergency budget requests in another way":

The bill contains much more than war-related items — $14 billion is requested for new armored vehicles.... Some of the so-called emergency replacement items in the 2007 request won't even be available until 2010 or later. We've been asked to replace two $20 million fighter aircraft with $200 million Joint Strike Fighters, which are still in development. If these were all replacements for vehicles damaged or worn out in combat, they would belong in an emergency spending bill. But this request goes far beyond replacing combat losses.

The number of unrelated spending items inserted by both branches and a deep lack of consensus within both parties in Congress on war strategy and funding will certainly make consideration of the supplemental bill difficult.

Legislators Introduce Competing Entitlement Commission Proposals

The 110th Congress is barely two months old, but several lawmakers have introduced proposals to create "entitlement commissions" that would be charged with formulating policies to address projected long-term fiscal challenges in Social Security and Medicare. The plans have surfaced just as there are increasing concerns on Capitol Hill about the fiscal gap — that is, the amount of spending reduction or tax increases needed to keep the national debt as a share of gross domestic product (GDP) at or below the current ratio.

There are currently three plans:

- A still unnamed commission, proposed by Sens. Kent Conrad (D-ND) and Judd Gregg (R-NH)
- National Commission on Entitlement Solvency, proposed by Sens. Dianne Feinstein (D-CA) and Pete Domenici (R-NM)
- Securing America's Future Economy ("SAFE"), proposed by Sen. George Voinovich (R-OH) and Rep. Frank Wolf (R-VA)

All three proposed commissions are structured to be nominally bipartisan, consisting of seven Republicans and seven Democrats, but each plan calls for additional members to be either appointed by the president or be representatives of the administration. The commissions are similar in mandate, requiring that proposed legislation be approved by a supermajority of commission members and requiring Congress to act on proposals submitted by the commission within a specified timeframe.

However, each proposal has its own unique methodology. For instance, the Feinstein-Domenici plan would create a permanent commission that makes recommendations to Congress every five years, while the Voinovich-Wolf plan would disband after submitting its final proposal to Congress. Additionally, the Voinovich-Wolf plan calls for the commission to conduct town-hall style meetings for a year and report the public's views in its report to Congress.

Details of all proposed commissions, with the exception of the Conrad-Gregg plan, can be found on their sponsoring senators' websites (links at right). Conrad and Gregg have been circumspect in promulgating details of their plans, as all information in a comparison chart prepared by OMB Watch was obtained from media reports and transcripts of Senate Budget Committee hearings. It is possible that Conrad will include some more details of his commission proposal in the upcoming budget resolution.

For a detailed summary of each of the commission proposals, see this chart.

ECAP Campaign Takes Positive Budget Message to States

The Emergency Campaign for America's Priorities (ECAP) has been promoting its "First Things First" agenda for the FY 2008 budget with local events all over the country since February.

The "First Things First" agenda is premised on the belief that public services need to be expanded to ensure equal opportunity and prosperity for all Americans. To this end, ECAP has requested that Congress, for FY 08:

- Provide $450 billion for domestic discretionary spending.
- Increase outdated benefit levels for Food Stamps, fund SCHIP at levels adequate

to cover all eligible children, restore funds cut from child support enforcement, and strengthen the unemployment insurance program.
- Reject new tax breaks for the wealthy and special interests, and any changes in the tax system, such as an AMT "fix," that do not make the system more progressive and that do not, at a minimum, replace lost tax revenue.

To promote the "First Things First" agenda, ECAP partners have held local events across the country and released reports documenting the impact of federal budget decisions on specific states. Over the last four weeks, ECAP partners have released reports in Arkansas, Arizona, California, Colorado, Connecticut, Florida, Georgia, Iowa, Idaho, Maine, New York, Ohio, Oregon and Tennessee.

ECAP is also planning to hold press events throughout March and April in West Virginia, Wisconsin, Washington, Illinois, Kansas, Maryland, Michigan, Minnesota and Missouri to release state-based reports in those areas.

OMB Watch has been an ECAP partner since its inception in 2005, when the campaign was founded to oppose another round of tax cuts for the wealthy that were being paid for with cuts to domestic service programs. ECAP's membership is diverse, including labor unions, religious organizations, anti-poverty groups, and national advocacy organizations for women, the elderly, the environment, and children. Its strategy has been to engage grassroots networks and local media outlets on national budget issues to educate the public and Congress about growing needs throughout the nation.

Bush Continues Anti-Regulatory Efforts with Industry Nominee to CPSC

In nominating Michael E. Baroody Mar. 1 to be chairman of the Consumer Product Safety Commission (CPSC), President Bush demonstrated yet another example since the 2006 elections of his efforts to slow down or roll back government regulation. CPSC is the independent regulatory agency charged with protecting the public against injury and death from a wide range of consumer products.

According to the *Los Angeles Times*, Baroody currently serves as the executive vice president of the National Association of Manufacturers (NAM), an industry trade group which often works to ease regulations on manufacturers of consumer products. Baroody has been at NAM since 1990, except for a year when he worked for the Republican National Policy Forum. While at NAM, Baroody built a powerful lobbying and communications arm, which has had a very strong anti-regulatory agenda. He appeared to be next in line to get the top job at NAM until former Michigan governor John Engler was appointed president and CEO.

The CPSC was created in 1972 to ensure uniform product safety standards for domestic and foreign consumer goods used in homes, schools, and sports. It does not regulate products like tobacco, vehicles, guns, food, and medical products. CSPC issues product

recalls and is the federal agency we call to report product-related injuries or unsafe products.

One of the three CPSC commissioner positions has been vacant since July 2006. The commission's ability to act has been suspended since January because the law only allows it to act with a vacancy for six months. The agency no longer had the voting quorum necessary to regulate for consumer safety since Bush left the position unfilled until Baroody's nomination. Now he has nominated someone who actively worked against the agency's mission and that has infuriated consumer activists and some on Capitol Hill.

The *Los Angeles Times* reports that, for example, Baroody fought against ergonomic standards that the Occupational Health and Safety Administration recommended in 2000, and he spoke on behalf of NAM when the Supreme Court ruled the Environmental Protection Agency (EPA) acted constitutionally when it issued air pollution limits in 2001. Baroody's nomination goes to the Senate Commerce Committee where Sen. Barbara Boxer (D-CA) has vowed to scrutinize the nominee.

Brain Drain Also Plagues CPSC

CPSC's budget was level for both FY 2006 and 2007, and the current request is for an increase in funding of $880,000 for FY 2008. The agency's FY 2008 budget request states that these funding levels resulted in losing the equivalent of 31 and 20 full time staff in 2006 and 2007, respectively, and 19 more losses will occur if the agency is funded at the 2008 request level. Only about 450 employees will be monitoring over 15,000 products.

A Feb 15. *BNA* story (subscription required) reports that the House has already expressed concern that the CPSC wasn't able to do the job because of a brain drain at the agency. Turnover has been high, and many experienced employees have been leaving, exacerbating the budget problems described in the request.

CPSC Troubles Just One Piece in a Puzzle

Since the November 2006 elections, Bush has re-nominated Susan Dudley to head the Office for Information and Regulatory Affairs (OIRA) at the Office of Management and Budget, which oversees nearly all regulatory matters in government., Dudley was not confirmed in the Republican-controlled Senate because of her extreme perspectives on regulation, and some wonder why Bush would re-nominate her now that the Senate is controlled by the Democrats.

Meanwhile, Dudley continues to evade Senate questions about her approach to managing OIRA. According to a Mar. 2 *Inside the EPA* story, in written responses to senators' questions, she downplays her role in any reviews of the EPA rulemaking proposals and dances around her support for regulatory considerations like the senior

death discount. The senior death discount was a formula for lowering the value of a life of an older person, which thereby decreases the benefits derived from environmental and health regulation.

She needs to downplay her potential review of EPA rules because her husband is in charge of developing cost-benefit analyses for EPA rules. *Inside the EPA* reports that Dudley is "prepared to take the steps necessary to avoid any conflict of interest or even the appearance of a conflict of interest. . . . I would insist that OIRA treat EPA regulations no differently than those of other agencies." In another response, she wrote that agencies have "the in-depth expertise [on rulemaking], and OIRA's role is that of coordination, guidance and review." If OIRA really played that benevolent role in the regulatory process, it would be a dramatic change.

As OMB Watch has documented, Dudley evaded questions when she testified in November before the Senate Homeland Security and Governmental Affairs Committee. The fact that Bush renominated Dudley, even though her confirmation is unlikely, may be a clue that Bush intends to appoint her as administrator when Congress recesses in August, if not sooner. Coupled with recent amendments to an Executive Order that governs the regulatory review process, the news about protecting public safeguards just gets worse. The new E.O. adds new layers of analysis on agencies, requires a political overseer in agency to shape the development of regulations from the start, and centralizes more review authority, particularly for agency guidance, at OMB. The impact of the E.O. amendments will be to slow down if not stymie new regulation.

As we watch our nation's inability to respond to a range of challenges, whether it's regarding the quality of our national parks, our veterans' health care quality, the readiness of the National Guard, Hurricane Katrina, or the regulation of our food supply, Bush continues to nominate people not to govern the country, but to achieve ideological ends and protect corporate interests.

Scientific Consultant Sparks Controversy over Conflicts of Interest

Recent findings indicate a consultant to a federal reproductive health sciences panel also has industry ties, creating a conflict of interest. The controversy raises concerns about scientific integrity in the federal regulatory process, as well as contractor transparency and responsibility.

In 1998, the National Institutes of Health (NIH) established the Center for the Evaluation of Risks to Human Reproduction (CERHR). NIH intended CERHR to study the ways in which substances present in our environment affect reproductive and developmental health. NIH intended CERHR to use panels of independent scientists to evaluate the risks and hazards of potentially toxic chemicals. One of CERHR's intended audiences is the regulatory agencies ultimately responsible for making decisions on

behalf of the public.

A recent investigation by the Environmental Working Group (EWG), a Washington-based public interest organization, found CERHR is largely managed by Sciences International, Inc. (SI). SI is a private consulting firm with financial ties to the chemical and tobacco industries, according to EWG.

CERHR and SI have maintained a relationship since 1998. SI's website states, "The most significant project at our firm is the management of the National Toxicology Program's Center for the Evaluation of Risks to Human Reproduction, one of the premiere institutions for evaluation of reproductive and developmental health issues." According to FedSpending.org, a federal contracts and grants database maintained by OMB Watch, the SI contract exceeded $1 million for each of the fiscal years 2005 and 2006.

The findings come as CERHR prepares to evaluate the effects of bisphenol A (BPA) on reproductive health. BPA is a chemical commonly present in hard plastics and has been found to be toxic to animals in low doses. The findings of the panel, which meets from Mar. 5 through Mar. 7, will likely be used by regulators and policy makers to make decisions affecting rules on BPA exposure.

SI prepared the 300-page briefing document on the risks of BPA that the panel is using. The conflict of interest arises as "the lead SI manager of CERHR co-authored a scientific paper with an employee of Dow Chemical Company on the critical issue of how animal test results can be applied to human health risk. Dow is a major producer of BPA," EWG asserts. The document exhibits industry bias by under-reporting studies which indicate the toxicity of BPA.

The controversy recently caught the attention of at least two legislators. Sen. Barbara Boxer (D-CA) and Rep. Henry Waxman (D-CA), in a letter dated Feb. 28, asked the Director of the National Institute of Environmental Health Sciences, of which CERHR is a part, to brief the lawmakers on the issue before the panel meeting. Boxer and Waxman expressed concern "about potential conflicts of interest that may be raised if a contractor plays a role in determining who will sit on the Center's committees that assess the reproductive and developmental risks of environmental agents." The request was not fulfilled.

SI's involvement raises concern about contractor responsibility and disclosure. Despite an almost symbiotic relationship and a large contract, in the absence of both federal and CERHR rules, SI's consulting status precludes it from any conflict of interest disclosure.

As OMB Watch has reported, Sen. Byron Dorgan (D-ND) has introduced the Honest Leadership and Accountability in Contracting Act. The proposed legislation contains provisions intended to reduce conflicts of interest in federal contracting.

However, the relationship between CERHR and SI continues. In Monday's session, the

CERHR panel announced SI would not be in attendance for those meetings. Jovanna Ruzicic, an EWG spokeswoman, called the decision a "meaningless face-saving gesture." She points out SI was already a major participant in the drafting of the briefing document on which the panel will base its findings. EWG is urging CERHR postpone the panel until SI discloses all of its professional relationships to the public and can guarantee impartiality.

In Congress, No Shortage of Fuel Economy Proposals

In Washington, legislators and White House officials continue to debate reform of the federal standard for vehicle fuel efficiency. Democrats and Republicans have questioned Bush administration officials on the president's proposal to alter the fuel economy standard for passenger vehicles. Members in both chambers of Congress have also proposed bills that would change the standard.

In 1975, in response to national oil shortages, Congress enacted corporate average fuel economy (CAFE) standards for passenger cars and light trucks. The CAFE program sets a mandatory fuel efficiency rate (measured in miles per gallon) and fines manufacturers who are not in compliance. Manufacturers are evaluated based upon the fuel economy of their entire fleet as opposed to individual vehicles. CAFE standards were widely credited with improving automotive fuel economy in the years immediately following enactment, but progress has since leveled off.

Neither Congress nor the National Highway Traffic Safety Administration (NHTSA), the agency charged with setting standards, has raised the standard of 27.5 miles per gallon since the program's inception more than 30 years ago. A recent study by the Civil Society Institute claims that Americans face fewer fuel efficient car choices and support higher federally mandated fuel economy standards. Now, politicians are jockeying for position to lead the charge toward higher standards and improved fuel efficiency.

Despite calls throughout the 2006 campaign for a more responsible energy policy, Democrats were not the first to act on CAFE in 2007. In his State of the Union address on Jan. 23, President Bush called for CAFE reform. In a more detailed plan for his initiatives, Bush called on Congress to allow NHTSA to continue to set standards at its discretion, not by legislative mandate.

Bush followed up his rhetoric in early February by submitting draft legislation to Congress. Bush's bill would allow NHTSA to set different fuel economy standards for each class (such as mid-size, full-size, etc.) of vehicles. The legislation also proposes a cap-and-trade system similar to that utilized for sulfur dioxide. Manufacturers producing exceptionally fuel-efficient vehicles would be credited the difference between the mile per gallon ratio of their vehicles and the ratio of the minimum standard. These credits could then be sold to other manufacturers.

Bush's proposal would not allow changes in the standard unless the benefits of such a change could be proven to outweigh the costs. Presumably, this would supersede the current statutory language, which calls only for the consideration of "economic practicability." This potential for a cost-benefit analysis to stifle higher standards would not be in conflict with other provisions of the bill, as the legislation does not require any kind of measurable increase over time.

On Feb. 28, the House Energy and Commerce Committee subcommittee on Energy and Air Quality held a hearing to review Bush's proposed legislation. Both Democrats and Republicans criticized the bill. Subcommittee Chairman Rick Boucher (D-VA) warned against the class provision's "perverse incentive" for manufacturers to produce larger vehicles. Ranking member Joe Barton (R-TX) called the cap-and-trade provision "problematic to say the least."

Committee Chair John Dingell (D-MI) appeared dissatisfied by the limited extent of the administration's research in preparing the bill. Dingell asked NHTSA administrator Nicole Nason if the administration had studied how this bill might effect "overall fuel consumption in the United States." Nason responded: "I don't know if studied would be the right word. Again, we have some rough analyses." Dingell asked the chairman of Bush's Council of Economic Advisors, "Has the administration conducted any independent analysis on CAFE credit-trading proposals?" The answer was no.

Critiquing the absence of a measurable goal for improved fuel economy, Rep. Tammy Baldwin (D-WI) said, "There is nothing in this proposal that requires NHTSA to make significant meaningful steps that will truly make a difference in our fuel economy standard. In fact, there's nothing here before us to require NHTSA to act at all."

Congressional Republicans also moved more quickly than Democrats on CAFE reform. On Jan. 24, Rep. David Reichert (R-WA), along with 12 other Republicans, introduced their own legislation. The bill is similar to the Bush proposal in two ways: it would grant standard-setting control to NHTSA and establish a cap-and-trade system. The legislation exceeds the presidential bill by calling for a minimum CAFE standard of 33 miles per gallon by 2017. Since then, four additional Republicans and two Democrats have signed on as cosponsors.

The Senate has been considering CAFE reform as well. On Jan. 4, Sen. Ted Stevens (R-AK) surprised pundits by introducing a bill that would mandate a minimum CAFE standard of 40 miles per gallon by 2017.

Sen. Dianne Feinstein (D-CA) introduced a more broadly supported but less ambitious CAFE reform bill. The bill would set a goal of 35 miles per gallon by 2019. It also includes other related provisions such as improved automotive safety standards and mandatory fuel-efficiency gauges on dashboards so drivers can monitor their fuel consumption while driving.

On Mar. 5, a bipartisan group of seven senators reintroduced the "Fuel Economy Reform Act," which stalled in committee in the 109th Congress. The bill would have NHTSA raise the CAFE standard by four percent each year and, like the Bush proposal, allow NHTSA to set standards by class. The proposed legislation also includes tax incentives for domestic manufacturers. The sponsors claim the tax breaks will help defray the cost of new technologies automakers would have to employ to significantly improve a vehicle's fuel economy.

None of the proposed legislation has cleared the appropriate committee. As a result, no lawmaker has been forced to go on record as supporting or opposing specific reform efforts. A Democratically controlled Congress is unlikely to pass President Bush's proposal in its current form. It is unclear which proposed legislation, and in what final form, will move the farthest down the legislative pipeline. For now, Americans will have to continue to live with a fuel economy standard set in a bygone era.

Whistleblower Protection Begins to Move in Congress

On Feb. 14, the House Oversight and Government Reform Committee marked up and unanimously approved the Whistleblower Protection Enhancement Act (H.R. 985), a bill that would extend whistleblower protections to more federal employees and require officials to more vigorously investigate retaliation. Whistleblower protection legislation has also been introduced in the Senate.

The bill, introduced by Reps. Henry Waxman (D-CA), Todd Platts (R-PA), Chris Van Hollen (D-MD), and Thomas Davis (R-VA) is similar to legislation considered during the last session of Congress, which stalled after passing in the Government Reform Committee. During the markup of H.R. 985, the committee passed amendments to expand the court venues in which whistleblower cases may be heard and to expand the damages that a whistleblower can receive if successful in a lawsuit against the government. Many believe that allowing more courts to hear whistleblower cases will result in more suits being decided in favor of whistleblowers; currently, the judicial playing field is slanted heavily in the government's favor.

The bill must now be reviewed and approved by the House Armed Services Committee because of a provision to extend whistleblower protections to employees of military contractors. The House Armed Services Committee has not yet scheduled a markup of H.R. 985.

On the Senate side, a whistleblower bill, the Federal Employee Protection of Disclosures Act (S. 274), has been introduced but has yet to be marked up by the Senate Homeland Security and Governmental Affairs Committee. Sen. Daniel Akaka (D-HI) introduced the bill with ten cosponsors: Sens. Thomas Carper (D-DE), Susan Collins (R-ME), Richard Durbin (D-IL), Charles Grassley (R-IA), Frank Lautenberg (D-NJ), Patrick Leahy (D-VT), Carl Levin (D-MI), Joseph Lieberman (I-CT), Mark Pryor (D-AR), and George

Voinovich (R-OH).

Another Senate bill, the Honest Leadership and Accountability in Contracting Act (S. 606), also includes whistleblower protections. Sen. Byron Dorgan (D-ND) introduced S. 606 with provisions similar to those in S. 274 but that allow for classified disclosures to any member of Congress.

On the heels of the House movement on expanding whistleblower protections, Greenberg Quinlan Rosner released poll results that showed that 79 percent of 1,014 "likely voters" support passage of a strong federal whistleblower law to protect government employees from retribution if they report waste or corruption. The poll also found that 41 percent of those surveyed would be "much more likely" to vote for a candidate that passed such whistleblower legislation.

Legislation Criminalizes Disclosures of Classified Information

Sen. Jon Kyl (R-AZ) introduced an amendment Mar. 2 to prevent the unauthorized disclosure of classified information by congressional employees. The proposal is a scaled-back version of a previous ambitious attempt to criminalize all leaks of classified information, but the amendment still met with strong opposition from the public interest and open government community.

Kyl considered introducing an amendment to an unrelated bill regarding government transparency on matters of data mining. The proposal would have amended the Espionage Act to criminalize the unauthorized disclosure of classified information regarding "efforts by the United States to identify, investigate, or prevent terrorist activity." A coalition of organizations, including OMB Watch, OpenTheGovernment.org, the Federation of American Scientists, and others, described Kyl's amendment as an effort to, "stifle, with the threat of criminal prosecution, informed public debate about the most serious matters of the effectiveness of government counterterrorism efforts." Important disclosures of controversial counterterrorism efforts, like the National Security Agency's spying program, the Central Intelligence Agency's network of secret prisons, and the Abu Ghraib torture scandal, which potentially violate the Constitution, international law and sound policy judgment, would have been criminalized by the Kyl amendment.

In the face of strong opposition, the language of the amendment was narrowed to prevent leaks of classified information from Congress and introduced on a different bill. Kyl's new amendment would revise the Espionage Act to criminalize the disclosure by an employee or member of Congress of information "contained in a report submitted to Congress pursuant to the Improving America's Security Act of 2007, the USA Patriot Improvement and Reauthorization Act of 2005, or the Intelligence Reform and Terrorism Prevention Act of 2004." While an improvement over the previous

amendment, this new amendment is, likewise, opposed by public interest advocates as an affront to an accountable and transparent government on matters of national security.

Kyl is attempting to attach his new amendment to Senate legislation which enacts many of the unresolved 9/11 Commission recommendations, Improving America's Security Act of 2007, (S. 4). A floor vote could occur on the amendment later this week, though it remains unclear if it will be found germane.

Medical Marijuana Lawsuit Uses Data Quality Act

A new Data Quality Act (DQA) lawsuit was filed Feb. 22 in a federal court in California. The suit claims that the Department of Health and Human Services (HHS) and the Food and Drug Administration (FDA) are disseminating false and misleading information regarding the health benefits of marijuana. The lawsuit is another test of the judicial reviewability of DQA, which enables groups and members of the public to challenge the data quality of federal government information.

The lawsuit was filed in the United States District Court for the Northern District of California by Americans for Safe Access in response to a denial of an information quality challenge originally made against HHS and FDA in October 2004. The petition challenged various statements made by HHS and FDA in the *Federal Register* regarding the health benefits of marijuana. For instance, the Americans for Safe Access requested that the following statement, "There have been no studies that have scientifically assessed the efficacy of marijuana for any medical condition," be revised to state, "Adequate and well-recognized studies show the efficacy of marijuana in the treatment of nausea, loss of appetite, pain and spasticity."

HHS denied the challenge, stating that it was in the process of performing a comprehensive review of the "peer reviewed literature in order to make a recommendation to the [Drug Enforcement Administration (DEA)] as to whether marijuana should continue to be controlled under the [Controlled Substances Act]." HHS also noted that DEA has a process to receive petitions from the public regarding the scheduling of a substance and that it is not the intent of DQA to create duplicative procedures for challenging the dissemination of government information. The Americans for Safe Access went on to appeal the decision, which was also denied by HHS.

DQA was attached to the Treasury and Government Appropriations Act and passed into law in late 2000. It is a two-paragraph section that slipped through Congress without debate and has grown into a mountain of controversy, often pitting industry against the public interest. DQA enables interested parties to challenge the use of data by government agencies and has often been used by industry to slow regulatory action and pressure agencies to remove or revise information on important matters of public health

and safety.

Whether DQA supports judicial review has been a point of contention. Previous lawsuits to challenge agency decisions regarding data quality petitions have failed. In March 2006, 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, when the court found that the act did not allow for judicial review and that the plaintiffs had not shown injury and thus lacked standing.

Though the current challenge is not made by industry and is not intended to slow regulatory action or restrict access to important government information, OMB Watch nevertheless has not supported the judicial reviewability of DQA decisions. First, DQA does not grant any unique right of action for litigation, as recent case law has shown. Second, enabling judicial review would provide another tool for industry to use against health, safety and environmental regulations. This seems highly inappropriate for a legal provision that has never been debated or reviewed by Congress.

House Starts Moving on Lobbying and Ethics Reform

Lobbying and ethics rules changes are rapidly becoming a focal point of the 110th Congress. Since the Senate passed the Legislative Transparency and Accountability Act of 2007, the action has moved to the House, where a bill on executive branch lobbying recently passed the Oversight and Government Reform Committee, and a Judiciary subcommittee addressed possible changes to the Senate bill.

On Feb. 14, the House Oversight and Government Reform Committee approved 29-0 H.R. 984, the Executive Branch Lobby Reform Act of 2007. The bill attempts to put an end to secret meetings between lobbyists and executive branch officials by requiring senior officials to report on a quarterly basis the contacts that relate to official government action. This includes each party's name, the date of the meeting, subject matter discussed, and the name of any client on whose behalf the contact was made. During the markup, the committee approved an amendment offered by Chairman Henry Waxman (D-CA) that requires that the reports of these contacts be publicly searchable in a computerized database. The Office of Government Ethics would also have to develop rules for implementing the reporting system and to check for accuracy. The bill also increases the waiting period from one year to two years before a former federal employee can lobby or influence grants and contracts. It also requires the government to develop standards for designating information as "sensitive but unclassified." (See more information here.)

H.R. 984 could be included as a part of the House's broad lobby reform legislation, which has not yet been filed. However, the House has started considering reform issues, even though no specific proposals have been made. It will likely use the Senate version, S. 1, the Legislative Transparency and Accountability Act of 2007, as a starting point.

New versions of proposals that were rejected by the Senate, including grassroots lobbying disclosure, now have an on opportunity to be considered as part of the House bill.

On Mar. 1, the House Judiciary Subcommittee on Constitution, Civil Rights and Civil Liberties held a hearing on the lobby reform measures included in S. 1. The agenda was centered on ethics and lobby changes passed in S. 1, but discussion instead focused mostly on grassroots lobbying disclosure, which was stripped from the Senate bill. Republican members opposed any grassroots lobbying disclosure requirements, fearing that the burden of disclosure and potential for penalties for failure to comply would stifle the average American's voice. However, witnesses explained that the "average Joe" referenced would not have to disclose, but would in fact benefit by knowing who is behind a large communications campaign and whose interests are being represented when confronted with such information.

Chairman Jerrold Nadler (D-NY) commented during his opening remarks that the "core issue is the pervasive influence of money in politics." In that context, disclosure of grassroots lobbying would help address the imbalance of power in the lobbying process and shine a light on campaigns lead by phony front groups. Opponents of grassroots lobbying disclosure referenced the Federalist Papers as a grassroots effort that would have been harmed if such disclosure existed at the time. However, even the rejected Senate version of disclosure would not have required disclosure by the Founding Fathers. And the legislative process has drastically changed since the 18th century, as budgets for grassroots lobbying campaigns have grown enormously. As Thomas Mann of the Brookings Institution noted during his testimony, disclosure would level the playing field. "Huge sums are spent on paid media, computerized phone banks, direct mail, and other forms of public communications to stimulate lobbying of Congress by citizens. Yet professional grassroots ("Astroturf") lobbying organizations and lobbying firms are not required to report on the sums they spend on these campaigns. It makes little sense to exclude these activities whose costs may well exceed expenditures for direct lobbying."

The heated debate over grassroots lobbying disclosure reflects concerns over constitutional issues. However, disclosure would not restrict speech because, as witnesses pointed out, only massively funded campaigns will be affected and would only be required to report, not restrict or alter their speech in any way. Additionally, there is a governmental interest in such disclosure. As a recent Congressional Research Service (CRS) report details; "...the courts have seemed to recognize the growth of importance of such 'grassroots' lobbying efforts in the legislative process, and the increased need for legislators and others to be able to identify and assess the pressures on legislators being stimulated (and financed) by interest groups by such methods."

There are signs that the Senate language on grassroots disclosure is being revised to narrow the impact and more clearly define the goals and objectives of the measure. As reported in *Roll Call*, Rep. Martin Meehan's (D-MA) version "would not require organizations that hire firms to help stimulate grass-roots activity to disclose those

efforts. Instead, the measure focuses on the firms themselves."

Other reform items were also discussed during the hearing, such as reporting campaign contribution bundling and extending the "cooling off" period before former lawmakers can actively lobby. It remains uncertain how these controversial measures will be finalized in the House lobby reform bill.

Justice Department Refers Kinder USA's Harassment Complaint against FBI to FBI

For nearly three years, according to Kinder USA, the U.S. relief organization based in Dallas, TX, has endured harassment and surveillance of its board, staff and volunteers by the FBI and the U.S. Attorney's office in Dallas. In December 2006, Board Chair Dr. Laila Al-Marayati sent a letter to the Department of Justice Office of Inspector General (IG) detailing the problem and asking for an independent investigation. She asked the IG to "take steps to terminate the wasteful and illegal governmental activities directed against a lawful charity managed and operated by United States citizens for needy children in areas of conflict." A month later, the IG's office wrote back saying the complaint had been referred to the FBI Inspection Division.

The Dec. 21, 2006, letter from Kinder USA to the IG's Civil Rights and Civil Liberties division spelled out a series of events the group said are "not based on any legitimate law enforcement purpose." Complaints against the FBI include:

- FBI visits to board members, the executive director and the Dallas office seeking interviews on Aug. 11, 2004, the day of a scheduled board meeting. Kinder says this was an attempt to disrupt the meeting and intimidate the board. One board member resigned out of fear for her livelihood and the emotional distress for her family.
- A September 2004 FBI interview of a Kinder employee where the Bureau alleged illegal acts by the group, and a subsequent interview at the employee's home where agents "quoted conversations that took place only during telephone calls," revealing electronic surveillance.
- An April 2005 interview with a Kinder employee where, in three hours of questioning, further telephone surveillance was revealed. The employee resigned "in fear of ongoing harassment by the FBI." That same month, a similar interview led a board member to resign.
- An overnight search of the Dallas office in February 2006

Kinder also urged investigation of the Dallas U.S. Attorney's office, which has been conducting a grand jury investigation of the group since November 2004. At that time, all the business records of the group were turned over to the grand jury pursuant to a subpoena. The grand jury has taken no action but has not closed its investigation. Kinder's letter says, "The use of the grand jury, in this manner and in this instance, to

collect data but to neither indict nor conclude an investigation, casts a chilling effect on the exercise of the rights of the Board, staff and donors of Kinder USA and is *per se* government misconduct." Kinder temporarily suspended fundraising after the subpoena out of fear the funds would be seized by the Treasury Department.

The IG's office responded to Kinder on Jan. 23, saying the "matters you raise are more appropriate for review by another office or Agency", and forwarded the complaint to the FBI's Inspection Division. On Feb.1, Kinder's attorney, John Kilroy, wrote back urging the IG to reconsider, saying "the FBI cannot be fair and impartial when investigating itself.... I urge you to reconsider and to initiate a thorough and impartial investigation." The request was apparently rejected, because on Feb. 15, the FBI Inspection Division wrote to Kinder that their Investigation Section "has reviewed your allegations and has determined that there is no evidence of misconduct on the part of any FBI employee. Therefore, no further action will be taken by this office." The letter did not address the substance of any of the complaints. There was no mention of the complaint against the U.S. Attorney's office in any of the correspondence from the government.

Patriot Act Drives Banking Problems for U.S. Muslim Charity

After a September 2006 raid by the federal Joint Terrorism Task Force, Life for Relief and Development (Life) of Michigan has had ongoing problems getting service from banks, even though at the time of the raid, the Federal Bureau of Investigation (FBI) said the investigation was not related to terrorism, and no charges have been filed. The only bank that will allow the humanitarian aid organization to make international wire transfers has required the group to comply with the Treasury Department's Voluntary Anti-Terrorist Financing Guidelines, which are supposed to be voluntary and flexible. However, Life officials say banks are reacting to the threat of litigation under unconstitutional provisions of the Patriot Act.

During the 2006 raid, the FBI seized computers and organizational records, but told the press the investigation did not relate to terrorism. Despite these facts, on Sept. 21, 2006, Comerica Bank informed Life that it planned to close all seven of its bank accounts by Oct. 2 of that year. The bank agreed to extend the deadline to Nov. 15 in light of the beginning of Ramadan, the traditional period when Muslims make charitable donations as part of their religious obligation. Because of Life's continued difficulty in opening an account at another bank, Comerica agreed to extend its deadline to Nov. 22, 2006. The bank never gave a reason for closing the accounts but did tell Life officials that it planned to share information about the group with other banks under Section 314(b) of the Patriot Act, which provides that "an institution must exchange information with other institutions regarding the closure of the account when it concerns money laundering or terrorist related activity."

Since the FBI had publicly stated that the raid was not related to terrorism, and such

information sharing would make it difficult if not impossible for Life to open another bank account and continue its operations, the group filed suit in federal court seeking an injunction to "prohibit Defendant Comerica from disseminating any false or misleading information under 314(b) of the Patriot Act." The suit also challenged the constitutionality of Sec. 314(b) and claimed Comerica's actions violated the Life's civil rights, since "Had the officers not been of Arabic descent or if Plaintiff was not a Muslim American charity, upon information and belief, the bank account would still be open." The community showed its support through a series of pickets and demonstrations at Comerica branches, and some Muslim Americans closed their accounts there.

On Dec.1, 2006, the U.S. Department of Justice moved to intervene in the case in order to argue for the constitutionality of the Patriot Act provision. However, that issue remains undecided, since Life and Comerica settled and dismissed the case after Life reviewed the bank's Sec. 314(b) filing and determined that Comerica "did not disseminate any negative information about Life." Despite this settlement, Life had difficulty opening a new bank account because applications ask for information on previous accounts. LaSalle Bank refused to open an account at all, and although Life was able to open accounts for administrative purposes with Chevy Chase Bank, it was not allowed to wire funds internationally.

Such a situation was not workable for an international humanitarian aid organization, so Life was forced to apply for a separate account for international transfers at another financial institution. Although they were successful with the application, the new bank forced them to respond to a Compliance Checklist that tracks old versions of the Treasury Department's *Voluntary* Anti-Terrorist Financing Guidelines verbatim. The form asks the applicant to answer Yes or No for each so-called best practice, and at the end states, "If the answer to any of the above questions are NO, the organization should take the immediate necessary legal and administrative steps to comply with the guidelines."

Although this use of the Treasury Guidelines is contrary to their stated purpose and Treasury's public statements about flexibility and voluntariness, Life completed the form because of their dire need for the account. Not surprisingly, the list included items that were impractical or ill-advised or both, and Life had to explain to bank officials why it did not comply with two provisions. After much back and forth, with the bank officials consulting their superiors, the account was opened.

Ihsan Alkhatib, Life's Legal Director, has called for reforming Sec. 314(b), saying the Patriot Act, not the banks, are the root of the problem. In an article in the *Arab American News* he said, "Banks are acting this way because of anti-terror laws.... Innocent banks doing business with entities that even the government did not classify as associated with terrorism have been subject to costly litigation." He cites Ted Frank in an Oct. 28, 2006, column in the *Wall Street Journal*, who describes the vague definitions of what constitutes "material support" of terrorism as the problem. It has led victims of terrorist attacks to sue banks for the actions of account holders that were not listed as

terrorist organizations by the U.S. government, saying "Lawsuits are pending now that claim, in effect, that the banks *should have known* then what the U.S. government did not decide until years later."

The government has since returned Life's seized computers and says it will return financial records on time for Life to file its annual Form 990 with the IRS. Since no charges have been filed, Life and its supporters are left wondering what was behind the raid. Their lawsuit noted that "this was the third year in a row that federal agents would either conduct interviews of Muslims or persons of Arabic Origin, or raid homes and Islamic charities right at the beginning of Ramadan the time period where donors provide the most generous donations." The Feb. 17, 2007, Columbia (MO) *Daily Tribune*, notes that the issue may be whether Life provided humanitarian relief to Iraq before the war, when transactions with the country were prohibited. The *Detroit News* also noted Sept. 26, 2006, that there were demonstrations against Israeli bombing in Lebanon during the summer. Whatever the cause, the effects have been to make delivery of humanitarian aid more difficult.

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In This Issue

Journalist Audit Underscores Lack of Transparency

An audit by journalist groups found that public access to Comprehensive Emergency Response Plans (CERP), as required by law, was inconsistent and unreliable around the country. Only 44 percent of the requests for the CERP were granted in full, whereas 20 percent were partially released and 36 percent were completely denied.

CERPs are required under the Emergency Planning and Community Right-to-Know Act of 1986, which was passed in response to the world's most devastating chemical plant disaster in Bhopal, India. According to the March 11 report, CERPs "must identify facilities and transportation routes of hazardous substances, describe emergency procedures, outline notification procedures, describe areas potentially affecting, outline

evacuation plans, list available resources and designate emergency response coordinators." To ensure that citizens are properly informed about what to do in cases of emergencies, the law mandates that the plans be publicly available.

Participants requested the 404 CERPs from the more than 3,000 Local Emergency Planning Committees (LEPC) in place around the country. Of the requests made, 177 requests (44 percent) were granted, 82 requests (20 percent) were partially granted, and 145 (36 percent) were denied in full. Officials gave various reasons for denying access to CERPs, many of which were illegitimate or misinterpretations. A director of one LEPC incorrectly stated that the USA PATRIOT Act barred public access to the information. Several reporters were told that state laws now prevented access to the emergency response plans, even though federal law supersedes state law. The threat of terrorism was one of the most often cited reasons for denying access to the plans.

The experiences of those granted access or partial access included other problems. Some reporters were followed by local police or subjected to criminal background checks. One reporter noted, "Someone was running my name through NCIC, a national database that contains criminal histories and is available only to law enforcement. Besides my name, they [had] my home address and plate number."

The audit underscores the lack of government transparency concerning important health and safety information. The law required public involvement in developing CERPs and public access to the document so that the process could be used to inform and prepare the public. Emergency planning is not as useful when the public, who must also be prepared to act in response to emergencies, is not informed as to the appropriate actions or procedures.

The audit was organized to coincide with Sunshine Week, an effort by the media, civic groups, libraries, universities, legislators and others to highlight the importance of open government. Members of the American Society of Newspaper Editors-Sunshine Week, the Coalition of Journalists for Open Government, the National Freedom of Information Coalition, and the Society of Environmental Journalists participated in the audit.

Open Government Legislation the Focus of Sunshine Week

Sunshine Week is an annual effort by the media, civic groups, libraries, universities, legislators and others to highlight the importance of open government. During this year's Sunshine Week (March 11-17), many legislative proposals to increase government oversight and transparency moved forward in Congress. The bills address contractor responsibility, environmental information, Freedom of Information Act reform, whistleblower protections, and other important aspects of an open and accountable government.

Contractor Responsibility

Federal contracting is growing at a rapid and dangerous pace. In the past six years, the amount spent on federal contracts has nearly doubled, from $207 billion in FY 2000 to almost $400 billion in FY 2005. For all the federal government work contractors perform, they remain essentially unaccountable to the public. The increase in federal contracts and lack of accountability contributed to last year's passage of the Federal Funding Accountability and Transparency Act (P.L. 109-282), co-sponsored by Sens. Tom Coburn (R-OK) and Barack Obama (D-IL). The bill requires the Office of Management and Budget (OMB) to create a searchable website that provides information about all federal spending, including government contracts, grants, loans, etc. In October 2006, OMB Watch launched FedSpending.org which provides access to much of the contract and grant information that the new law would cover.

More needs to be done to increase oversight and accountability of contractors. In particular, the following three types of information should be made publicly available:

- Information on contractor performance on past contracts
- Contractors' record of compliance with federal laws and regulations, especially health, environmental, environmental, civil rights, and employment laws
- Information on lawsuits and legal actions brought against contractors and their subdivisions

Public disclosure of such information will increase public oversight for federal contractors and help ensure that the public's money is being spent wisely. The Honest Leadership and Accountability in Contracting Act of 2007 (S. 606), introduced by Sen. Byron Dorgan (D-SD), is a good first step in eliminating fraud and abuse in federal contracts. Also, the Accountability in Contracting Act (H.R. 1362), sponsored by Rep. Henry Waxman (D-CA), would "change federal acquisition law to require agencies to limit the use of abuse-prone contracts, to increase transparency and accountability in federal contracting, and to protect the integrity of the acquisition workforce." The bill was passed by the House 347 to 73 on March 15. Take action to support Congress' efforts to increase contractor responsibility.

Environmental Information

The U.S. Environmental Protection Agency (EPA) finalized rules in December 2006 that weaken toxic reporting under the Toxics Release Inventory (TRI) program, despite enormous opposition to the changes. The changes allow facilities to avoid detailed reporting of toxic pollution of less than 5,000 pounds as long as less than 2,000 pounds are released to the environment. The EPA is also permitting facilities that manage up to 500 pounds of persistent bioaccumulative chemicals such as lead and mercury to avoid detailed reporting of the waste. The proposed changes have been met with stiff resistance throughout the rulemaking process. As documented in an OMB Watch report, over 122,000 public comments were submitted in response to EPA's plans to cut TRI

reporting, and more than 99.9 percent opposed the agency's proposals.

On Feb. 14, Sen. Frank R. Lautenberg (D-NJ) and Reps. Frank Pallone (D-NJ) and Hilda Solis (D-CA) announced companion bills to restore TRI and undo the EPA's recently finalized reporting rollbacks. Take action to support these bills.

Freedom of Information Act Reform

The mounting problems regarding the Freedom of Information Act (FOIA) are well-documented. The Coalition of Journalists for Open Government found that even though 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. In response to increasing pressure to relieve agency backlogs and improve FOIA procedures, President Bush issued Executive Order 13392 on Dec. 14, 2005. The order, though, does not go far enough to relieve agency backlogs. The Government Accountability Office (GAO) recently stated, "Despite increasing the numbers of requests processed, many agencies did not keep pace with the volume of requests that they received."

Legislative reform of FOIA was deemed necessary to relieve these problems and restore open government. By a vote of 308 to 117, the House passed the Freedom of Information Act Amendments of 2007 (H.R. 1309) on March 14. The bill restates the 20-day response requirement and imposes penalties on agencies that fail to meet the requirement. The bill also creates a FOIA ombudsman at the National Archives to serve as a resource for the public in requesting documents and to exercise oversight of FOIA compliance. Additionally, the bill offers a needed correction and expansion of access to attorney's fees for those whose FOIA requests are unjustly denied. Finally, the bill would restore the presumption of disclosure under FOIA that was eliminated by the John Ashcroft memorandum soon after 9/11. In a letter submitted to the committee in support of the bill, OMB Watch stated, "The increasingly dire state of FOIA procedures and backlogs across government agencies and the inadequacy of the agency improvement plans calls for congressional reform, and we wish to add our support of H.R. 1309 in the hopes that it is eventually signed into law."

Other Important Pieces of Open Government Legislation

In addition to the Accountability in Contracting Act and the FOIA Amendments Act, the House has passed two important pieces of legislation:

By a vote of 333 to 93, the House on March 14 passed the Presidential Records Act Amendments of 2007 (H.R. 1255), which would ensure that presidential records are made available to the public and would nullify President Bush's order that gave former presidents the authority to withhold documents.
By a vote of 331 to 94, the House on March 14 passed the Whistleblower Enhancement Protection Act of 2007, which would offer additional protections to federal government

employees who bring forward evidence of corruption, fraud, and abuse at their agencies.

Sunshine Week promotes the importance of an open and transparent government. Access to accurate information is at the foundation of a well-functioning democracy, and the legislative efforts over this past week are great strides in the effort to provide greater access to government information. OMB Watch encourages individuals to preserve and protect an open and accountable government by taking action and encouraging their representatives and senators to support the important open government legislative initiatives.

EPA Looking at Labs

The U.S. Environmental Protection Agency (EPA) has begun a review of its laboratory network that may result in significant closures, according to some early agency plans. In response to budget cuts, EPA intends to reduce costs at least 20 percent by 2011. According to EPA officials in a phone briefing on March 15, the review is to assess the efficacy of the lab network, eliminate duplicative programs or efforts, and increase overall efficiency. Given the FY 2007 and 2008 budget cuts to research and development, there is concern that the review and potential closures of labs are budget driven rather than reflecting a substantive management plan to create a more effective EPA.

One review plan, introduced to the House Committee on Science and Technology's Subcommittee of Energy and Environment during a hearing on March 15, proposes consolidating 39 agency laboratories. According to the Bureau of National Affairs, Dr. George Gray, the Assistant Administrator for Research and Development, pledged that no laboratories would be closed "during the tenure" of EPA administrator Stephen Johnson. However, how long Johnson, appointed by President Bush, will remain in his position remains to be seen. The review is expected to take up to three years to complete, although details are unclear, as no official plan has been finalized.

A June 8, 2006, EPA memo indicated that an early plan unquestionably included significant closings. In the memo, released in September 2006 by Public Employees for Environmental Responsibility, Chief Financial Officer Lyons Gray directed agency officials to cut laboratory infrastructure costs by at least 10 percent by 2009 and another 10 percent by 2011. Closing, relocating and consolidating labs were highlighted as core components of the plan. The more than 2,000 scientists employed at EPA labs would also be subject to staff buy-outs and targeted attrition. According to EPA's Gray's March 15 remarks to both the House subcommittee and to interested stakeholders in a phone briefing, laboratory consolidation does remain part of the plan.

The budget cuts and potential consolidation of labs strikes chords very similar to the EPA's recent scandal of closing regional libraries. In response to severe FY 2007 budget cuts, five (out of 27) EPA libraries were closed, documents with no other copies were

destroyed, and access to EPA materials has been limited. Though Congress intervened and halted any subsequent closings pending their review of EPA's plans, the president's FY 2008 budget calls for even larger cuts at EPA, making reductions to research and information facilities increasingly likely.

Using budget purse strings to discreetly implement a political agenda may be part of the strategy at work in the EPA labs review. For instance, even though climate change is currently the most prominent environmental issue, the current administration's budget cuts appear to be undermining efforts to address this emerging threat. EPA's own Science Advisory Board observed that the proposed FY 2008 budget will focus research programs "more on yesterday's issues and less on new and emerging environmental problems." Given the increasing scrutiny that EPA and other agencies are under for politically motivated manipulation of science, such a result from budget changes must be questioned. At a hearing on March 19, the House Committee on Government Oversight and Reform continued its investigation into whether the current administration pressured scientists to minimize the importance of climate change.

EPA's libraries and laboratories are crucial to understanding and addressing a myriad of health and environmental issues currently facing our country, including climate change. Strong science requires an arena free from political pressures, and with sufficient funding for strategic, not just reactive, research. OMB Watch will be closely following EPA actions on its management of agency libraries and laboratories to ensure that their "efficiency improvements" do not impede important scientific progress.

Report Finds Underreporting and Abuse of USA PATRIOT Act Powers

The Office of the Inspector General (OIG) at the Department of Justice (DOJ) reported on March 9 that the Federal Bureau of Investigation (FBI) has been systematically underreporting National Security Letter (NSL) requests and has repeatedly violated federal law and agency policies in collecting personal information. The report unleashed a firestorm on the Hill, with calls for reform of the USA PATRIOT Act.

The Patriot Reauthorization Act of 2006 directed the OIG at DOJ to review the FBI's use of the NSL powers under Section 505 of the USA PATRIOT Act and to report any improper or illegal use of such powers. Without court approval, the FBI can issue NSL requests that require Internet service providers, telephone companies, credit reporting agencies, and banks to disclose information relating to individuals':

- Internet use: websites visited and the email addresses to which and from which emails were sent or received
- Telephone use: the times and durations of calls and the numbers to which or from which calls were received or dialed
- Financial transactions: checking and savings account information, credit card

transactions, loan information, credit reports and other financial information

Previously restricted to suspected terrorists or spies, the USA PATRIOT Act significantly broadened the NSL provision to cover any information that is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." The USA PATRIOT Act also expanded approval authority of NSLs beyond senior FBI Headquarters officials to all special agents in charge of the FBI's 56 field offices. In October 2005, President Bush issued Executive Order 13388, which expanded access to NSL records to state and local governments and "appropriate private sector entities."

Inaccurate Reporting

Pursuant to requirements of the USA PATIROT Act, the FBI reported to Congress that 39,000 NSL requests were issued in 2003, 56,000 in 2004 and 47,000 in 2005. The OIG investigation found that the FBI significantly underreported the requests. "Overall, we found approximately 17 percent more national security *letters* and 22 percent more national security *requests* in the case files we examined in four field offices . . . As a result, we believe that the total number of NSL requests issued by the FBI is significantly higher than the FBI reported." (emphasis original). The OIG also found systematic errors regarding the status of NSL requests and the classification of targets of NSLs, specifically, whether the target was a U.S. citizen or non-U.S. citizen.

Violation of Federal Law and Policy

The OIG investigated abuse of NSL powers and found that approximately one-fifth of the reviewed files contained unidentified violations of NSL legislation and policy. "In our review of 77 FBI investigative files, we found that 17 of these files — 22 percent — contained one or more violations relating to national security letters that were not identified by the FBI. These violations . . . included instances in which the FBI issued national security letters for different information than what had been approved by the field supervisor. Based on our review . . . we believe that a significant number of NSL violations are not being identified or reported by the FBI."

The OIG also found that over 700 "exigent letters" were used to collect information from three telecommunications companies on over 3,000 telephone numbers in violation of law and policy. "We concluded that the FBI's acquisition of this information circumvented the requirements of the [Electronic Communications Privacy Act] NSL statute and violated the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection and internal FBI policy. These actions were compounded by the fact that the FBI used the exigent letters in non-emergency situations, failed to ensure that there were duly authorized investigations to which the requests could be tied, and failed to ensure that NSLs were issued promptly after the fact pursuant to existing or new counterterrorism investigations. In addition, the exigent letters inaccurately represented that the FBI had already requested subpoenas for

information when, in fact, it had not."

Political Fallout of the Report

The report elicited an immediate response from the director of the FBI, Robert S. Mueller III, who took full responsibility for the underreporting, "Who is to be held accountable? And the answer to that is I am to be held accountable." He attributed the reporting inaccuracies to "deficiencies in the database" and assured, "We have already taken steps to correct these deficiencies."

President Bush also responded to the report, stating that the OIG "justly made issue of FBI shortfalls [and] also made clear that these letters were important to the security of the United States." Bush stated that he would ensure that the FBI quickly corrects the mistakes, "My question is, 'What are you going to do to resolve these problems?'"

Republicans and Democrats on the Hill expressed outrage in response to the findings and promised a full investigation. Sen. John Sununu (R-NH), who in response to the United States attorneys scandal and the NSL report called for the replacement of Attorney General Alberto Gonzales, stated that the report "has shown that our worst fears regarding the documentation and oversight of National Security Letters were all too real."

Legislators called for reform of the USA PATRIOT Act in order to resolve the problems. Sen. Arlen Specter (R-PA) stated that Congress may have to "change the law . . . to impose statutory requirements and perhaps take away some of the authority which we've already given to the FBI, since they appear not to be able to know how to use it."

The House Judiciary Committee held a hearing March19 on the report, and the Senate Judiciary Committee has scheduled a hearing for today, March 20. A representative of the FBI and the Inspector General of DOJ, Glenn A. Fine are expected to testify at both hearings.

House Proposal for Grassroots Lobbying Disclosure Due Soon

While House Speaker Nancy Pelosi's (D-CA) office is still working on the details of grassroots lobbying disclosure as part of a package of Lobbying Disclosure Act (LDA) reforms, both supporters and opponents have continued to debate the merits of the idea.

The contentious debate over whether big dollar federal grassroots lobbying should be disclosed has continued, despite a general understanding that a House provision is likely to be significantly scaled back from the version rejected by the Senate. On March 7, six reform groups sent a letter to House members outlining support for four major LDA reforms. These include disclosure of bundled campaign contributions from lobbyists and

lobby firms, disclosure of grassroots lobbying activities by lobby firms, an increase in the cooling off period before former members of Congress can engage in lobbying activities from one to two years, and a prohibition on lobbyist-paid parties at national political conventions. The six groups are the Campaign Legal Center, Common Cause, Democracy 21, the League of Women Voters, Public Citizen, and U.S. PIRG.

The scaled-back grassroots disclosure proposal from the reform groups would only apply to firms hired to carry out grassroots lobbying campaigns if they collect more than $100,000 for such campaigns in a quarter. The firms would be required to register and file reports identifying each client paying more than $50,000 per quarter and the issue involved. The proposal would exempt communications between an organization and its members and those that are primarily aimed at membership recruitment.

This limited approach has been criticized from two different perspectives. OMB Watch has supported bill language that, in addition to requiring grassroots lobby firms to report, also would require firms and groups that already are required to register and report direct lobbying expenses under LDA to also report grassroots expenditures and activities. In a March 19 op-ed in *The Hill*, Executive Director Gary Bass said, "Disclosure requirements should not and cannot single out particular groups of people, even if a specific segment of people has been the most heavily involved in phony grassroots lobbying campaigns. A better way to approach grassroots lobbying disclosure is to require all actors who meet defined thresholds to disclose their grassroots lobbying activity. This can be done so as not to create burdens on small groups."

Many conservative groups oppose any kind of disclosure regime. At a Cato Institute briefing on March 9, speakers from the ACLU, Cato Institute, American Target Advertising and the Center for Competitive Politics outlined their objections. Their criticisms addressed constitutional issues, claiming registration and disclosure would impose a burden on citizen-to-citizen communications that present no threat of corruption to the system. They also opposed the proposal to limit disclosure to grassroots lobbying firms, saying government regulation should not favor one kind of speaker over another.

Many expect the House Democratic leadership to make a decision as to whether they will support a provision requiring grassroots lobbying disclosure and the scope of such a provision, if included, some time this week. It is not clear when a bill would be brought to the House floor.

Committee Votes Down Faith-Based Hiring Amendment to Head Start Bill

On March 14, the House Education and Labor Committee approved the Improving Head Start Act of 2007 (H.R.1429) after defeating an amendment that would have allowed faith-based organizations to hire teachers for the Head Start program based on religion.

Attempts to insert such language into Head Start were unsuccessful in the past. This is the first time the issue has come up in the 110th Congress. The controversial provision was defeated 26-19 on a party line vote, and the overall bill passed 42-1. However, the amendment could be brought up again when the bill is considered on the House floor, which may occur before Congress' April recess.

The amendment, offered by Resident Commissioner Louis Fortuno (R-PR), dominated the debate during the markup hearing. Head Start is the federal early education program for disadvantaged children. Currently, faith-based groups that offer Head Start programs cannot consider religious preferences when hiring. The Fortuno amendment would have repealed that rule but still restricted groups from religious proselytizing with federal funds. The amendment states that the religious organization "shall retain its religious character and control over the definition, development, practice, and expression of its religious beliefs."

If passed, the amendment would have undermined civil rights laws, removed religious liberty protections, and thus allowed religious discrimination in an essential early education program, where children have diverse religious backgrounds. In short, the amendment would have granted religious organizations that participate in the Head Start program the right to discriminate with federal funds. Currently, many Head Start grantees are faith-based organizations, and they may use religion as criteria for hiring with their non-federal funds.

Rep. Dale Kildee (D-MI) expressed his opposition to the amendment during the hearing. "Head Start teachers should be chosen because they are qualified and effective teachers who will help children succeed and thrive. Hiring and firing decisions should not be made because of the teacher's religion."

The proposal was included in last year's Head Start reauthorization bill, but it stalled in the Senate. However, support has stubbornly re-merged. Republican members on the committee, led by Ranking Member Howard P. McKeon (R-CA) issued a fact sheet outlining why the amendment should be supported. It states, "Faith-based organizations have a federally protected right to maintain their religious nature and character through those they hire. These organizations willing to serve their communities by participating in federal programs should not be forced to give up that right." Supporters argued that religious groups should be able hire based on religion as a way to better serve the community and to maintain their religious identity.

McKeon's stance ignores some fundamental factors in the debate. As Rep. Dennis Kucinich (D-OH) commented, "I see this as being a real constitutional question. Repealing civil rights protections that have been in Head Start for more than 20 years could cause already at risk 3- to 4-year-olds to lose teachers with whom they've built close bonds simply because of a teacher's religion."

Religious, civil rights, labor, health, and advocacy organizations, acting through the

Coalition Against Religious Discrimination (CARD), sent a letter to the committee calling on members to oppose the Fortuno amendment. OMB Watch is a part of this coalition and signed on to the letter. There was a short time period for groups to react, yet thanks to these efforts and to those on the committee who recognized the measure's dangerous implications, the amendment was voted down. The reauthorization bill did not include a problematic provision that was introduced but failed to pass in 2005. It would have created barriers to voter registration by nonprofits sponsoring Head Start programs by extending a ban on use of Head Start funds for voter registration to encompass the privately funded activity. Twenty percent of Head Start monies are private funds. For details of the 2005 proposal, see the Nov. 29, 2005, *OMB Watcher* article Fate in Senate of Nonprofit Gag Provision Uncertain.

Appeals Court Upholds USAID Pledge Requirement for HIV/AIDS Grantees

On Feb. 27, a three-judge panel of the U.S. Circuit Court for the District of Columbia overturned a lower court ruling that voided a USAID requirement that grantees under an HIV/AIDS program adopt certain policies on prostitution. The ruling in *DKT International v. USAID* is the first decision in two cases in separate federal appeals courts that involve the same issue. DKT expects to seek a re-hearing before the entire Circuit Court. An appeal from another lower court ruling that overturned the same requirement is pending in the U.S. Court of Appeals for the Second Circuit in New York. Conflicting rulings in the two appeals courts could increase the likelihood the issue will reach the Supreme Court.

The legal issue in both cases is whether Congress can mandate policy statements outside the scope of the grant project. In this case, DKT International (DKT) sued to block enforcement of Section 7631(f) of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, which requires that no grants go to any group "that does not have a policy explicitly opposing prostitution and sex trafficking." It also bars funds from being used to "promote or advocate for legalization" of sex trafficking and prostitution.

DKT lost a $60,000 subgrant from Family Health International to market condoms in Vietnam because they refused to certify that they had such a policy. Their refusal was based on concerns that the policy might stigmatize and alienate many of the people it targeted for its HIV/AIDS prevention services. DKT also refused because the group says the certification requirement in Section 7631(f) of the Act violates its First Amendment rights because it applies to other programs that are not federally funded.

DKT did not challenge the government's right to control the message funded in the grant program or to prohibit use of federal funds to advocate for legalization of prostitution. Its challenge focused on the requirement that it have a policy that applies beyond the government funded project. The lower court agreed with DKT, finding that the required

policy statement and certification "constitute viewpoint based restrictions on speech and they are not narrowly tailored to further a compelling government interest." (Opinion, p. 27) The lower court also noted that, "the Supreme Court has repeatedly held that the government may not compel private individuals or organizations to speak in a content-specific, view-point specific manner as a condition of participating in a government program." (Opinion p. 14)

In reversing the lower court, the appeals court stressed the government's right to fund its message. The 2003 Act at Section 7611(a)(4) says, "the reduction of HIV/AIDS behavioral risks shall be a priority of all prevention efforts in terms of funding, educational messages, and activities by promoting abstinence from sexual activity and substance abuse, encouraging monogamy and faithfulness, promoting the effective use of condoms, and eradicating prostitution, the sex trade, rape, sexual assault and sexual exploitation of women and children." Congress also found private organizations to be "critical to the success" of the program. (Opinion p. 3)

The appeals court found that because of the Act's educational message, USAID has the right to discriminate based on viewpoint regarding who conveys that message. However, the court applies this principle beyond the government program, based on its interpretation of the Supreme Court case *Rust v. Sullivan* (500 U.S. 178). In *Rust*, the Supreme Court said a clinic could provide abortion counseling "through programs that are separate and independent from the project that receives Title X funds." (*Rust* at p. 196)

DKT argued that the *Rust* case involved projects, not the entire grantee's organization. However, the DKT ruling extends the *Rust* rationale to cover the entire organization, relying on the Supreme Court's ruling in *Regan v. Taxation Without Representation* (461 U.S. 540), which upheld limits of legislative lobbying activities of 501(c)(3) organizations because of their ability to create 501(c)(4) affiliates that have no lobbying limits. The court said, "We see no difference here", noting that DKT could set up a subsidiary organization that could adopt the required policy and sign the pledge, thus qualifying for the federal grant "as long as the two organizations' activities were kept sufficiently separate. The parent organization need not adopt the policy."

In making this point, the court refers to the government's statements in oral argument, which answered "yes" to the court's question: "All their complaints could be solved by a corporate reorganization?" However, the opinion does not go on to cite further government statements in the oral argument that qualify that answer. At pages 8-9, the government's attorney says, "There could be circumstances in which in order to protect the government's interest here, USAID might seek to impute the speech of one entity to another", saying the government could look at "how separate is separate enough..."

There is a long running dispute over such separation requirements in the context of legal services programs. The Second Circuit is currently considering an appeal from a U.S. District Court that found the separation requirements imposed on legal services to be an

unconstitutional burden. See Background: *Dobbins v. Legal Services Corporation*. The government has taken a more flexible approach to separation of religious programs from government programs by faith-based government grantees. See HHS Gives Guidance on Keeping Federal Funds Out of Religious Programs.

The policy question of whether grantees should condemn prostitution and sex trafficking has been controversial and has divided some nonprofits. The *Chronicle on Philanthropy* noted that over 200 charities sent a letter to President Bush opposing the policy, while a coalition of religious groups has supported the policy. Whatever one's view on the policy, nonprofits should beware mixing the policy question with the First Amendment question. The bottom line is whether awarding a federal grant gives the government the right to reach beyond the grant project to dictate the speech and activities it does not fund, thus imposing its will on private donors and the organization as a whole. This expansive government power would seriously undermine the independence of the nonprofit sector, turning government grantees into little more than mini-agencies of the federal government.

The second case involving the anti-prostitution pledge is pending in the Court of Appeals for the Second Circuit. The plaintiffs are the Alliance for Open Society International (AOSI) and its affiliate, the Open Society Institute (OSI) and Pathfinder International. Details on that case are available on the Brennan Center for Justice website.

Senate Votes Down Effort to Expand Definition of Material Support

The Senate bill designed to implement recommendations of the 9/11 Commission, S. 4, had almost 200 amendments and took over two months to complete. One amendment, introduced by Sen. Jon Kyl (R-AZ), could have potentially weakened humanitarian work of U.S. charities overseas but was defeated as part of a package of amendments that did not pass.

Kyl's amendment, SA 317, sought to increase the maximum penalties for those who give material support to suspected terrorists and a designated foreign terrorist organization. The text of the amendment would have broadened the definition of material support to anyone who "provides material support or resources to the perpetrator of an act of international terrorism, or to a *family member or other person associated with* such perpetrator, with the intent to facilitate, reward, or encourage that act or other acts of international terrorism." (emphasis added) The penalty for violating this provision would have been a fine, up to 25 years in prison, or both, or if death results, a prison term of any number of years to life.

The terms "family member" or "person associated" were not defined in the amendment. Under this language, it may have been possible that someone who provided water or medical care to the child of a suicide bomber would have been subjected to criminal

penalties. This legislative vagueness, combined with severe penalties, had the potential to discourage humanitarian aid and development programs, particularly in high-risk areas where such aid is greatly needed.

While defending this provision on the Senate floor, Kyl commented, "The material-support statutes have been the Justice Department's workhorse in the war against terrorists, accounting for a majority of prosecutions. These statutes are also very effective at starving terrorist groups of resources."

Nonprofits became aware of the language in the Kyl amendment and quickly acted. Muslim Advocates, the charitable arm of the National Association of Muslim Lawyers, sent out a call to action to nonprofits to oppose the amendment. OMB Watch submitted a document urging senators to vote no. The measure became part of a package of amendments, which Sen. John Cornyn (R-TX) introduced. Cornyn's amendment, SA 312, had to be voted down in order for the Kyl provision to be removed from the overall bill. Fortunately, Cornyn's amendment was defeated by a vote of 49-46.

What remains in federal statutes is still is an overly expansive definition of material support that potentially harms victims of terror and aid workers. As the Ninth Circuit Court of Appeals ruled in November 2006, part of the language in Executive Order 13224 that allows designation of people and groups "otherwise associated" with terrorism is "unconstitutionally vague on its face." The case was brought by the Humanitarian Law Project, and the Justice Department has not yet decided to appeal the case.

Mine Safety Concerns Remain after Sago

One of America's largest miners' unions has released a report faulting the coal industry and the federal government for the Sago mine incident of 2006. The report comes as mine safety legislation passed in the wake of the incident has yet to be fully enforced.

On March 15, the United Mine Workers of America (UMWA) released *Report on the Sago Mine Disaster of January 2, 2006*. The report claims friction within the mine caused the explosion in Sago, WV, which killed 12 miners (none of whom were union members). The report states the accident was completely preventable and blames the mine's owner and federal and state regulatory bodies for the incident. UMWA also includes recommendations for improved mine safety.

Claiming friction as the cause of the explosion runs contrary to the position of the mine's owner, the International Coal Group (ICG), and the State of West Virginia. ICG claims "overwhelming evidence" that lightning was the cause of the explosion. A panel writing on behalf of the West Virginia government found a lightning strike to be "involved." However, UMWA claims the strike occurred at too great a distance and without a conduit through which an electric surge could reach the mine. UMWA claims "frictional activity

from the roof, roof support or support material" caused the methane gas explosion.

The report also claims the accident would not have occurred if federal law had been properly enforced. UMWA primarily blames ICG and the federal agency in charge of enforcing mine safety laws, the Mine Safety and Health Administration (MSHA), for conditions which contributed to the deaths of the 12 miners. According to the report, ICG and MSHA did not adequately recognize or enforce statutory provisions related to mine seals, two-way communication in to and out of the mine, mine rescue teams, fresh air ventilation, oxygen supplies within the mine, safety chambers, and tracking devices to determine the exact location of trapped miners.

In response to the report, ICG's president and CEO said in a statement, "The UMWA has rolled out this so-called report with its usual bombast; however, upon closer review the report is simply a propaganda piece designed to criticize and undermine the state and federal mine regulators and ICG, whose miners continue to work union free."

In the report, UMWA recognizes Congress's efforts to improve mine safety through the Coal Act of 1969, the Mine Act of 1977 and most recently the MINER Act. UMWA places future responsibility on MSHA, recommending the agency adopt a more robust regulatory agenda in order to prevent future disasters from occurring. The report states, "The Agency's decisions over the past several decades to promulgate regulations, grant petitions for modiÂ¬fication and create policies that contradict the intent of Congress by reducing or eliminating the legislated protections played a major role in the tragic events of January 2, 2006."

Shortly after the Sago mine explosion — and the May 2006 Darby mine explosion in Kentucky which killed five miners — Congress passed the Mine Improvement and New Emergency Response Act of 2006 (MINER Act). The legislation requires the regular development of accident preparedness plans, improved availability of rescue teams and equipment, and increased amounts of breathable air. Several provisions of the law are accompanied by deadlines for their implementation. President Bush signed the MINER Act into law in June 2006.

On Feb. 1, Rep. George Miller (D-CA), chairman of the House Education and Labor Committee, sent a letter to Secretary of Labor Elaine Chao concerning implementation of the MINER Act. Miller's letter identified three areas where the Department of Labor has missed deadlines for the implementation of the MINER Act. The provisions are availability of self-rescuing equipment; improved evacuation training; and availability of caches of breathable air. In the letter, Miller says, "I think your progress in these three areas is a critical bellwether of your commitment to the law."

Since the initial letter of Feb. 1, MSHA has issued guidance recommending a minimum amount of breathable air but did not directly address Miller or the committee. The committee has sent three follow-up letters. No one at the Department of Labor has

replied to any of the correspondence, according to committee staff.

Miller's committee also released a report on implementation of the MINER Act. The report details Miller's concerns and faults MSHA and the mining industry for inadequate progress.

On Feb. 28, the Senate held a hearing to investigate the progress of the MINER Act and the overall state of mine safety. MSHA administrator Richard Stickler defended the agency's progress and called implementation of the MINER Act the agency's "top priority." However, J. Davitt McAteer, former MSHA administrator and mine safety expert from Wheeling Jesuit University, said, "In the months since the Sago disaster, much has changed and much more is in progress, but unfortunately for the average miner underground today not much has improved from the day-to-day safety and health standpoint."

Miller has scheduled a House Education and Labor Committee hearing on March 28. The hearing, *Protecting the Health and Safety of America's Mine Workers*, is likely to address the enforcement of the MINER Act as well as the UMWA report. Witnesses have not been announced. The hearing indicates Miller's desire for the committee "to take a thorough look at mine safety and health in this country, including the need for additional policies, regulations or legislation."

Leaders of Finance Committee Respond to IRS Outsourcing Program

Sens. Max Baucus (D-MT) and Chuck Grassley (R-IA), Chairman and Ranking Member of the Senate Committee on Finance, sent letters to IRS officials March 15 questioning an Internal Revenue Service (IRS) pilot program allowing outside experts to draft guidance documents for the IRS. The letters follow the controversy raised by a March 9 *New York Times* story [subscription] detailing the project, which allows tax lawyers and accountants to draft the documents rather than IRS officials.

The IRS program, described in Notice 2007-17, calls for publication of a "notice for each guidance project selected for the program. The notice would identify research, background documents, drafts of proposed guidance and other work products, and ask interested parties to provide them." The IRS expects the projects will relate to "guidance in a narrow, technical area of the tax law, where the need for guidance is driven by market changes with which taxpayers may be more familiar than are the IRS and Treasury."

The letters from Baucus and Grassley to the Treasury Department and IRS officials express concern about whether these departments are putting "special interests before the public interest" and whether "the process would result in some practitioners and taxpayers having undue influence over government regulations that would lead to

beneficial outcomes for their clients or their own tax matters." The letters ask Treasury and the IRS to assess this guidance process and provide specific information about the program to the Finance committee.

The *New York Times* story quotes Donald L. Korb, Chief Counsel at the IRS and one of the recipients of the letter, as supportive of the program and justifying it based on fairness to taxpayers and on the fact that these are technical issues of low priority. He is quoted as saying the pilot program does not change the current process.

There is truth to Korb's statement. For six years, the Bush administration has provided access to special interests in unprecedented ways, as OMB Watch has documented often. (See, for example two reports, here, and here.) Establishing a pilot program to allow regulated parties to write tax regulations is an extension of existing practice elsewhere in federal agencies.

Corporate interests have had a seat at the Bush administration's table to help write or frame policy and regulations, ranging from energy policy to consumer and work place safety to securities regulations to voluntary food safety guidelines. For example, a *Seattle Times* story from March 2004 describes how the U.S. Environmental Protection Agency used industry language verbatim in writing a proposed mercury rule under Bush's Clear Skies initiative, which would have capped mercury emissions without requiring any additional costs to industry.

Compliant Congresses before the 110th chose to ignore these trends or helped advance them. This may be changing as these issues garner media attention. For example, in the committee's press release about the Senators' letters, Grassley is quoted as saying:

We don't need K Street lawyers writing enforcement regulations to help their clients create tax shelters. That would be worse than a camel's nose under the tent. It would be the whole caravan. We might as well have the Justice Department let defense counsels write sentencing guidelines. If the IRS is that short on resources, the commissioner needs to tell Congress.

Bush's 2008 budget request for the IRS doesn't do a lot to help with the problem. The regulatory budget request is $157.4 million, down from $209.6 million enacted in 2006, when the IRS experienced across-the-board cuts. As happened in the Reagan administration, Bush is attempting to limit the size of government and abdicate its responsibilities by defunding federal agencies. OMB Watch Executive Director Gary Bass sarcastically summed up the trend in the New York Times article: "Why don't we just privatize Congress and outsource the development of our laws?"

Contracting Reform Bills Move in Congress

Congress is moving forward on bills to reform the federal contracting system, as the

House approved a bill that improves contracting procedures, and the Senate introduced a comprehensive contract reform bill. The bills are an encouraging sign that Congress is working to fix some of the broken parts of the contracting system, but it will need to do much more to address the full scope of the problem.

The $400 billion-a-year federal contracting industry is the fastest growing area of discretionary federal spending, accounting for roughly 40 cents of every dollar spent and having jumped 83 percent since FY 2000. Yet the public does not have reliable access to information regarding the contracting system of the federal government. While this system has operated in relative obscurity, numerous scandals have entangled lawmakers, executive branch officials and private companies in connection with contract waste, fraud and abuse.

On March 15, the House passed the "Accountability in Contracting Act" (H.R. 1362), co-sponsored by Oversight and Government Reform Committee Chairman Rep. Henry Waxman (D-CA), by a vote of 347-73.

The wide margin by which the bill passed reflects a consensus on the need for procedural reforms and greater transparency. It requires agencies that do over $1 billion in annual contracting to devise and implement a plan to minimize sole-source contracts, which are not subject to competition, and cost-plus contracts, which have relaxed controls on contractor spending. It would also limit sole-source contract term-lengths to no more than 240 days.

The bill also includes provisions that would improve public access to contract management information and remove conflicts of interest from the procurement process. Agencies would be required to make available to committee chairpersons or ranking members (but not to the public) audit reports that found overcharges over $10 million. The bill would make public agency justifications for not opening up contracts to multiple bidders. Instituting a revolving door provision, the bill mandates that procurement officials must wait two years after leaving a government position before they can work for a private contractor.

The House Armed Services committee, however, stripped a few provisions from the original bill. For example, a requirement for a public audit report for questionable costs exceeding $1 million was dropped, as was a requirement that one percent of agency procurement budgets be spent on contract oversight.

The House bill also has significant omissions. It lacks strong provisions that would hold contractors accountable for contract underperformance, mismanagement and noncompliance with federal laws and regulations. It also fails to impose stronger and broader limitations on the scope of federal responsibilities available for contracting. Finally, it does not mandate comprehensive disclosure or process reforms of federal procurement policy.

The Honest Leadership and Accountability in Contracting Act of 2007 (S. 606),introduced in the Senate by Sen. Byron Dorgan (D-ND), addresses some of the more wasteful aspects of contracting that H.R. 1685 stops short of tackling. S. 606 currently has 22 co-sponsors.

Under S. 606, war profiteering or fraud would result in larger fines, and prospective contractors that exhibit a pattern of fraud, waste, or abuse will not be considered to have a satisfactory record of integrity or business ethics. Agencies would also have to make public any information regarding contractor violations of federal laws and regulations and any punishments enacted for those violations. This data would be made available through the Federal Procurement Data System, which is one source of data for FedSpending.org.

Under the Dorgan bill, the contracting process would also undergo changes, as higher standards would have to be met in order to issue non-competed contracts. Contractors would be prevented from receiving contracts to conduct government oversight, and contracting out inherently governmental responsibilities would be curtailed. However, it is unclear how strongly the bill would enforce these provisions, and consequently, how much of a difference they would make in contracting procedures.

H.R. 1632 is one of five bills relating to increasing access to government information that the House passed during Sunshine Week, an annual event to bring attention to government openness and transparency.

House Panel Passes $124 Billion Supplemental Bill

On March 19, the Bush administration said it would veto a supplemental appropriations bill being readied for a House vote the week of March 26. The White House indicated that the president opposes language that would require troop withdrawal from Iraq as well as "excessive and extraneous non-emergency spending". The supplemental appropriations bill, at $124 billion, will be the largest supplemental bill ever considered by a house of Congress and has sweeteners in it to offset a tough vote on withdrawing troops from Iraq. The Senate Appropriations Committee is scheduled to consider its own version of the supplemental on March 22.

As introduced in early March, the House bill mirrored President Bush's request for $99.6 billion in appropriations for ongoing military operations, equipment for American forces, and training and equipment of Afghan and Iraqi forces. But as the bill got caught up in internal House conflicts regarding Iraq war policy, leadership sought to ease its passage with tradeoffs that certain Members wanted, and it grew in size. On March 15, the House Appropriations Committee approved the emergency supplemental appropriations bill, but by then it had grown to $124 billion.

A week before the Committee vote, Speaker Nancy Pelosi (D-CA), seeking to bolster the

bill's chances, announced that the minimum wage bill passed by the House in January would be added to the supplemental. The wage measure consists of a $2.10 increase in the federal minimum hourly wage, from $5.15 to $7.25, over two years and a package of small business tax breaks that would cost $1.3 billion over five years. Although the minimum wage is a supplemental-sweetener, its inclusion is highly unorthodox in its timing: the Senate has passed a much-larger $8.3 billion set of tax breaks and the two tax packages are awaiting conference.

GOP Senators objected strenuously to including this minimum wage sweetener. Senate Finance Committee ranking member Charles Grassley (R-IA) told Congressional Quarterly [subscription], "Speaker Pelosi ought to know, there's another house. We are a bicameral Congress.... And there are things like the Senate Finance Committee. This is an intrusion on the prerogatives of the tax-writing committees." But it may have broken the logjam: on March 19, Grassley announced that he was dropping demands for a pre-conference agreement with House Ways and Means chair Charles Rangel (D-NY) on the wage bill's tax packages.

Congress added to the president's supplemental request about $20 billion in domestic spending, including:

- nearly $2.5 billion for Gulf Coast recovery
- $3.7 billion for agriculture disaster relief in the Midwest and California
- $750 million for the State Children's Health Care Insurance Program
- $400 million low-income energy assistance
- $400 million for timber-dependent communities in the Pacific Northwest

Other programs that received additional funds involve international food assistance, foreign aid, pandemic flu prevention, and wildfire suppression. Other late additions to the supplemental crack down on wasteful government contracting. The bill adds millions to the budgets of multiple Inspectors General to investigate contacts related to the Gulf Coast recovery. It also withholds funds from the Defense Department until it produces a report on contractors involved in the wars in Afghanistan and Iraq. And the supplemental would require that the agencies that rely heavily on contractors develop and implement a plan to minimize wasteful contracts. The House recently passed a similar provision in H.R. 1362. The president later added requests of $3 billion for the Base Relocation And Closure (BRAC) program and another $3 billion for troop increases. Notwithstanding these additions being added, the president made it abundantly clear that he intends to veto the House bill.

A key reason for the threatened veto is the controversial provision that would determine the length of the war in Iraq. The supplemental dictates that major combat operations would end, at the latest, by September 2008, and by January 2008 at the earliest. When the war would end is dependent on benchmarks specified in the bill.

The supplemental first requires that the president submit to Congress reports on the war

in Iraq by July 1 and Oct. 1, 2007. In the first report, the president must certify whether or not the war in Iraq has made progress toward achieving a host of specified goals; in the second report, the president must certify whether or not these goals have been achieved. Among these goals are sectarian reconciliation, an improved security situation and progress on economic reconstruction.

If the president reports that progress has been insufficient or that the goals have not been met, or if the president fails to issue either report, the Department of Defense would have 180 days to withdraw most military forces from Iraq. Even if the president reports that the specified goals have been accomplished, the bill requires that all armed forces begin redeployment from Iraq by March 1, 2008. American troops, with some exceptions, would have to leave Iraq by September 2008.

These provisions would be the first to restrict the duration of the Iraq war. But, due to certain exceptions and omissions, the president would still retain a great deal of authority over the course and length of the war.

First, the president would have complete discretion over what constitutes a satisfactory report on conditions in Iraq. The bill does not provide criteria by which Congress could judge the president's reports, nor does it not seem to give Congress the power to challenge the president's report.

Furthermore, the deadline for the commencement of the latest troop withdrawal — March 1, 2008 — occurs outside of the time-span for which this appropriations bill will be providing funding. Congress must pass another appropriations bill to continue the war effort in FY 2008, which could contain language that could remove or change this deadline. And the bill, in its current form, does not specify what consequences would apply if the Department of Defense does not comply with the imposed deadline, though non-compliance would seem be a clear violation of the law.

The bill also mandates that troops being sent to Iraq meet readiness standards, though the president may waive these restrictions if he provides Congress with a justification.

President Bush issued a veto threat from Air Force One as soon as news reports were out that the Democrats were adding timetables and conditions to the bill. That gave GOP House members cover to vote against it; indeed, every Republican on Appropriations opposed it. Democratic defections on the floor are also feared — estimates are in the 12-15 vote range. The Democrats' majority in the House is 15 votes. But the supplemental could well attract some scattered GOP votes. There is a broad consensus that this is must-pass legislation — it provides vital troop support, including no less than $10 billion for body armor — but may not succeed in its current form.

Senate Committee Adopts $2.9 Billion Budget Resolution; Floor Action Ahead

On March 15, the Senate Budget Committee approved a $2.9 billion budget resolution for Fiscal Year 2008 on a 12-11 party-line vote. The full Senate is expected to take up the measure on March 20, with 50 hours of debate, votes on numerous amendments, and a final vote scheduled before the end of the week. The House Budget Committee is set to mark up its own budget resolution, with floor action likely the week of March 26. (Click here for links to resolution summary and details.)

The blueprint, produced by Senate Budget Committee Chair Kent Conrad (D-ND), projects a $132 billion budget surplus by 2012, without any specified tax increases. It calls for $948 billion in discretionary spending, exceeding the FY 2008 $930 billion budget cap President Bush proposed in February, with most of the increase going toward education, veterans, and community policing programs. Conrad's plan also provides a boost of $50 billion over the next five years in mandatory spending for SCHIP, the state children's health insurance program.

In the past, Bush has threatened to veto any budget ultimately passed by Congress that exceeds his discretionary spending cap. The budget resolution is a "concurrent congressional resolution," not an ordinary bill, and it does not go to the president for signature or veto. But it sets firm budget targets and limits for 19 broad spending and revenue estimates over the next five years. Since Conrad adds three percent (a mere *one percent* over what is needed to maintain the current level of domestic program services) in spending to Bush's cap, he may be steering Congress toward an eventual presidential veto.

The plan also restores a key procedural requirement to congressional budget-making: a pay-as-you-go (PAYGO) rule, meaning that legislation with provisions hiking mandatory spending or cutting taxes must include offsets to pay for those provisions and make the bill revenue neutral. Unlike the PAYGO rule adopted by the House earlier this year, however, Conrad's version of it would not permit Congress to count latter-year savings as offsets for earlier deficit spending.

So, for example, Conrad's PAYGO rule would not allow delaying the implementation of the painful offsets required to prevent middle-class exposure to the alternative minimum tax (AMT) — cost: upward of $50 billion a year — to say nothing of AMT repeal — cost: roughly $1 trillion over ten years. Similarly, the resolution calls for extending Bush's tax cuts beyond their 2010 expiration only if they are paid for by spending cuts or by revenue from other sources, which some in Congress interpret as forcing Congress into "the largest tax increase ever," to quote Senate Finance Committee ranking member Charles Grassley (R-IA).

GOP reaction to the budget resolution has been uniformly negative, with most criticism directed at the assumptions, projections, and mechanisms used to arrive at its projected five-year surplus, as well as at the 22 reserve funds in the Committee's final version. In fact, Conrad's plan uses almost identical assumptions and projections in the president's

proposal in the areas of war spending and the AMT, so many of the criticisms echo those from Democrats when Bush issued his budget in February.

The use of reserve funds in the budget resolution is commonplace; they have been used since 1983 to direct specified or unspecified amounts of spending that an authorizing committee *may* later approve. The *New York Times* described them last week as "not funds in any normal sense, [but] a statement of intentions by lawmakers to raise the necessary money, through either spending cuts or tax increases, by the time it would be necessary to spend it."

But GOP eyebrows were raised when fund after fund was added to the resolution, 22 such funds in all — twice the previous record — specifying $70 billion in potential spending over five years. Senate Budget Committee ranking member Judd Gregg (R-NH) estimates (BNA, [subscription]) the aggregate spending amounts outlined in the 22 funds over and above the specific $70 billion at "closer to about $200 billion."

The days ahead are critical ones for the FY 2008 budget resolution. House Budget Committee Chair John Spratt (D-SC) has said little about the chairman's mark he will release on March 21, except that it will include the House version of the PAYGO rule. Meanwhile, the Conrad resolution goes to the Senate floor, where it requires only a majority vote to pass — one of the few pieces of legislation that cannot be filibustered in the Senate. On the other hand, this makes it easier to amend, and long days and nights are expected as the GOP tries to tack on tax cuts or other damaging amendments, while Democrats, with no votes to spare, seek to hold their 51 members solidly together against such amendments and keep Conrad's plan intact.

PAYGO Questions Answered

The 110th Congress has brought attention once again to a well-known but little-understood fiscal responsibility mechanism: the pay-as-you-go rule, or PAYGO. The House has already enacted a PAYGO rule. The Senate has introduced a PAYGO bill (S. 10), and is expected to pass its own PAYGO rule in the FY 2008 Budget Resolution, which is now being considered in the Senate.

The new Congress will face many challenges that will test its commitment to PAYGO rules as it considers expensive changes to tax law, notably relief from the Alternative Minimum Tax (AMT), and modest expansions of some federal programs, such as the State Children's Health Insurance Program. The challenge for the majority will be in addressing these policy issues and still paying for them without being labeled as a party that supports tax increases.

Because PAYGO will be involved in most of the major policy decisions over the next two years, it is important to understand exactly what PAYGO is, and how it impacts enacting new policies in Congress. Continue reading the full analysis of PAYGO and the Senate

provisions by clicking here.

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GSA Administrator Testifies on Misconduct Allegations

On March 28, General Services Administration (GSA) chief Lurita Doan testified before the House Committee on Oversight and Government Reform to account for incidents of alleged mismanagement and politicization of GSA resources. In her testimony, Doan mostly offered unsubstantiated denials and accusations while professing ignorance or a faulty recollection of key actions.

Since assuming the top position at GSA in June 2006, Doan has been accused of being

involved in repeated incidents of misconduct, including an attempt to award a contract to Doan's personal friend, an improper intervention in a contract negotiation with Sun Microsystems, an assault on the independence of the GSA Office of Inspector General (OIG), and the politicization of federal resources. (See this brief background article on the allegations).

The hearing's scope included all of these allegations, and the committee also heard testimony from Sen. Chuck Grassley (R-IA) and the GSA Inspector General.

The Office of the Inspector General

Grassley's testimony strongly criticized Doan's attempts to reduce the budget of the OIG. Inspectors General, by law, remain independent from the agencies they are charged to hold accountable. Grassley asserted that Doan did not have the authority to reduce the OIG's budget and that her intervention undermined its independence and ability to conduct oversight.

Doan defended her actions by denying that her *goal* was to encroach on the OIG's authority. However, she did not address Grassley's concern that the *effect* of her actions would be a less-independent OIG.

Doan instead claimed she changed the OIG budget request because she wanted to root out wasteful spending. Yet the examples of wasteful spending she offered in her testimony — out-of-date information technology and bad management of the human resources department — are not related to the reductions in the OIG's budget she made, which concerned the OIG's authority to conduct preliminary audits of government contractors and a proposed expansion of the OIG's regional offices.

In addition, Doan alleged that the OIG has created a "gotcha atmosphere" at GSA, which makes agency work more difficult. However, Doan did not offer any examples of when this "atmosphere" had made a negative impact on GSA performance, nor did she explain how the OIG could make it harder to effectively administer contracts.

Politicization of Federal Resources

Doan also gave an unsatisfactory explanation of a meeting she attended where a staffer from the White House political office, headed by Karl Rove, briefed GSA staff on the 2008 election. In a striking exchange (for which video is available), Doan said the meeting was a "team-building" exercise and claimed she did not remember a presentation that included a map where certain Democratic congressional districts and Senate seats were highlighted and labeled "targets."

Witnesses of the meeting have told committee staff that at the end of the presentation, Doan asked GSA officials, "How can we use GSA to help our candidates in the next election?" Doan testified at the hearing she does not remember asking that question.

The Congressional Research Service has analyzed whether this meeting constituted a

potential violation of the Hatch Act, which prohibits using federal resources for partisan purposes. The paper came to the conclusion that if Doan did ask the question about "our candidates," she could have violated the Hatch Act.

Preferential Treatment in Contracts

Doan also defended her attempt to direct a contract to a friend and former business associate. Doan denied there was any "intentional wrongdoing," and, refreshingly, admitted to making "a mistake in my eagerness to begin to solve an urgent problem." But she did not dispute that she attempted to improperly award a no-bid contract to a long-time business associate.

In regard to another controversial contract, Doan denied she had any involvement in the resolution of a protracted contract dispute with Sun Microsystems. The OIG had found that Sun was overcharging GSA and that GSA could have secured a more favorable contract with another company. Sen. Grassley's investigation uncovered evidence Doan pressured GSA contract negotiators to agree to unfavorable terms.

Congress Approves War Funding; Pressures Bush to Withdraw Troops

Despite repeated veto threats from President George W. Bush, both the House and Senate have approved enormous war supplemental bills that contain a schedule for eventual withdrawal of American soldiers from Iraq. At approximately $124 billion, these bills are the largest supplemental funding legislation in history.

On March 23, the House approved its version (H.R. 1591) of the supplemental bill in a 218-212 vote, with two Republicans joining all but 14 Democrats to pass the bill. The entire debate in the House hinged on the timetable for withdrawal of U.S. soldiers from Iraq, as House leaders worked for weeks to balance the demands of liberals who were seeking a fast withdrawal with those of conservative Democrats, who were hesitant to set any timetable for commanders in the field. In the end, they were able to find the right balance and likely eased the concerns of many members who supported the bill with an additional $20 billion in funding outside the scope of the wars in Iraq and Afghanistan.

The Senate approved its version of the supplemental bill on March 29 by a vote of 51-47, making a few small changes to the committee mark that was approved the week before. Two Republicans, Sens. Gordon Smith (OR) and Chuck Hagel (NE), joined with Democrats to pass the bill, despite language specifying a "goal" of withdrawing troops from Iraq by March 31, 2008.

The bill approved $123.2 billion, with the vast majority — $96 billion — going to the Defense Department, mostly to continue military operations in Iraq and Afghanistan. It also included a $1 billion increase for the National Guard and Reserve and $1.1 billion for improvements to military housing. The bill also has $5.75 billion for programs overseen

by the State Department, with $3.2 billion of that for Iraq.

Like the House bill, the Senate version includes an additional $20 billion in spending, including an extra $4.3 billion for veterans' health care, $6.7 billion in hurricane relief funds, $745 million for the State Children's Health Insurance Program, $2 billion for homeland security upgrades, and $4.2 billion for agriculture disaster relief.

Despite a number of Republican amendments to strip parts of this additional spending from the bill, mostly offered by Sens. Tom Coburn (R-OK) and Jim DeMint (R-SC), only one was successful — a DeMint amendment to strip payments to spinach growers. It passed 97-0.

The Senate did approve a few amendments that added funding to the bill, including for the Secure Rural Schools And Community Self-Determination Program (approved 74-23), the Adam Walsh Child Safety and Protection Act of 2006 (approved 93-0), and $1.5 billion for additional mine-resistance vehicles in Iraq (approved 98-0). Those amendments were offered by Sens. Ron Wyden (D-OR), John Ensign (R-NV), and Joseph Biden (D-DE), respectively.

During Congress' work on the supplemental, Bush issued numerous firm veto threats against both the House and Senate versions, citing "the excessive and extraneous non-emergency spending."

In addition, the president vowed to veto any bill that sets deadlines or schedules for withdrawal of soldiers from Iraq. Because each chamber's bill refers to specific dates (a "deadline" in the House's version and a "goal" in the Senate), both houses of Congress have now called for complete withdrawal of U.S. troops from a war that has lasted longer than World War II and has been this nation's most expensive ever. The House and Senate versions of the bill have slight variations in the specific dates for withdrawal to begin and end, and in how much pressure they put on the president to withdraw U.S. forces. The Senate language calls for the first withdrawals to begin within 120 days of enactment of the supplemental bill, but does not *force* a complete withdrawal of U.S. forces.

With the standoff between Congress and the president continuing, it is unclear how soon the supplemental bill could be signed into law. This uncertainty has led to very different estimates as to how long current funding for the wars can last. The president has repeatedly stated the supplemental funding bill needs to be approved by mid-April in order to avoid funding shortfalls for the military, but a recently released report by the Congressional Research Service states the military will have sufficient funding through the end of May. With minor accounting changes, CRS believes current funding can last well into the summer.

The Senate has appointed conferees but the House has not, so a conference on the bills will not begin until after the current congressional recess ends in mid-April.

Congressional leaders, including Senate Majority Leader Harry Reid (D-NV) and House Speaker Nancy Pelosi (D-CA) want to work with President Bush during the conference to avoid a veto of the bill but will need to stay close to the intent of the current language in the bills to maintain support in each chamber.

Budget Resolution Conference Faces Key Choices on PAYGO, Taxes

In the final weeks of March, the House and Senate adopted budget resolutions for Fiscal Year 2008 by narrow margins and will now turn to the task of finding a compromise resolution in conference committee. The two $2.9 trillion budget plans are broadly similar — both seek to reach a budget surplus by the year 2012, establish reserve funds to extend the State Children's Health Insurance Program (SCHIP) to all eligible children, and embrace pay-as-you-go (PAYGO) principles. But their slightly differing spending provisions and definitions of PAYGO, as well as a Senate amendment to extend some of President George W. Bush's middle-income tax cuts, will present some critical choices in conference.

The Senate passed its budget resolution, S. Con. Res. 21, on March 23, by a 52-47 vote, with Maine GOP Sens. Olympia Snowe and Susan Collins joining the 49 Democrats and Independents Bernie Sanders (VT) and Joseph Lieberman (CT) in support. The Senate's nonbinding budget blueprint provides $18 billion more in domestic discretionary spending for next year than Bush's proposed FY 2008 budget, projects a $132 billion surplus by 2012, offers a two-year patch for the Alternative Minimum Tax (AMT), and establishes a strict PAYGO regime.

During floor debate on the resolution, the Senate voted 97-1 to add an amendment by Finance Committee Chair Max Baucus (D-MT) that recommended $195 billion — about $60 billion over and above the projected surplus — be used to extend Bush's 2001 and 2003 middle-class tax cuts, expand SCHIP, and make modest changes to the estate tax. More drastic amendments to cut the estate tax were rejected.

The House adopted its own budget resolution, H. Con. Res. 99, on March 29, by a 216-210 margin, with 12 Democrats and two Republicans crossing party lines. The House resolution calls for a $153 billion surplus by 2012, a nearly $25 billion increase for domestic programs, a one-year AMT patch, and a less rigorous PAYGO rule than the Senate's.

The House voted on, but rejected, alternative budget resolutions proposed by the Progressive Causes (by 81-340), the Congressional Black Caucus (by 115-312), and the GOP conference (by 160-268). The GOP alternative, offered by Budget Committee Ranking Member Paul Ryan (R-WI), would have cut entitlement spending by $270 billion over five years, added $168 billion to the deficit, and violated the House PAYGO rule; it was defeated 160-268. This vote was a wider-than-expected margin, with 40 GOP

members breaking ranks to oppose it. The conservative Democrat Blue Dog coalition did not offer an alternative this year, instead endorsing the House leadership's resolution.

OMB Watch and many of its progressive community partners, including the Emergency Coalition for America's Priorities (ECAP), support both resolutions, with a slight preference for the House version, which provides $5 billion more than the Senate for annually appropriated discretionary domestic programs, including $7.9 billion more for education and social service programs and $3.5 billion more for veterans programs for FY 2008 than Bush's budget. These increases and the commitment to PAYGO principles are seen as a start, a "down payment" on future efforts to redress the last several years' chronic under-funding of social service needs across the country.

Much of the partisan debate surrounding the budget resolutions has focused on the Democrats' assumption that many of the 2001 and 2003 Bush tax cuts would not be extended — yielding nearly $400 billion more revenue than the president's budget over the next five years. The GOP has claimed repeatedly that the Democratic budget resolutions require "the largest tax increase in American history." In fact, however, they assume no tax hikes, only the same increase in revenues assumed under the very same tax cut laws.

The major fiscal difference between the House and Senate resolutions lies in how this increased revenue is handled. The Senate plan, under the Baucus amendment, sets aside about $180 billion after 2010 to renew current middle-class tax cuts such as the expanded child tax credit, marriage penalty relief, and the 10-percent tax bracket, and fixes the estate tax at the current 2009 exemption levels ($3.5 million for individuals, and tax rate, 45 percent). These provisions consume all of the Senate's projected 2012 surplus and then some and call for an additional $15 billion for SCHIP. The Baucus amendment does not propose how that additional funding should be offset, but Senate Democrats would still be free to adhere to PAYGO principles in all their legislation. Their commitment to fiscal responsibility will in some ways be measured by their ability to draft deficit neutral bills even for their most popular priorities like middle-class tax cuts and children's health care.

Implications of the Baucus Amendment on the Estate Tax Debate

The Baucus amendment offered and adopted in the Senate Budget Resolution may have implications for the estate tax debate. The amendment, however, does not change tax law or automatically alter estate tax exemptions and rates — in fact, it never even mentions the estate tax by name. The Baucus amendment is an adjustment to spending and revenue totals in the outline within the budget resolution. It is a non-binding suggestion — a proposal for how federal resources could be spent. The practical effect of the amendment is that it proposes to use the projected surplus for a few specific spending and tax policy changes.

During debate on the amendment, Sen. Baucus ☼ gave details as to his desires for how the surplus revenues, projected in the budget resolution to materialize in 2012, could be spent. He spoke of three specific proposals: extending children's health insurance to all kids in America, extending some middle-class tax cuts, and extending the 2009 levels of the estate tax.

The main motivation for the Baucus amendment was to outline a number of tax and spending policies that could be implemented to spend the projected 2012 surplus during 2011 and 2012, in the process staking a Democratic claim on the additional revenue. It was also likely proposed to deny Republicans their own proposals to use the surplus for additional tax cuts.

In addition, the Baucus amendment's estate tax provision is notable for its recognition that previous proposals on the estate tax were far too irresponsible and expensive to actually implement. Both Baucus and Sen. Kyl ☼ (R-AZ), the main two senators involved in the estate tax debate, have now shifted significantly away from what once were pro-repeal positions on the estate tax toward far more moderate proposals. This is likely due to the Democrats' strong commitment to PAYGO in the current Congress.

While the Baucus amendment does not force implementation of the policies he outlined during the debate on the budget resolution, it does represent an important shift in the Senate away from fiscally reckless estate tax policies and toward more common sense reforms.

Finally, conference treatment of PAYGO itself will be telling. The House's PAYGO rule allows up-front expenses to be offset by future cuts or tax increases, so long as there is no aggregate increase in entitlement spending or decrease in taxes over the five- or ten-year period following the current fiscal year. The Senate plan permits only paid-for entitlement increases or tax cuts in any given fiscal year and extends PAYGO through 2017.

In any event, the budget resolution conference committee report, expected by the end of April, is all but certain to include some version of PAYGO and additional resources for a new farm bill, SCHIP, education, and veterans' health, reflecting a significantly increased congressional commitment to fiscal responsibility and many underserved domestic spending priorities.

Support Mounts to End IRS Privatization Program

Key politicians and advocacy groups are lining up against an IRS program to privatize tax collections, as suspect contracts have raised further concerns about the effectiveness and transparency of the program.

OMB Watch has joined with the American Federation of State, County and Municipal

Employees (AFSCME), Citizens for Tax Justice, and the National Treasury Employees Union (NTEU) to urge Congress to pass H.R. 695 and S. 335, bills that would end the IRS private tax collection program. In conjunction with these groups, OMB Watch sent letters to the House and the Senate making the case that this wasteful and dangerous program should be terminated immediately.

The IRS private debt collection program, authorized in 2004 and initiated in September 2006, contracts out the collection of tax debts that the IRS has identified but claims it does not have the resources to obtain. Contractors are allowed to keep 21 to 24 percent of all the money they collect, even though IRS employees could do the same work for one-eighth the cost.

Representatives controlling key committees have also made public their opposition to the private debt collection program. Rep. Jose Serrano ☼ (D-NY), chairman of the House appropriations subcommittee on financial services and general government, repeated his intention to end the program at a March 28 hearing. At that hearing, Treasury Secretary Henry Paulson gave a muted defense of the program, acknowledging concerns about cost and taxpayer rights that Bush administration officials had previously denied. Paulson did not recommend repealing the program, but signaled he would not strongly oppose repealing it. "It's a hard one for me to feel strongly about," Paulson said in a recent TaxAnalysts article.

In addition, Chairman of the House Ways and Means Committee Charles Rangel (D-NY) has stated his intention to repeal the IRS privatization program and asked that the IRS not issue any more contracts to private debt collectors. Rangel's interest is most likely in moving forward with H.R. 695, which is co-sponsored by Reps. Chris Van Hollen (D-MD) and Steve Rothman (D-NJ) with bipartisan support.

Rangel said his immediate concerns over the program stem from a suspicious denial by the IRS to renew one of the current debt collector's contracts. The contractor — Linebarger Goggan Blair & Sampson — is a debt collector based in Texas.

Neither the IRS nor Linebarger have explained why the contract was not renewed. A tax expert in San Antonio, where Linebarger has offices, speculated that Linebarger may have had trouble recovering the tax debts, making the contract less profitable. Private contractors do not have the legal authority to compel tax payment if a debtor refuses to cooperate.

IRS Taxpayer Advocate Nina Olson has found data suggesting private collectors have only successfully obtained payments from 20 percent of the cases IRS gave them. The IRS has not released information explaining what has happened to the vast majority of cases given to private collectors. Olson said that given the lack of data, it is impossible for the public to evaluate the program. On the other hand, a report by the Treasury Inspector General for Tax Administration has found that IRS has taken enough steps to protect taxpayer rights and ensure that the debt collection program is monitored for

effectiveness. The report urged further action in computer security and how the IRS tracks data on taxpayers who request to deal with IRS agents instead of private contractors, among other concerns.

Correction: The original version of this article contained errors about Linebarger Goggan Blair & Sampson, LLP, a Texas-based firm. The article incorrectly stated that the firm was "currently being sued" in a case in Texas; Linebarger was never a party to the suit in question, Municipal Services Bureau v. City of Brownsville, *and the suit was dismissed in February. The article also incorrectly stated that "some" of the firm's employees were convicted of bribery; only one employee of the firm was indicted and convicted of bribery, and he was fired upon his indictment. --Ed., April 6, 2007.*

OMB Manipulated Climate Science, Report Says

Political officials throughout the Bush administration have edited and manipulated climate science communications, according to a recent report by a nonprofit watchdog group. Evidence shows the White House Office of Management and Budget (OMB) to be involved in the manipulation.

On March 27, the Government Accountability Project (GAP), a public interest advocacy and watchdog organization, released a report detailing political interference in federal offices performing scientific research related to global climate change. The report, *Redacting the Science of Climate Change*, focuses on the manipulation of agency scientific communications to Congress and the media. The report is the product of a year-long investigation which included interviews and examinations of internal executive branch documents.

Examples in the report indicate OMB has been involved in political interference. OMB exerted political influence in responses to questions from Congress. OMB also plays an oversight role in a federal climate science clearinghouse.

For example, after an April 26, 2006, Senate committee hearing on the effects of climate change, two senators submitted questions for the record to the National Oceanic and Atmospheric Administration. A number of federal offices, including OMB, took the opportunity to comment on and edit the responses.

In one of its edits, OMB inserted text which "attributed global warming to increasing water vapor, in reliance on a quote taken out of context from a scientific paper," according to the GAP report. Before finalizing the response, one of the paper's authors intervened to correct OMB's assertion.

In another edit, OMB recommended removing the phrase "healthy coral reef ecosystems are important to both the fisheries and tourism industries and negative impacts on these ecosystems could affect these industries." OMB felt the phrase unnecessary, according to

documents obtained by GAP.

The report indicates OMB has also been involved in interference as an overseer of the Climate Change Science Program (CCSP). CCSP was formed to coordinate climate change science across a number of federal agencies and serve as a clearinghouse for information. CCSP is governed by members of those agencies as well as other executive offices, including OMB. Two OMB officials also sit on a CCSP working group in charge of publicly disseminating climate science information.

However, CCSP has underwhelmed observers in its releases of public information, according to the report. Since 2004, CCSP has released only 12 substantive written products, none of which exceed four pages in length. Since January 2006, the only new materials to emerge from CCSP have been three press releases. CCSP currently employs a staff of 14. Though OMB's exact involvement cannot be quantified, Tarek Maassarani, the author of the GAP report, says, "OMB has a presence in a lot of the decision making processes" in CCSP.

GAP released the report in conjunction with a hearing held by an oversight subcommittee of the House Science and Technology Committee. Like the report, the hearing focused on political interference in climate science communications.

The testimony of James McCarthy, a Harvard professor of biological oceanography, underscored the importance of sound science in the global climate change dialogue and the danger of scientific manipulation. Speaking of recent consensus on rising global temperatures and the anthropogenic causes thereof, McCarthy said, "Despite this strong scientific understanding, media coverage and political debate on global warming science often give undue credence to the views of little known organizations and statements by individuals purporting to be experts on climate science."

Both the report and the hearing point to other offices within the Executive Office of the President as involved in climate science manipulation. Most notably, internal documents have identified the White House Council on Environmental Quality (CEQ) and the Office of Science and Technology Policy (OSTP) as perpetrators.

CEQ and OSTP have been more involved in political interference than OMB, according to the report. However, OMB's role in the political manipulation of climate science communication is not to be understated. According to Maassarani, "OMB is very hostile to the policy implications of this science."

Miners Detail MSHA's Failings in Emotional Testimony

On March 28, the House Committee on Education and Labor heard emotional testimony from miners and miners' families about the dangerous conditions that currently exist in the coal industry, despite recent federal legislation that addresses mine safety. The main

focus of the hearing was to provide a forum for the families and miners to argue for legislative and regulatory action similar to laws recently passed in West Virginia and Kentucky and to describe conditions in the mines.

Committee Chair George Miller (D-CA) asked the witnesses to discuss what role the states have in determining the extent of mine safety and what Congress can learn from the states' efforts. In his opening remarks, Miller addressed failures to collect fines from companies violating laws and stacking the federal Mine Safety and Health Administration (MSHA) with industry insiders. "Under the Bush administration, MSHA has rolled back safety and health rules, and has shifted its focus away from enforcing the law and toward so-called 'voluntary compliance assistance'," Miller said.

Three witnesses from Kentucky — a miner who was fired for raising safety concerns, the wife of a deceased miner, and an attorney who has represented miners — called for expanded federal legislation similar to Kentucky's HB 207, which was passed in 2006. The legislation requires increased numbers of mine inspections, more multi-gas detectors, investigative subpoena powers and more mine emergency technicians at mining sites.

West Virginia also passed legislation in 2006 after fourteen miners were killed in two different incidents. Senate Bill 247 "mandates immediate and crucial upgrades in West Virginia's rescue technology and provides for better communication among local and state officials and mine operators when an accident occurs." Nearly all the witnesses testified that state actions are not enough, however, and that MSHA hasn't met its obligations under the law despite specific deadlines for action.

According to witnesses, many of whom sat with pictures of family members killed in mine incidents, serious dangers still exist in mines despite passage in 2006 of the federal Mine Improvement and New Emergency Response Act (MINER). Congress passed the MINER Act after seventeen deaths at the Sago and Darby mines. There were more coal miner deaths in 2006 than in any year since 1991, according to written testimony from the United Mine Workers of America (UMWA). The UMWA, and many members who attended the hearing from West Virginia, agreed with several other witnesses who argued that MSHA has failed to protect miners since Congress created the agency in 1977.

The dangers described by the witnesses include insufficient stores of oxygen, mandatory ventilation systems and explosion-proof seals. MSHA has allowed coal companies to institute many of these safety requirements on a voluntary basis while the agency studies the restraints and, in some cases, relaxes the standards.

Several witnesses urged Congress not to allow coal industry officials to hold positions in MSHA. They also asked the Committee to have MSHA officials appear at hearings and ask questions about why the agency hasn't put regulations in place when the states have been able to move quickly in implementing new safety standards. MSHA withdrew

seventeen proposed health and safety rules in 2001. Miller vowed to have both MSHA and coal company representatives appear before the Committee in subsequent hearings.

Coal companies joined MSHA as targets of the witnesses' complaints. Without adequate inspections and enforcement, companies cut corners. A Kentucky miner fired for complaining about safety violations was blacklisted in his region and said that mine safety is not any better now than when he started mining 28 years ago. Witnesses spoke of intimidation and threats for raising safety complaints, including threats to the children of a deceased miner.

The Alma mine fire in West Virginia was one of the 2006 incidents addressed at the hearing and provides an example of industry neglecting safety. Two miners were killed in the fire, after which MSHA began an investigation. MSHA has just imposed the largest fine in its history against the Alma mine owners, Aracoma Coal Company. According to a March 30 BNA story, the $1.5 million fine was levied for 25 violations of mandatory safety requirements, 21 of which were judged "reckless disregard" by MSHA. Among the violations,

Miners were not immediately notified or withdrawn when the initial carbon monoxide alarm signaled, MSHA said. Also, a required fire suppression system was not installed and there was no water available in the area to fight the fire. Airflow carried smoke from the fire into the primary escapeway because required ventilation walls had been removed.

A state investigation found 168 violations by the owners. During the investigation, the state issued 90 subpoenas. The MSHA and West Virginia investigations of the Alma fire provide examples of some of the differences between the state and federal powers and responsibilities in regulating the second most dangerous occupation in the nation.

FDA Issues New Conflict of Interest Guidelines

The U.S. Food and Drug Administration (FDA) issued a proposal that revised its criteria for determining whether scientific advisory committee members have financial conflicts of interest. The guidance, which would be nonbinding if adopted, is in its draft form and will be open for comment upon publication in the *Federal Register*. The guidance simplifies FDA's process for determining financial conflicts of interest. It also details exceptions agency personnel can make to allow scientists with conflicts of interest to serve on panels. The proposal comes as FDA faces increasing scrutiny over its ties to the pharmaceutical industry.

FDA advisory committees are standing panels comprised of individuals considered experts in a particular field. Members are generally non-governmental employees but may also include government employees outside of the office to which the panel is making recommendations. Committees are comprised primarily of members with

scientific interests, but may also include members representing consumer, industry and patient interests. Advisory committees vote to provide nonbinding recommendations to FDA.

Federal law requires agencies to screen advisory committees for financial conflicts of interest. The guidance points out, because FDA advisory committees are integral in the agency's regulatory decision making, "the public has a particular interest in and high expectations for FDA's process." FDA recently identified assessment of potential conflicts of interest as an area in need of improvement.

On March 21, FDA released a proposal which would "streamline" the agencies process for assessing financial conflicts of interest. The guidance includes detailed instructions agency personnel should use when considering advisory committee members. Agency personnel should determine whether the candidate has a disqualifying financial interest. The proposal defines a financial interest as "the potential for gain or loss to the employee as a result of governmental action on the particular matter." A member's family, partners, employer, prospective employers, and organizational ties should be considered.

The guidance sets a threshold of $50,000 for determining the severity of a conflict of interest. The guidance suggests potential members with a financial interest of more than $50,000 should not serve on panels. Those with a financial interest less than $50,000 may participate but only as non-voting members.

The guidance also instructs personnel to consider financial interests the candidate may have had in the preceding year, regardless of whether those interests still apply. This provision exceeds statutory criteria for determining conflicts of interest.

However, the proposal also includes criteria for granting exemptions to potential committee members with financial conflicts of interest. This is in accordance with federal statute, which requires certain provisions for exemption.

One of these exemptions applies to non-governmental employees. Upon determining an individual has a financial interest greater than $50,000, the guidance instructs agency personnel to ask: "Does the need for the individual's services outweigh the potential for a conflict of interest?" If the answer is "yes," the member could serve on the panel but could not vote.

The guidance suggests ways to determine whether the need for an individual supersedes financial interest. One factor is the determination of the uniqueness of the individual's expertise. The guidance states, "Need will be most persuasively shown when a reasonably thorough search for a similarly or better qualified candidate with fewer conflicts can be documented."

Other suggestions for determining need involve qualifying in some way the conflicts that led to the determination of financial interest. For example, personnel are to consider "the

extent to which the disqualifying financial interest could be affected by the actions of the advisory committee." The guidance does not indicate who in the agency should make these determinations.

OMB Watch is concerned about the factors the guidance identifies in determining the "need for the individual's services." In comments the organization plans to submit, OMB Watch states, "Allowing agency personnel to qualify conflicts undermines the original criteria for determining financial interests. Conflicts either exist or they do not. Mitigating the severity of a conflict of interest should not be an option." OMB Watch also critiques the proposal for setting a seemingly arbitrary level of $50,000 for exclusion from committees, and encourages FDA to include its rationale in the final guidance.

"Currently, the proposal includes several loopholes which could allow agency personnel to advance a political agenda and sacrifice scientific integrity in the process," OMB Watch says in its comments. "If FDA closes these loopholes, this conflict of interest guidance will provide a fine framework for agency personnel and set a course for other agencies to follow."

FDA's decision to address ties between advisory committee members and industry comes in the wake of two House hearings which addressed the agency's drug approval process. At the second hearing on March 22, FDA Commissioner Andrew von Eschenbach defended the agency in front of the House Energy and Commerce subcommittee on Oversight and Investigations. Commenting on high-profile drug safety failures such as the Vioxx incident, subcommittee Chairman Bart Stupak (D-MI) said, "FDA officials responsible for protecting Americans overruled their own scientists and chose instead to listen to the self-interested pleadings of the drug companies."

The hearing revisited the 2006 controversy over the antibiotic Ketek, which was rushed to market despite warnings from agency scientists about the drug's potential side effects. Von Eschenbach claimed FDA did not rely on false safety studies despite contrary claims posted on the agency's website. On March 28, Stupak and Committee Chairman John Dingell (D-MI) sent a strongly worded letter to Michael O. Leavitt, the Secretary of Health and Human Services. The letter announced the lawmakers intent to investigate possible efforts by Von Eschenbach to "intentionally mislead the Subcommittee" and requesed documents to that effect.

Lawmakers are likely to continue to examine industry's influence at FDA as Congress prepares to reauthorize the Prescription Drug User Fee Act (PDUFA). PDUFA authorizes FDA to collect fees from pharmaceutical companies which are then used to conduct safety studies on specific drugs. The fees are tied to "performance goals" that prompt FDA to expedite the approval process. PDUFA is set to expire on Sept. 30, the end of the fiscal year.

Department of Homeland Security Finalizes Chemical Security Program

On April 2, the Department of Homeland Security (DHS) finalized interim chemical security regulations. The final regulations are an improvement over the proposed regulations issued in December 2006, but many weaknesses remain. In particular, DHS modified its broad interpretation of a provision regarding state preemption but did not adequately establish that states can develop rules stronger than the federal ones. The final rules do little to allay concerns regarding the lack of public accountability and access to information or the failure to require consideration of inherently safer technologies by facilities reporting to DHS.

Section 550 of the Department of Homeland Security Appropriations Act of 2007 required DHS to develop a temporary program for instituting security performance standards for high-risk chemical facilities.

According to the final rules, DHS will assess the risk level of every chemical facility based on the amount and type of dangerous chemicals. The only facilities subject to the chemical security rules will by "high risk facilities," estimated by DHS to be approximately six to seven thousand facilities across the country. DHS will then categorize the high-risk facilities into four tiers of escalating risk. Facilities in all four tiers are required to submit site security plans for approval, but the strength of the standards increase in proportion to the risk of the facility.

In an April 2 conference call, DHS stated that the final rules addressed three primary concerns raised by the public interest and environmental community — state preemption, excessive secrecy, and use of inherently safer technologies. However, the public interest and environmental community believes the final rules do not address these concerns sufficiently. It appears Democrats in Congress are reacting in a similar fashion.

State Preemption

The proposed chemical security rules included a broad preemption provision which, according to DHS's interpretation at the time, would have nullified all stronger state chemical security programs. In the final rules, this approach was recognized by DHS as an expansive interpretation of the agency's authority under Section 550. In the preamble to the final rules, DHS states, "the Department [of Homeland Security] has modified certain of its prior statements on preemption as potentially too broad." DHS noted in Monday's conference call that no state laws "currently on the books" are believed to conflict with the final regulations, and federal law has no impact on existing state chemical security programs. The final rule contains the same preemption clause as present in the proposed rule, though DHS has modified its interpretation and is no longer claiming preemption of all stronger state chemical security programs.

The state preemption clause was regarded as one of the more controversial subjects of

the proposed regulations. Many public interest groups opposed the provision, as did many members of Congress. The preemption issue was so important to Congress that it attached a rider to the supplemental appropriations bill that would explicitly resolve the problem that DHS's federal chemical security rules do not preempt any state or local programs. The president is expected to veto the supplemental appropriations bill.

According to the *Washington Post*, New Jersey Gov. Jon Corzine's (D) spokesperson said the rules "appear to undermine states' ability to tailor important policies unique to their own situation and vulnerability." The *Post* adds that Sens. Frank Lautenberg (D-NJ), Susan Collins (R-ME), and Robert Menendez (D-NJ) have already expressed concerns about the DHS final rules.

Excessive Secrecy

The final regulations maintain the plan to create a new sensitive but unclassified category of information called Chemical-terrorism Security and Vulnerability Information (CVI). Access to information marked as CVI will be limited to "covered persons who have a need to know."

In comments to DHS, OMB Watch and Public Citizen strongly objected to this paradigm for information sharing. The groups recommended that the regulations specify how the collected information will be combined and shared with ongoing counterterrorism and security programs at other departments and agencies. OMB Watch and Public Citizen also encouraged DHS to create the infrastructure to increase information sharing, not by limiting information to those who "need to know," but by creating an environment and culture at DHS which understands the need to share information with state, local and private actors and with the public.

Most of these recommendations went unheeded in the final regulations. In the final rules' preamble, DHS recognizes that, "the Department does not take the creation of a new information protection regime lightly," and notes that all people with a "need to know, including appropriate State and local officials, will have access to the necessary CVI." Unfortunately, DHS is still operating under a framework that has been repeatedly criticized as largely responsible for the mistakes leading-up to 9/11. The final regulations limit information sharing for "activities approved, accepted, funded, recommended, or directed by the Department [of Homeland Security]." Despite the good intentions of the federal government, DHS cannot predetermine every potential use of the information being collected and should, therefore, try to maximize access to CVI at the local and state levels. Anything short of such access is a dangerous impediment to homeland security efforts. Also troubling is that DHS regards CVI information as automatically exempt from the Freedom of Information Act.

The final regulations make an improvement in access to information, though, by clearly stating that no other federal regulations are intended to be displaced. The existing programs at the U.S. Environmental Protection Agency and the Occupational Safety and Health Administration will not be affected. DHS officials on the April 2 conference call

also stated that the identities of facilities covered by the chemical security program would generally be publicly available but not information on the risk tier the facility was placed within. The officials also stated that communities would be informed about facilities that flagrantly violate the security requirements of the program, although it was implied that such information would only be available after some delay.

Inherently Safer Technologies

The authorizing legislation passed by Congress last year prevented DHS from instituting chemical security standards, which would approve or disapprove a site security plan "based on the presence or absence of a particular security measure." OMB Watch and Public Citizen, along with other environmental and public interest groups and members of Congress, urged DHS to add provisions encouraging chemical facilities to consider implementing safer processes and using safer chemicals as a method to improve site security through the reduction of risk. Such provisions would not force companies to implement inherently safer technologies, nor would they establish a litmus test to reject site security plans simply based on the absence of inherently safer technologies from the plan. In the final rules, DHS, nonetheless, stated it did not have the authority to implement such a section.

DHS's decision to exclude any provisions encouraging installation of safer technologies is especially difficult to understand as it comes on the heels of a Chemical Safety Board report laying blame for the BP Texas City refinery accident on the company's failure to invest in safer equipment. The tragic March 2005 accident that killed 15 and injured 170 clearly demonstrates a common vulnerability at chemical plants — cost cutting and bottom line thinking that delays installation of life saving equipment.

Chemical facilities pose one of the greatest threats to our nation's security. The U.S. Army's Surgeon General states that 2.4 million people are at risk of death or injury as a result of an attack on a chemical plant in the United States, and the U.S. Public Interest Research Group estimates that 41 million Americans live in "within range of a toxic cloud that could result from a chemical accident at a facility located in their home zip codes." Those estimates, and the DHS chemical security rules, fail to address the significant threat posed by the transportation of deadly chemicals to and from the thousands of facilities DHS plans to include in its program. A new report, "Toxic Trains and the Terrorist Threat," by the Center for American Progress highlights this currently overlooked aspect of the chemical security issue.

Needs and Methods for Congressional Oversight the Focus of Hearing

In the context of the ongoing controversy surrounding the firing of eight U.S. attorneys, the House Judiciary Subcommittee on Commercial and Administrative Law held a hearing on March 29 that explored the oversight powers of Congress. "Ensuring Executive Branch Accountability" included testimony from several experts on executive

privilege and congressional oversight powers.

Frederick Schwarz, Jr., senior counsel at the Brennan Center for Justice at New York University Law School, testified before the subcommittee. Schwarz imparted his findings on congressional powers based on his experiences as chief counsel of the Church Committee, the 1970s investigative committee that uncovered widespread FBI abuse spying on political opponents, civil rights leaders and war protestors. Schwarz called for a "broader investigation into the politicization and the credibility of the Justice Department." The U.S. attorney firings are in need of investigation, stated Schwarz, but congressional oversight should expand to include areas of national security and the interpretation and execution of legislation and policy, which impacts the entire executive branch. Schwarz asserted that without oversight, the executive branch tends toward abuse of powers; "History demonstrates that the absence of oversight allows the awesome law enforcement and national security powers of the executive branch to be turned to harmful ends."

The subcommittee also heard from John Podesta, former chief of staff for President Clinton and current president of the Center for American Progress. Podesta stressed that there are limits to executive privilege. President Clinton exercised executive privilege but also, stated Podesta, "understood that the privilege is not unqualified: that the public interests by the claim of privilege must be weighed against those that would be served by disclosure. He appreciated that even where the privilege applies, it is not absolute." Congressional oversight is necessary, because there are no formal mechanisms for oversight of the White House. Podesta stated that, "the White House has no inspector general to investigate abuses and it is not subject to the Freedom of Information Act. Only Congress can provide appropriate oversight and accountability."

For the effective exercise of congressional oversight powers, Schwarz recommended that Congress respect the following:

- Oversight need not be a partisan matter: "sensible men and women will converge on sensible courses of action."
- Contemporaneous documents and live testimony are essential in determining the facts.
- Testimony must be transcribed: "a 'hearing' without a transcript is simply a waste of time."
- Access to privileged or classified information can be obtained with appropriate procedures.
- Congress and the White House must mind the distinction between legitimate secrets and excessive use of national security powers.
- Executive privilege should not be taken at face value.

The witnesses served as advisors to a Congress in the midst of several ongoing investigations of potential abuses of executive power. The articulation of the powers and methods necessary for vigorous oversight will hopefully be put to good use by the 110th

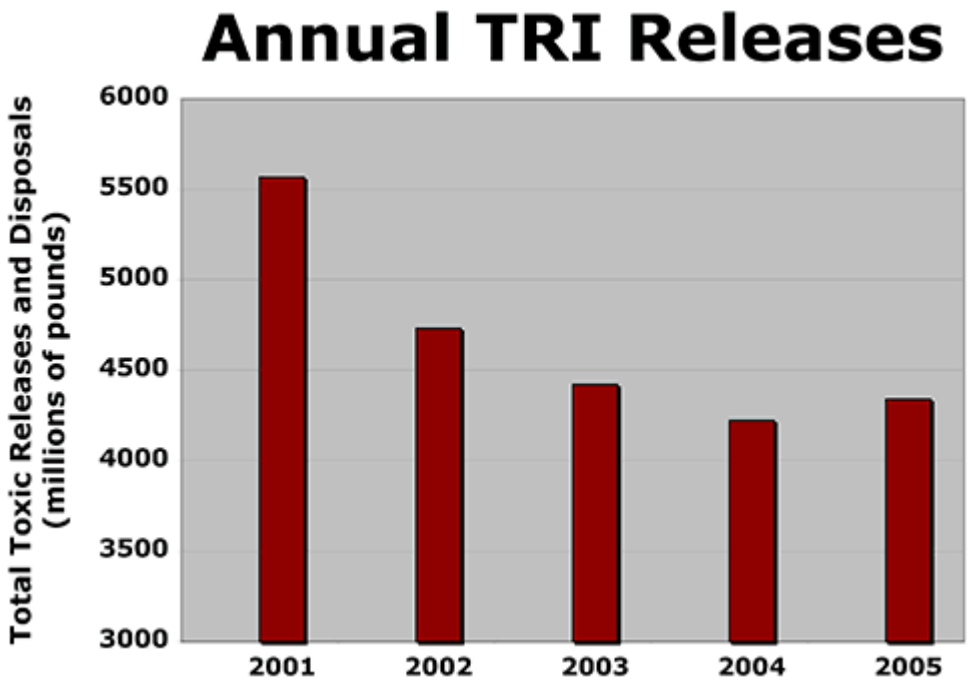
Congress.

RTK NET Publishes 2005 Toxics Release Inventory Data

The Right-to-Know Network (RTK NET) published the 2005 Toxics Release Inventory (TRI) data on March 23, providing public access to important U.S. Environmental Protection Agency (EPA) data on the release and transfer of toxic chemicals in the United States. This is EPA's earliest release of the annual TRI data in the history of the program.

Individual facilities report TRI data by sending reports to EPA every year. RTK NET allows the public to search the data, enabling users to learn about the toxic chemicals in their local communities, states, regions, and the entire nation. Users can search by location, individual facility, parent company, industry type, and offsite waste transfer data tailored to fit their specific requirements. Updates over this past year include more comprehensive search results and additional cross-referencing options that allow for simultaneous sewage plant and offsite transfer searches. RTK NET is also using a new indexing protocol, called sitemaps, which will allow key results to be found via popular Internet search engines such as Google, Yahoo and MSN.

For 2005, over 23,000 facilities reported 4.34 billion pounds of releases and disposal of toxic chemicals, covering approximately 650 chemicals and chemical categories. This is an increase of three percent (117 million pounds) from 2004, driven by increases in releases from the metal mining, electric utilities and primary metals industry sectors. The longer term trend for TRI continues to demonstrate significant reductions, with 2005 totals down 22 percent (1.23 billion pounds) from the releases in 2001. The 2005 data show a troubling nine percent increase (72 million pounds) in the release of carcinogens, including a 54 percent increase (65 million pounds) in the release of arsenic. The new TRI data also indicated a five percent (25 million pounds) increase in releases of Persistent Bioaccumulative Toxins (PBTs), which occurred because releases of lead rose by six percent (26 million pounds) from 2004, while releases of other PBTs, such as mercury, dioxin, and PCBs, decreased modestly.



Unfortunately, in December 2006, EPA changed the TRI rules to drastically reduce the amount of data collected on toxic pollution throughout the country, severely diminishing the usefulness of the TRI program for users. Amid huge opposition, the agency raised the threshold for detailed reporting for most of the 650 TRI chemicals, from 500 pounds to 5,000 pounds, up to 2,000 pounds of which can be released directly to the environment. The reporting changes will also allow facilities to withhold details on low-level waste generation of persistent bioaccumulative toxins (PBTs) such as mercury and lead.

"We are pleased that EPA got the data out faster this year, but their efforts to chip away the amount of toxic pollution tracked in TRI raises doubts about the usefulness of the program to individuals and communities," said Sean Moulton, Director of Federal Information Policy at OMB Watch. "EPA has insisted on viewing TRI as a tool for national totals and trends, which means the details that are disclosed at the local level that are so important to health and safety may be abandoned."

OMB Watch urges RTK NET users to weigh in so we can continue to provide useful environmental information on chemical releases. See http://www.crtk.org/subscribe.cfm to sign up for updates. Citizens concerned about the TRI rollbacks can contact Congress by visiting http://ga6.org/campaign/TRI.

OMB Watch created RTK NET in 1989 in support of the Emergency Planning and Community Right to Know Act (EPCRA), which mandated public access to TRI information.

CEQ Guidance Adds Needed Details to Bush Executive Order

On March 29, President George W. Bush's Council on Environmental Quality (CEQ) released guidance to agencies that explains in greater detail how to implement the president's recent environmental order. On Jan. 24, Bush issued Executive Order (E.O.) 13423, Strengthening Federal Environmental, Energy and Transportation Management. The order replaced five detailed environmental orders, issued by President Bill Clinton, with vaguer, less aggressive provisions that broaden agency exemptions and consolidate power in executive offices.

Bush's E.O. did establish some specific goals, including that by 2015, "energy intensity" should decrease by 30 percent, water consumption should shrink 16 percent, and the federal fleet's gas consumption should be down 16 percent. However, the new executive order lacked much of the specificity and detail from the previous orders it replaced. The five earlier E.O.s utilized more than thirty-seven pages to detail requirements and activities associated with the stated environmental and energy goals. The new E.O. covered the same issues in just five pages, consisting of instructions that were more generic and vague then those contained in the previous orders. Now the CEQ has released a 50-page guidance document to help fill in some of the blanks.

The CEQ's Instructions for Implementing Executive Order 13423 cover organization and oversight as well as details for energy and water management, building materials, greener products, toxic materials, fleet management, and more. However, many of these goals merely replicated ones established by Clinton's orders, differing primarily in their target dates. For instance, the gas consumption goal is no different from the one established under Clinton's E.O. 13149 issued in 2000, but the new order allows almost twice as much time and uses a much older baseline. While the instructions provide greater detail and context to the executive order, it is clear that additional guidance and goals will be developed in future years by the Steering Committee and Workgroups outlined in the instructions.

A change evident in E.O. 13423 and reinforced by the CEQ instructions is the shift of authority and control for these environmental and energy goals to executive offices such CEQ and the White House Office of Management and Budget (OMB). Previously, agencies such as the U.S. Environmental Protection Agency (EPA) and Department of Energy (DoE) oversaw such programs. While the instructions reserve an elevated position for these agencies, that role is advisor to the executive offices. The problem with such a shift of authority is that executive offices are more politically controlled and have much less accountability and transparency than the more public agencies.

There was also great concern that the new executive order would eliminate the requirement that federal facilities report toxic pollution under the Toxics Release Inventory (TRI), because it revoked a Clinton executive order establishing the requirement without explicitly restating the provision. However, the CEQ guidance

clarifies that the TRI reporting requirement remains in place.

Another troubling change implemented through E.O. 13423 is new loopholes for compliance that designate entire projects exempt from the E.O. due to security reasons. The National Intelligence Director and an agency head with "law enforcement activities" have the discretion to exempt projects from complying with this E.O. when they determine there is danger of "unauthorized disclosure." Previously, waiver and exemptions could be applied for, but the process required justifications and approval.

Though it maintains some energy efficiency reduction goals, the new executive order does not improve upon them and, in some instances, lowers obligations. Additionally, the order shifts responsibility for these goals away from objective agencies with expertise in energy and the environment to political executive offices with more limited accountability.

The following E.O.s were revoked:

- E.O. 13101, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition (9/14/98-Clinton)
- E.O. 13123, Greening the Government Through Energy Efficient Energy Management (6/3/99-Clinton)
- E.O. 13134, Developing and Promoting Biobased Products and Bioenergy (8/12/99-Clinton)
- E.O. 13149, Greening the Government Through Federal Fleet and Transportation Efficiency (4/21/00-Clinton)
- E.O. 13148, Greening the Government Through Leadership in Environmental Management (4/21/00-Clinton)

Senate Committee Advances Electronic Filing Legislation

Legislation that would require senators to file their Federal Election Commission information electronically was passed out of the Senate Rules Committee on Feb. 28. The issue has been raised in the last two sessions of Congress but has never been passed by the Senate.

The bill, the Senate Campaign Disclosure Parity Act (S. 223), introduced by Sens. Russell Feingold (D-WI) and Thad Cochran (R-MS), would require Senate candidates to file their campaign finance reports electronically rather than on paper, starting next January. House and presidential candidates, as well as federal political action committees, have all had to file electronically since 2001.

Ironically, the Senate offices already use software to electronically fill out the campaign disclosure forms, but the data is then printed out and delivered to the Federal Election Committee (FEC), which then re-enters all of the information in a computer database.

Eliminating this wasteful and unnecessary step should speed up the process, allowing the public review the information sooner, and should increase accuracy while decreasing costs. Entering all of the data filed on paper from the Senate's campaign finance reports takes the FEC weeks and is estimated to cost $250,000 each year.

Proponents of the legislation plan to bring it up for a unanimous consent vote on the Senate floor. While similar legislation has yet to be introduced in the House, given that House members are already required to electronically file this information, it is unlikely that the members will hesitate to hold the Senate to a similar standard.

New York Police Watched Nonprofits before 2004 GOP Convention

A March 25 story in the *New York Times* revealed that the New York City Police Department (NYPD) conducted a covert surveillance program in 14 states, Canada and Europe that collected information on groups planning lawful protests or events at the 2004 Republican National Convention. The information became public as a result of two lawsuits brought against the city by seven of the 1,806 people arrested during the convention. However, the city has asked a federal court to keep detailed records of this surveillance secret, fearing they will be "misinterpreted." The vast scope of the surveillance has become public knowledge at the same time that Congress is investigating Federal Bureau of Investigation (FBI) abuse of Patriot Act powers to collect information.

The *Times* investigation found that during the year leading up to the Republican convention, NYPD sent agents to cities such as Albuquerque, Montreal and Miami. They attended meetings and filed detailed reports. In some cases, they contacted the police departments in other cities about peaceful anti-war events, such as concerts billed as Bands Against Bush that included political speeches between sets. Anti-war groups were not the only targets. According to the *Times*, church groups, environmentalists, anti-death penalty groups and street theatre groups were also watched. In all, the *Times* said NYPD "chronicled the views and plans of people who had no apparent intention of breaking the law."

The New York Civil Liberties Union (NYCLU) filed the lawsuits in October 2004, challenging use of mass arrests, improper detention and fingerprinting as violations of the First, Fourth and Fourteenth Amendments to the U.S. Constitution. NYCLU was successful in convincing the city to destroy fingerprint records of people arrested for minor offenses. However, the group's effort to have the mass arrest procedures barred from future use is proceeding to trial.

The NYCLU obtained the NYPD documents through the pre-trial discovery process, and the court granted permission to make the information public in January 2007. Judge James C. Francis of the Federal District Court in Manhattan said, "The questions posed

by these cases have great public significance. At issue is the proper relationship between the free speech rights of protesters and the means used by law enforcement officials to maintain public order." The documents were posted on the NYCLU website in late February. In addition, the *Times* reviewed still-secret records on the surveillance program and joined the NYCLU's request to the court to unseal them. The city opposes the motion, saying the news media will sensationalize the information.

A spokesman for the city said the surveillance program was necessary to prepare for the large crowds expected during the Republican convention. However, the courts have required some indication of unlawful activity to justify an investigation of an organization. New York has treated protest as adequate justification. The deputy police commissioner for intelligence, David Cohen, is a former CIA official who has made public statements linking investigations of political activity to terrorism investigations. One demonstrator who was arrested said he had been questioned by detectives with the terrorism task force. In all, the *Times* said, "In its preparations, the department applied the intelligence resources that had just been strengthened for fighting terrorism to an entirely different task: collecting information on people participating in political protests."

The broad scope of the NYPD surveillance and the use of anti-terrorism laws to crack down on protesters fit the pattern of overreaching investigation of lawful political activity. A March 9 report from the U.S. Department of Justice Inspector General (DOJ IG) found that the FBI has made heavy use of national security letters, which do not require judicial review, to justify surveillance and investigations. In Congress, both the House and Senate Judiciary Committees have held oversight hearings, where the DOJ IG said he found "widespread and serious abuse." As a result, some members of Congress, including Sen. Russell Feingold ☼ (D-WI), have said the Patriot Act needs to be reviewed to prevent future problems. Feingold was the only member of the Senate to vote against the Patriot Act in 2001.

NYPD is not alone in seeking to keep evidence of their political investigations secret. In civil lawsuits challenging domestic surveillance by the National Security Agency, DOJ has taken extraordinary steps to keep information secret, including requirements that judges use DOJ computers to write their opinions and limiting their access to case documents. One of these suits involves the Oregon charity Al-Haramain Islamic Foundation, which was shut down by the Treasury Department in 2004. The organization's attorneys learned from a document released in pre-trial discovery that the government had eavesdropped on conversations between the attorneys and Al-Haramain officials. DOJ has forced the attorneys to return the document, but the group has sued for damages as a result of the eavesdropping. The court denied DOJ's motion to bar the attorneys from referring to the document or the organization's knowledge of the wiretap.

Double Standard: Chiquita Banana Fined, Not Shut Down, for Transactions with Designated Terrorists

In a plea agreement with the U.S. Department of Justice (DOJ), on March 14 Chiquita Brands International agreed to pay a $25 million fine after admitting it paid terrorists for protection in a dangerous region of Colombia. The payments, made between 1997 and 2004, continued despite the company's knowledge that they were illegal. The company was allowed to continue profitable production during the investigation. The U.S. government's action is inconsistent with standards and procedure used against charities, which have had their assets seized and frozen while investigations are pending. Six U.S. charities have been shut down on the basis of much less evidence than the direct payments to which Chiquita admitted. The Chiquita fine is unlikely to affect its operations, as the company has annual revenues of approximately $4.5 billion.

The Cincinnati-based company paid approximately $1.7 million to the United Self-Defense Forces of Colombia (AUC) and also made payments to the leftist Revolutionary Armed Forces of Colombia (FARC), both U.S. designated terrorist organizations. The government's designation of AUC as a terrorist organization made it illegal for anyone in the U.S. "to knowingly provide material support, including currency and monetary instruments" to such organizations. According to a *Wall Street Journal* report in 2003, outside attorneys for Chiquita notified the company that the payments violated U.S. anti-terrorism laws and should not continue. However, payments to the groups continued until Chiquita sold its subsidiary, Banadex, in June 2004.

The company reported the $25 million plea agreement to the Securities and Exchange Commission (SEC). The SEC filing stated, "In 2003, Chiquita voluntarily disclosed to the Department of Justice that its former banana-producing subsidiary had been forced to make payments to right- and left-wing paramilitary groups in Colombia to protect the lives of its employees. The company made this disclosure shortly after senior management became aware that these groups had been designated as foreign terrorist organizations under a U.S. statute that makes it a crime to make payments to such organizations."

DOJ's "slap on the wrist" approach exhibits clearly unequal enforcement of anti-terrorist financing laws. In contrast to the direct funding Chiquita paid AUC, no significant evidence of terror financing by U.S.-based charities has been found. Instead, questionable evidence was used to shut down the largest U.S.-based Muslim charities, including the Holy Land Foundation.

Charities File Friend of Court Brief Supporting Grassroots Lobbying Rights

A group of 17 charities filed an amicus brief in the U.S. Supreme Court case *Wisconsin*

Right to Life v. Federal Election Commission on March 23, urging the Court to protect the right of charities to broadcast grassroots educational and lobbying communications. Multiple amicus briefs have been filed on both sides of the case, which challenges the constitutionality of the "electioneering communications" rule in the Bipartisan Campaign Reform Act of 2002 (BCRA). The rule bans broadcasts that refer to federal candidates and are funded by corporations, including charities, 60 days before a general election and 30 days before a primary. The Court will hold oral argument on April 25, and a decision is expected in the summer or early fall, in time to clarify the law before the 2008 elections.

The charities' amicus brief argues charities and religious organizations do not pose a threat of corruption to the electoral system when they air grassroots lobbying broadcasts, since tax law requires them to remain nonpartisan in elections. As a result, they do not broadcast the type of "sham issue ads" that the McCain-Feingold law was meant to stop. It also argues that the "electioneering communications" rule is overbroad, since there are no exceptions for unpaid or nonpartisan broadcasts.

The case, which is reaching the Supreme Court for the second time, was brought by Wisconsin Right to Life (WRTL), a 501(c)(4) social action organization. In 2004, WRTL wanted to conduct a grassroots lobbying campaign urging Sens. Russ Feingold (D-WI) and Herb Kohl (D-WI) to oppose upcoming Senate filibusters of President Bush's judicial nominees. Because Feingold was up for re-election, the ads could not air 60 days before the election, which was when Congress was considering judicial nominations. WRTL filed suit challenging the constitutionality of the law, and the Federal Election Commission argued that, because the Supreme Court had upheld McCain-Feingold generally, WRTL could not challenge application of the rule to its grassroots lobbying effort. The Supreme Court ruled that WRTL could bring the challenge and sent the case back to the lower courts to consider the merits. WRTL won a favorable judgment in December 2006, and the FEC appealed.

Congressional supporters of grassroots lobbying rights are ready to push H.R. 71, the First Amendment Restoration Act. It would repeal the electioneering communications rule if the Supreme Court does not strike it down. It is sponsored by Rep. Roscoe Bartlett ☼ (R-MD), who spoke against the rule on the House floor on March 29, the fifth anniversary of passage of BCRA. He said it "limits a citizen's freedom of speech and freedom of association." Rep. Virginia Foxx ☼ (R-NC) also spoke out against the provision on March 27, saying the rule sends the wrong message to organizations, since it "communicates to them that they have no right to voice their views during elections."

The charities' amicus brief was written by attorneys Robert F. Bauer, Karl J. Sandstrom and Ezra W. Reese of the firm Perkins Coie. It is available online here. Charities that signed the brief are:

National organizations:

- Alliance for Healthy Homes
- American Conservative Union Foundation
- Center for Lobbying in the Public Interest
- Independence Institute
- Independent Sector
- NARAL Pro-Choice America Foundation
- National Council of Jewish Women
- National Council of Nonprofit Associations
- National Legal and Policy Center
- National Low Income Housing Coalition
- OMB Watch
- Violence Policy Center

State organizations:

- California Association of Nonprofits
- The Housing Alliance of Pennsylvania
- Nonprofit Coordinating Committee of New York, Inc.
- The North Carolina Center for Nonprofits
- Pennsylvania Association of Nonprofit Organizations

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In This Issue

Recess Appointment Makes Dudley Head of White House Regulatory Policy Office

On April 4, President George W. Bush used a recess appointment to make Susan Dudley the head of the White House's regulatory policy office. Dudley's new position will afford her great power over the federal regulatory process. The appointment comes despite strident opposition from public interest groups concerned about her views on regulation. The recess appointment of Dudley, along with that of other controversial officials, has also provoked anger in the Senate and raised questions about the constitutionality of the method.

Dudley is now the administrator of the Office of Information and Regulatory Affairs (OIRA), an office within the White House Office of Management and Budget (OMB). As head of OIRA, Dudley holds significant authority and responsibility. OIRA reviews the most significant regulatory or deregulatory actions the federal government proposes. The

office has the power to alter or reject regulations as it sees fit. Dudley will also oversee the implementation of the Paperwork Reduction Act, which includes her approval of all information collected by the government from ten or more people, as well as establishing policy on agency information dissemination practices.

Dudley is the first OIRA administrator (other than acting administrators) not to be confirmed by the Senate. While recess appointments may occur in other parts of the government, it has never happened at OIRA. This may be because the position is so central to the operation of government that presidents have recognized the need for legitimacy through the Senate confirmation process.

Dudley will establish precedents as the first OIRA administrator to execute the White House's recent changes to the regulatory process. On Jan. 18, Bush amended Executive Order 12866 — Regulatory Planning and Review. The changes make agency guidance documents subject to OIRA review for the first time. Additionally, agencies will be required to provide to OIRA written identification of the market failure or other problem prompting regulation. OMB has not provided detailed instruction on either provision, thereby granting Dudley latitude in setting precedents.

Another of those amendments, the expanded role of agency regulatory policy officers (RPOs), raised concern over the status of Dudley's husband, Brian Mannix. The amendments to E.O. 12866 require that agency RPOs approve the commencement of all agency regulatory activity. Mannix had been serving as the RPO for the U.S. Environmental Protection Agency (EPA). The perception of a conflict of interest led Mannix to step down from his role as RPO and serve only as a senior EPA official, according to an agency memorandum obtained by the publication *Inside EPA*. The expanded role of the RPO would have deepened this perception of conflict with the OIRA administrator.

Notwithstanding the fact that Mannix will no longer have official capacity to communicate with OIRA on regulatory matters, EPA's memo on the matter leaves open the possibility that Mannix will be involved in internal agency decisions about regulations. EPA has not provided any public information on the role Mannix will play in this capacity. This seems like an area that Congress may want further oversight and clarification.

The primary point of contention over the Dudley appointment relates to her views on regulation. The public interest community, including OMB Watch, has scrutinized Dudley's past record and comments. A report by OMB Watch and Public Citizen finds Dudley to be ideologically opposed to government regulation. She overemphasizes the ability of the free market to self-correct. She also abuses the idea of monetizing the value of regulations, going so far as to support the senior death discount — a cost-benefit analysis calculation that devalues older individuals' lives compared to younger individuals.

Dudley's industry ties are also reason for concern. For three years, Dudley worked closely with industry executives at the Mercatus Center, an anti-regulatory think tank. According to the report, "Such ties to regulated industry suggest that Dudley...would use OIRA as corporate special interests' private backdoor for influencing policy."

OMB Director Rob Portman issued a statement defending Dudley. "She brings a balanced and comprehensive understanding of the regulatory process, and her principled approach emphasizes careful research and transparent analysis," Portman said. His statement did not address the decision to appoint Dudley during a Senate recess.

Bush's choice to use a recess appointment is controversial considering the Senate's intent to move forward on the nomination in the normal way. In December 2006, Dudley's nomination stalled in the Homeland Security and Governmental Affairs Committee as the 109th Congress came to an end. It was widely perceived that Dudley would not have been confirmed in the short lame duck session if the oversight committee had reported out the nomination. Nonetheless, Bush renominated Dudley in late January, and in late March, Sen. Joseph Lieberman ☼ (I-CT), the new oversight committee chairman, said he would begin moving forward with the nomination, indicating he had not yet taken a position on whether Dudley should be confirmed.

Preempting the Senate's constitutional role in confirming nominees prompted Lieberman to issue a statement through a spokeswoman. Lieberman aide Leslie Phillips said, "The Administration's decision to recess appoint Susan Dudley shows disrespect for the advise and consent responsibilities of the U.S. Senate and for the American people."

In addition to Dudley, Bush recess appointed three other officials, the most controversial of which was Sam Fox. Senate Democrats criticized Fox for funding attack ads aimed at Sen. John Kerry ☼ (D-MA) during the 2004 presidential campaign and appeared unlikely to confirm Fox. Bush withdrew the nomination hours before a scheduled vote, only to recess appoint him on April 4. Another appointee was Andrew Biggs, named as the new deputy commissioner of the Social Security Administration. Biggs, who has been a lower ranking official in the Social Security Administration, was at the center of Bush's past push for privatization. Sen. Max Baucus ☼ (D-MT), chair of the committee with Social Security oversight, objected to the Biggs nomination, but Bush went ahead anyway.

The batch of controversial recess appointments has raised concerns about the constitutionality of the method. Norm Ornstein, a scholar at the conservative American Enterprise Institute, questioned the legality of the Dudley appointment. In an essay in *Roll Call*, Ornstein argues the recess appointment provision was included in the Constitution because early Congresses met for only a few weeks a year. According to Ornstein, the explicit language of the Constitution allows the power to be used only when the vacancy occurs during the recess and necessity obliges the president fill the vacancy

immediately.

Ornstein also points to the *Federalist Papers* in which Alexander Hamilton called for appointments to be a joint venture between the president and the Senate. He argued the recess appointment provision should be used sparingly for vacancies "which it might be necessary for the public service to fill without delay." Ornstein claims, "No one at the time — no one — argued that the recess appointment power was to be used for other, broader purposes, especially in cases where the president was simply trying to make an end run around the Senate."

Pundits now wonder whether the next congressional recess will bring similar controversy. On April 11, Bush withdrew the nominations of two controversial EPA officials, Alex A. Beehler and William Wehrum. Though environmentalists and Senate Democrats welcomed the withdrawals, concern remains as to whether Bush may be following the course of the Fox nomination — withdraw the nominee and appoint during a recess. *The Los Angeles Times* reports an unnamed lobbyist with ties to the Bush administration as saying "that was the plan all along" for Beehler and Wehrum. However, the article speculates the furor over the appointments of Dudley and others may stall the use of further recess appointments.

Courts Rebuke Bush Administration's Forest Actions

On April 6, the Bush administration appealed the first of two recent federal district court decisions that held the U.S. Forest Service violated the National Environmental Policy Act (NEPA) and the Endangered Species Act when it overturned the 2001 Roadless Area Conservation Rule and rewrote forest management plans.

The Clinton-era rule declared more than 58 million roadless acres managed by the Forest Service off-limits to logging, road building, and oil and gas leases. It was passed after extensive public comment and protects some of the most remote and wild lands in the federal system. The rule was challenged through a number of lawsuits filed by extraction industries and several states and counties.

According to a BNA story, a district court in northern California in Sept. 2006 overturned a 2005 Forest Service rule that allowed states to petition the federal government to open these roadless areas because the Forest Service "failed adequately to consider the environmental and species aspects" when it issued the new rule. The court said the Forest Service should have conducted an environmental impact statement, required under NEPA, for such a significant rule change. The Forest Service argued it was exempt from NEPA because the new rule was merely a procedural change. The court rejected this argument.

According to the Heritage Forests Campaign, the Forest Service rule would have replaced "environmental protections for much of our national forests with a voluntary process

that allows governors to petition for protection of roadless areas in their states — or for more logging, mining, drilling or other forms of commodity development. In the end this new policy does not assure any type of federal protections for these national forestlands." The state petition process did not allow any elected officials or citizens outside those states containing the protected roadless areas any means of participating in the process.

Several states had already filed petitions under the Bush administration's new rule. The same district court that heard the case in September issued an injunction in November 2006 that halted all activity in the roadless areas. The court issued a final injunction on Feb. 6, 2007, that clarified the injunction covered oil and gas leases that had been issued under the Bush rule. The injunction also prevented the Forest Service from "approving or authorizing any management activities in inventoried roadless areas that would be prohibited by the 2001 Roadless Rule, including the Tongass Amendment, and issuing or awarding leases or contracts for projects in inventoried roadless areas that would be prohibited by the 2001 Roadless Rule" until it remedied the violations of NEPA and the Endangered Species Act.

The administration's decision to appeal the district court ruling comes on the heels of another district court rebuke of the way the Forest Service has ignored legal processes established for agency rulemaking. A different judge in the same California district court ruled that the administration illegally rewrote forest management rules governing 192 million acres of federally owned lands. According to a March 31 *Washington Post* story, the judge suspended rules issued in 2005 because the government "did not adequately assess the policy's impact on wildlife and the environment and did not give sufficient public notice of the 'paradigm shift' that the rule put in place."

The court ordered the administration to undergo another rulemaking analysis that considers the environmental and public participation requirements of NEPA, the Endangered Species Act and the Administrative Procedure Act. The court's decision describes the history and the arguments made by the Bush administration that NEPA's environmental impact assessment requirements didn't apply. Although acknowledging that the 2005 rule was a "paradigm shift," the administration argued that the rule was a strategic and aspirational change, not one that resulted in "on-the-ground" impacts and, therefore, were outside the scope of NEPA's impact assessment requirements. It argued that changes in the management plans do not impact the environment and so are exempt from NEPA.

Defenders of Wildlife, Sierra Club, The Wilderness Society, and the Vermont Natural Resources Council brought the suit and argued that the rule changes set aside Reagan-era forest management planning processes that included considerations of species diversity and viability and limited logging and resource extraction activities. The 2005 rule, they argued, set aside these considerations and allowed local officials to set logging limits without public participation or amendments to the management plans. The court agreed.

EPA Issues another Delay in Contaminant Regulation

The U.S. Environmental Protection Agency (EPA) recently called for further study of a substance found in rocket fuel before regulation of the contaminant can occur. A Senate champion of environmental protections criticized the decision, which is the latest delay in a regulatory policy EPA has been developing since 1998.

On April 12, EPA stated the agency will not regulate the drinking water contaminant perchlorate, an ingredient in rocket fuel and fireworks. The National Academies of Science (NAS) found perchlorate commonly present in public drinking water supplies and found ingestion to inhibit human thyroid function. The EPA cited the need for further investigation in its decision not to regulate perchlorate.

Sen. Barbara Boxer ☼ (D-CA) issued a statement chiding EPA for its decision. Boxer is a supporter of perchlorate regulation and has introduced two bills during the current Senate. One bill (S. 150) would mandate EPA to set a standard for perchlorate exposure, and the other (S. 24) would improve drinking water testing. Boxer said, "I am outraged that EPA has yet again refused to do its duty to protect the health of our families and communities from perchlorate pollution."

Much of Boxer's displeasure stems from the amount of time EPA has spent developing perchlorate regulations. EPA first addressed the issue of perchlorate contamination in 1998 but has shown little progress in advancing regulations.

During the Clinton administration, EPA began studying perchlorate with the intent of promulgating regulations to improve public health related to exposure. In 1998, the agency released its first assessment, which was then peer reviewed. In 1999, EPA issued interim guidance on perchlorate. The interim guidance intended to provide information on exposure levels for both EPA and non-EPA researchers.

In 2002, EPA released a revised assessment of perchlorate based on the initial 1998 assessment. The White House then asked NAS to peer review that document and make recommendations. NAS issued its report in January 2005. In 2006, EPA replaced the 1999 interim guidance with new interim guidance, which adopted the recommendations of the NAS report. The new interim guidance, the current framework for assessing perchlorate, suggests a more definitive exposure level for research purposes.

However, the Natural Resources Defense Council (NRDC) found the White House and Pentagon had exerted political influence over the formation of the NAS study group, as well as the study itself. Because of the potential liability for defense contractors, political appointees urged NAS to downplay the danger of perchlorate, according to NRDC. It is unclear to what extent the political pressure altered the study's findings because, according to NRDC, "the White House, DOD and EPA have attempted to cover up their campaign to pressure NAS and to undermine efforts to address perchlorate pollution by

unlawfully withholding or redacting an unprecedented number of documents."

Public skepticism over the commitment of the Bush administration to promulgate perchlorate regulations increased in December 2006 when EPA finalized a rule for monitoring drinking water contaminants. The proposed rule included perchlorate as one of the contaminants, but EPA removed it from the list in the final rule. Critics accused EPA of bowing to industry's wishes.

Now, EPA has missed yet another opportunity to begin regulating drinking water for perchlorate contamination. Under the Safe Drinking Water Act, EPA must propose candidate contaminants every five years and, after a review period, begin regulating those it deems necessary. In 2005, EPA issued a contaminant candidate list of 51 chemicals, of which perchlorate was one. However, EPA's April 12 statement proposes to exclude perchlorate, along with 12 other chemicals, from the final list of regulated contaminants.

In the statement, EPA claims perchlorate "require[s] additional investigation to ascertain total human exposure and health risks." EPA's decision will be open for public comment for 60 days following its publication in the *Federal Register*.

Congress Urged to Reform USA PATRIOT Act

Congress continues to exercise oversight of the Federal Bureau of Investigation's (FBI) misuse of USA PATRIOT Act powers. The Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights held a hearing on the Department of Justice (DOJ) Inspector General report on the misreporting and abuse of National Security Letter (NSL) powers. A common theme from the four witnesses at the hearing was the need for Congress to reform the USA PATRIOT Act and curtail the FBI's NSL powers.

The DOJ Inspector General reported on March 9 that the FBI has been systematically underreporting to Congress the number of NSL requests and has repeatedly violated federal law and agency policies in collecting personal information. Without court approval, the FBI can issue NSL requests that require Internet service providers, telephone companies, credit reporting agencies, and banks to disclose information relating to individuals':

- Internet use: websites visited and the e-mail addresses to which and from which e-mails were sent or received
- Telephone use: the times and durations of calls and the numbers to which or from which calls were received or dialed
- Financial transactions: checking and savings account information, credit card transactions, loan information, credit reports and other financial information

The witnesses before the Senate subcommittee criticized the expansions made to the FBI's NSL powers under the USA PATRIOT Act. The USA PATRIOT Act significantly broadened the NSL provisions — previously restricted to suspected terrorists or spies — to cover any information that is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." The USA PATRIOT Act also expanded approval authority of NSLs beyond senior FBI Headquarters officials to all special agents in charge of the FBI's 56 field offices. There is no policy regarding how long information collected through NSLs can be maintained or under what circumstances information must be disposed.

Suzanne E. Spaulding, former Deputy General Counsel of the Central Intelligence Agency, stated in her testimony, "Clear rules and careful oversight provide essential protections for those on the front lines of our domestic counterterrorism efforts. Unfortunately, it appears both were lacking in the implementation of national security letter authorities."

Former Rep. Bob Barr (R-GA) testified, "For over five years, those of us who fight to defend the Constitution from government overreach have pleaded with Congress to put reasonable checks and balances on intrusive powers created by the PATRIOT Act. Those pleas have largely fallen on deaf ears; and until a few weeks ago, the FBI operated in the dark, hiding its abuse of power from Congress and the public."

The DOJ Inspector General report found:

- Reporting Errors: 22 percent of the NSL requests investigated by the Inspector General were not reported
- Violations of Law and Policy: One-fifth of the investigated NSL files contained unreported violations of federal law and policy
- Abuse of Exigent Letters: 700 exigent letters (letters to request information in emergency situations) were used illegally in non-emergency situations to collect information from three telecommunications companies on over 3,000 telephone numbers

All of the witnesses, including Peter Swire, former Chief Counselor for Privacy in the Clinton administration, called for reform of the NSL powers of the USA PATRIOT Act. Swire stated that Congress should require judicial approval of NSL requests and narrow the showing of a connection to a terrorist or a foreign power. Additionally, Swire recommended mandating that information that is no longer pertinent be destroyed, reforming the gag rule for NSL recipients, and requiring the issuance of a "Statement of Rights and Responsibilities" to accompany NSL requests.

"We should update our law enforcement and intelligence tools to respond to new technology and new threats," said Swire. "We should similarly update checks and balances to draw on the traditions and capabilities of all three branches of government."

According to the Congressional Research Service, two federal courts have found the "NSL statutes could not withstand constitutional scrutiny unless more explicit provisions were made for judicial review and permissible disclosure by recipients." The ruling in *Doe v. Ashcroft* found that the USA PATRIOT Act provisions are in violation of the Fourth Amendment's protection against unreasonable searches and seizures and of the First Amendment's protection of free speech. The decision in *Doe v. Gonzales* also found the NSL powers to be in violation of the First Amendment.

George Christian, a party in the *Doe v. Gonzales* case, testified before the subcommittee, "Though our gag order was lifted, several hundred thousand other recipients of national security letters must carry the secret of their experiences to the grave."

Several bills have been introduced to reform the NSL powers of the FBI. Rep. Jane Harman ☼ (D-CA) introduced the National Security Letter Judicial and Congressional Oversight Act (H.R. 1739) on March 28. The bill would accomplish many of the reforms suggested by witnesses at the subcommittee hearing. The Congressional Research Service reports that other NSL reform bills were introduced in the 109th Congress. These bills may be reintroduced in the 110th as the controversy over the FBI's abuse of NSL powers continues to develop.

California Moves to Reinstate Reporting Standards Weakened by Federal EPA

California, a leader in strong environmental policy, has introduced a bill that would restore reporting requirements for toxic chemicals to pre-U.S. EPA rollback threshold levels. As the federal government weakens toxic waste regulation, states are taking charge of the Toxics Release Inventory (TRI) and prioritizing the protection of their residents. The California Toxic Release Inventory Program Act of 2007 (Assembly Bill 833) maintains the previous level of reporting and prevents the federal changes from impacting the state program.

Assembly member Ira Ruskin introduced the bill. "It is unfortunate that California must once again defend itself from a Bush Administration action that harms the health of people and turns its back on scientific knowledge," said Ruskin in a press release. "In this case, the affected industry did not even clamor for the reporting rollbacks granted by Bush's EPA. My legislation ensures that the people of California maintain the same rights to know despite the efforts of the Bush Administration to curtail that right." The bill passed in the Environmental Safety & Toxic Materials Committee on April 11 and will now be considered by the Appropriations Committee.

In December 2006, the U.S. Environmental Protection Agency (EPA) finalized a rule that increased the annual amount of toxins facilities can emit before substantive reporting is required. Previously, all toxic releases and disposals over 500 pounds required detailed reports on management of the toxin. Effective January 2007, the threshold increased to

5,000 pounds, provided less than 2,000 pounds are released directly to the environment. This tenfold increase will essentially allow releases below the threshold to go unreported. For releases under the threshold, facilities need only file a short form affirming the chemical name and that its quantity is below the reporting requirement — no specific information on the quantity or where the chemical went (air, water, or land) is included.

According to an analysis by the Environmental Working Group (EWG), in California alone, 600,000 pounds of hazardous waste would essentially vanish from the record books. The EWG report, *Stolen Inventory*, explains that data on several dangerous carcinogens would be among the missing information, including: 41,000 pounds of ethylbenzene, 10,000 pounds of styrene, 12,000 pounds of benzene and 16,000 pounds of chromium-related compounds. The report estimates that 274 facilities would switch to the relaxed reporting system, with certain areas disproportionately losing data. Los Angeles County alone would account for 107 missing facilities. Passage of AB 833 would ensure that these toxins and facilities remain on the California books.

EPA declared that its December rule change would decrease unnecessary reporting burdens for companies. However, California's actions indicate that the opposite is happening. State governments were vocal in their opposition to the TRI rollback; agencies and officials from 23 states submitted comments in the effort to stop the rule change. Many states have built their toxics programs around the TRI data, sometimes adding to information tracked, but avoiding senseless duplication of federal reporting requirements. Some states, such as Massachusetts and New Jersey, have strong additional toxic reporting programs of their own. Others, such as Minnesota, are concerned about potential health impacts and revenue loss from toxic reporting fees. In the absence of acceptable federal reporting thresholds, such concerned states may choose to follow California's lead and create new toxics reporting standards to compensate for EPA's rollback. Companies operating in multiple states will be compelled to comply with numerous different state programs instead of the singular system that had been in practice for the past twenty years.

Federal legislative efforts are also underway in both the House and Senate to undo much of the damage from EPA's rule change. Similar to California's introduced legislation, these bills simply restore the original TRI reporting thresholds and prevent facilities from avoiding the requirement to report their toxic pollution. On Feb. 14, Sen. Frank R. Lautenberg (D-NJ) and Reps. Frank Pallone (D-NJ) and Hilda Solis (D-CA) announced companion versions of the Toxic Right-to-Know Protection Act, S. 595 and H.R. 1055, respectively. Both bills are currently being considered in committee.

Polar Bears: Don't Ask, Don't Tell

New accusations of manipulating scientific information and gagging government scientists have arisen amidst the government's consideration of listing polar bears as an

endangered species. Memos that censored scientists traveling to countries around the Arctic region and draft reports that were significantly altered in their final form have fueled these concerns.

A leaked memo from Richard Hannon, a regional director of the U.S. Department of the Interior, instructs U.S. Fish and Wildlife Service officials in the Alaska Division to limit their discussions on polar bears and climate change when in Arctic region countries. The memo, reported by the *New York Times*, specifically states that the officials "will not be speaking on or responding to these issues."

Existence of the memo met with outrage and suspicion in Congress as two senior Democratic members demanded more information on the matter. Reps. Bart Gordon (D-TN) and Brad Miller (D-NC) demanded in a letter to Interior Secretary Dirk Kempthorne that all records on this matter be released to Congress. Gordon is chairman of the House Committee on Science and Technology, and Miller is chairman of the investigations and oversight subcommittee. The letter expressed concern that the memo "appears to be the latest effort by the Bush Administration to block a full and free discussion of issues relating to climate change by the scientific community."

This matter bears striking resemblances to 2006 claims from NASA climatologist James Hansen that a political appointee, ironically in the position of Public Information Officer, attempted to prevent Hansen from being interview by National Public Radio. The matter drew significant public attention, and eventually, the Bush administration had to respond with new disclosure policies.

The Government Accountability Project cites the Interior memo in a new report, *Redacting the Science of Climate Change*, as demonstrative of Interior's attitude toward climate change. The investigative report did not find evidence of any direct interference in climate change research but uncovered "unduly restrictive policies and practices" with respect to communicating information to the media, public and Congress — specifically information that did not support existing administration policy positions. The report stated, "Interference with media communications includes delaying, monitoring, screening, and denying interviews, as well as delay, denial, and inappropriate editing of press releases. Interference with the public and Congress includes inappropriate editing, delay, and suppression of reports and other printed and online material."

New concerns have been raised that such communication interference may have occurred in editing a Department of Interior report on the status of polar bears. In December 2006, Interior proposed listing polar bears as endangered because the sea ice they depend on is disappearing. But officials left out of the listing proposal any discussion of the connection between human activity and rising Arctic temperatures that are eliminating the sea ice and stated that the agency had not examined such factors. Yet another agency study, "Range-Wide Status Review of the Polar Bear," published in December 2006 cites several studies on the effects of climate change on sea ice and how reducing greenhouse gas emissions could slow Arctic warming. None of this material

made it into the proposal to list polar bears. Instead, the proposal states, "there are few, if any, processes that are capable of altering this trajectory."

A decision on listing the polar bear as an endangered species is expected by January 2008.

New Complaints of Partisan Electioneering Go to IRS, FEC

November 2008 may seem to be a long way off, but in the current reality of political campaigns, the presidential election is right around the corner, and the campaigns are not the only entities actively involved. Recent complaints filed with the Internal Revenue Service (IRS) and the Federal Election Commission (FEC) challenge the activities of two nonprofits, Priests for Life and Americans for Job Security.

Priests for Life

Catholics for a Free Choice (CFFC) has filed a complaint with the IRS against the group Priests for Life, claiming that Priests for Life has engaged in prohibited campaign intervention in violation of its 501(c)(3) tax-exempt status. CFFC's complaint focuses on two videos on the Priests for Life website that implicitly support the presidential campaign of Sen. Sam Brownback ☼ (R-KS). The videos show Brownback giving a speech and display supporters holding up signs that say "Brownback For President." This is the third complaint CFFC has filed against Priests for Life. In October 2004, CFFC cited Priests for Life's heavy involvement in electoral activities supporting Republican candidates.

Americans for Job Security

On April 11, Public Citizen, a national advocacy organization, filed a complaint with both the IRS and the FEC against the business trade association Americans for Job Security (AJS). Public Citizen charged that AJS violated federal election law and its tax-exempt status as a 501(c)(6) trade association. Trade associations are barred from conducting activities that seek to influence elections as their primary purpose. After analyzing television and radio broadcasts, Public Citizen determined that the primary purpose of AJS is to influence elections. "The fact that AJS's advocacy communications were intended to influence elections combined with the organization's representation that it invested the vast majority of its resources on advertisements leads to the inescapable conclusion that the group was primarily engaged in influencing elections in the years covered in this complaint."

Public Citizen used the IRS 11-point test from IRS Rev. Rule 2004-6 to determine whether ads should be considered either electioneering or issue-advocacy messages. They also analyzed 32 transcripts of AJS messages, finding that each satisfied the criteria for "electioneering." The complaint said, "Every single one — 32 out of 32 — of AJS's

communications analyzed in this complaint satisfied a clear majority of the factors in favor of a communication being deemed an exempt function under Section 527(e)(2) and each satisfied only a slim minority, if any, of the factors pointing against a communication being deemed an exempt function under the section."

As a result, Public Citizen said the group is not eligible for 501(c) nonprofit tax status and should instead be required to register as a political committee under federal campaign finance law and be subject to its disclosure requirements and contribution limits. In addition, Public Citizen also asks the IRS to collect back taxes for AJS's undeclared electioneering activities and require it to pay penalties for violating its tax-exempt status.

According to a recent report issued by the Campaign Finance Institute (CFI), "Soft Money in the 2006 Election and the Outlook for 2008 The Changing Nonprofits Landscape," in 2006, AJS spent about $1.5 million for ads favoring former Sen. Rick Santorum (R-PA).

This is not the first time AJS has seen such scrutiny. In October 2004, Citizens for Responsibility and Ethics in Washington (CREW) filed a complaint with the IRS against the group with the same charges. And according to a March 2005 *New York Times* article, AJS "ran more than 5,000 television advertisements in at least five states last year [2004], all without having to disclose the source of its money." As a 501(c)(6), AJS is not required to reveal its donors, assuming it is engaged in public policy advocacy activity.

The electioneering activity of 501(c) groups such as AJS showed others an opportunity to avoid campaign finance disclosure. The Public Citizen press release highlights a recent announcement that Club for Growth intends to establish a 501(c)(4) organization in light of recent scrutiny on its 527. According to an article in *Roll Call*, (subscription required) Club for Growth president, former Rep. Pat Toomey (R-PA), told its members that a "reorganized tax status will alter little of the group's focus on 'promoting economic freedom,' but also will allow unlimited anonymous donations from individuals and allow the group to take part in a variety of new lobbying activities. Club directors also reconfigured its political action committee, which it can use to channel hard-dollar donations to candidates." However, 501(c)(4) tax status does not eliminate all chances of running into trouble with the FEC. For example, if a group engages in prohibited political activities such as running an ad that "expressly advocates" the election or defeat of a candidate, it would run afoul of FEC rules.

Government Manipulates Research Again, This Time on Voter Fraud

Documents released as a result of oversight hearings in the House have revealed that the Election Assistance Commission (EAC), the bipartisan body charged with implementing the Help America Vote Act, has rejected or altered research on voter fraud and

intimidation and the impact of voter identification laws. This marks another instance in which the government has been accused of manipulating information.

The details of the EAC controversy, described in an April 11 *New York Times* article, sparked prompt responses in the House and Senate, with several members writing to the EAC demanding an explanation and questioning whether partisan considerations have affected their decisions. On April 16, the EAC announced that it has asked its Inspector General to conduct an independent investigation into its research contracting procedures.

In May and September of 2005, the EAC commissioned two reports, one on voter fraud and intimidation and one on voter identification requirements. In November 2006, when the reports had not been published, People for the American Way (PFAW) submitted a petition signed by 13,000 people seeking release of the report on voter fraud and intimidation. In December 2006, the EAC released the report, titled *Election Crimes: An Initial Review and Recommendations for Further Study*. It was promptly criticized in a PFAW analysis, which called the report a whitewash for ignoring key facts.

In March, the EAC voted not to adopt the study on voter identification requirements, which was conducted by the Rutgers University's Eagleton Institute. The Eagleton report found that voter identification requirements and other laws intended to address fraud can reduce voter turnout, particularly among minorities. However, an EAC statement said since the report focused on one election year, it "was not sufficient to draw any conclusions."

Also in March, the House Appropriations Subcommittee on Financial Services and General Government held a hearing at which Rep. Maurice Hinchey ☼ (D-NY) asked the EAC for a copy of the draft voter fraud report submitted by the researchers, Tova Wang of the Century Foundation and Job Serebrov, an election law expert. In April, the subcommittee released the original draft report. In an April 11 press release, Hinchey and Subcommittee chair Rep. Jose Serrano ☼ (D-NY) said, "Significant changes were made to the findings of outside experts before the final report was released....In hiding a draft report from the public that is significantly different from the final version, the EAC has created a lot more questions than it has answered while stunting debate on the issue."

The *New York Times* article also was published on April 11. It noted several alterations from the original draft report to the final version released by the EAC. These include:

- the original report found little evidence of polling place fraud, while the final report said there is "a great deal of debate on the pervasiveness of fraud."
- the original report found "evidence of some continued outright intimidation and suppression" of voters, but the final report said voter suppression is also a topic of debate.
- the original report found "false registration forms have not resulted in polling

> place fraud", but the final version blamed nonprofit organizations, claiming "registration drives by nongovernmental organizations as a source of fraud."

An EAC statement released on April 11 responded to the news by saying the agency would examine its contracting and decision-making process on research and reports.

On April 12, another *New York Times* article found that "Five years after the Bush administration began a crackdown on voter fraud, the Justice Department has turned up virtually no evidence of any organized effort to skew elections, according to court records and interviews."

The publicity prompted Sens. Dianne Feinstein (D-CA) and Richard Durbin (D-IL) to write the EAC seeking answers to 20 questions on the process and decisions relating to the two reports. One question directly asked, "Did the commissioners or commission senior staff receive any outside communication or pressure to change or not release the entire draft report or portions of the draft language on the voter identification report?" A letter from Rep. Zoe Lofgren ☼ (D-CA) expressed alarm at "what appears to be an emerging pattern by the EAC to hold off on publicly releasing reports as well as modifying reports that are released." Citing the problems with the voter fraud and identification reports, she asked the EAC for copies of all versions of the pending, overdue report on absentee ballots and military and overseas voting.

On April 16, the EAC asked its Inspector General to conduct an investigation. The announcement asked that the voter fraud and identification reports be specifically reviewed, and included copies of the letters from members of Congress.

The EAC's problems appear not to be isolated incidents. Former EAC Commissioner Ray Martinez told the *New York Times* that while he was on the commission, he argued unsuccessfully that all reports, both drafts and final versions, should be made public.

Unfortunately, this is not the first time the Bush administration has come under fire for manipulating information to make reports more consistent with current policy positions. Such manipulations have occurred in terrorism statistics, economic reports, and reports on polar bears. Rep. Henry Waxman ☼ (D-CA) compiled a report, *Politics And Science in the Bush Administration*, documenting dozens of cases where the Bush administration altered scientific information to make it fit policy positions. For instance, in 2005, it was uncovered that a Council on Environmental Quality official, Philip Cooney, heavily edited several government climate change reports to downplay the reliability of the science and magnitude of the problem. In a recent House Oversight and Government Reform Committee hearing, Cooney acknowledged that some of his edits on the climate reports were made "to align these communications with the administration's stated policy."

Treasury Posts Risk Matrix for Charities

In March, without public announcement or comment, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) published a Risk Matrix for the Charitable Sector on its website. The Introduction of the publication says the matrix is meant help charities comply with U.S. sanctions programs that prohibit transactions with designated terrorists or certain countries. In 2006, Treasury said it was working on a draft of the matrix, and in June 2006, a group of nonprofits wrote Treasury asking for a public comment period. Treasury did not respond. Despite the unannounced posting, representatives of the nonprofit sector are likely to comment on the matrix and suggest improvements.

The Introduction to the matrix says the publication is needed because of "reports by international organizations and in the media have revealed the vulnerability of the charitable sector to abuse by terrorists." In the past, Treasury has urged charities and grantmakers to take a risk-based approach to avoiding violations of sanctions laws through its Voluntary Anti-Terrorist Financing Guidelines. The Introduction to the matrix also says it will be "particularly useful to charities that conduct overseas charitable activity due to the increased risks associated with international activities."

The Introduction notes that the matrix is not a comprehensive list, and in a footnote, says it is not mandatory. Instead, another footnote recognizes that "charities and their grantees differ from one another in size, products, and services, sources of funding, the geographic locations that they serve, and numerous other variables." However, the burden is on charities to determine the best approach, since Treasury has no safe harbors or specific measures that protect against sanctions, which include asset seizure. Instead, the footnote says Treasury "addresses every violation in context, taking into account the nature of a charity's business, the history of the group's enforcement record with OFAC, the sanctions harm that may have resulted from the transaction, and the charity's compliance procedures."

The matrix lists 11 factors according to whether they constitute a low, medium or high risk of diversion of funds to terrorists. The factors are:

- specificity of stated purpose and expenditures
- written grant agreement with safeguards
- references
- history of legitimate activities
- due diligence by grantor, including on-site review and audits
- documentation
- size of fund disbursements
- availability and use of a reliable banking system
- suspension procedures, and

- location of charity's work (U.S. only, international, conflict areas)

In footnote 4, Treasury notes that the matrix should be applied to sub-grantees "to the extent reasonably practicable."

Treasury cites the American Bar Association's (ABA) 2003 comments in IRS Announcement 1003-29 Regarding International Grant-Making and International Activities by Domestic 501(c)(3) Organizations as a resource in development of the matrix. However, the passage of time and subsequent experience may well have changed the ABA's views. In addition, nonprofits participating in the Treasury Guidelines working group, which published Principles of International Charity in 2005, are also likely to make suggestions.

Unlike Treasury, the European Union (EU) released a discussion draft of risk indicators for comment in July 2005. It lists six areas of governance that pose potential risks. However, the Introduction of the draft says, "An indicator should not in any case be regarded in isolation, but should be evaluated in the context of other indicators and the organizational and legislative environment in which the NPO operates."

Supplemental Debate: War of Words

In the weeks since the House and Senate each narrowly passed emergency supplemental appropriations bills, the president and congressional Democrats have engaged in a rhetorical battle over additional items above the president's record request, as well as language calling for a withdrawal of troops from Iraq. Bush has issued almost daily attacks against the bills since they passed, calling them attempts to "micromanage" the war and fund unnecessary projects. The two sides are scheduled to meet at the White House April 18, but the war of words is not expected to abate anytime soon.

Despite similarities, the House and Senate versions differ significantly in terms of the troop withdrawal schedules and minimum wage tax packages added to the president's request, differences that will need to be worked out in conference.

The House bill includes a timetable requiring final troop withdrawal to begin by March 1, 2008, with the process to be completed by August 31, 2008. The Senate bill calls for the beginning of U.S. troop redeployment within 120 days of enactment, with a non-binding "goal" of withdrawing all combat forces by March 31, 2008.

In addition, both bills raise the federal minimum wage to $7.25 an hour over two years but have different tax cut provisions that accompany the wage increases. The House provides $1.3 billion in small business tax breaks, with a roughly equal amount of offsets, while the Senate has now increased the total cost of its tax provisions from $8.3 billion to

$12.6 billion, with $13.8 billion in offsets.

The president has promised to veto both the House and Senate versions, despite the fact that the final product from the conference committee is unknown, and the panel may yet emerge with the Senate's non-binding troop withdrawal language.

Democrats in Congress might be inclined to accommodate the administration's demands for a "clean" bill — one without the withdrawal provisions and the $20 billion in additional funding. But there is very little room for maneuver within their own caucuses. Given close votes in both the House (218-212) and Senate (51-47), any significant changes in the conference report could reduce vital Democratic support that would likely be needed to pass a final version of the bill. Moreover, a *Washington Post*-ABC News poll reported in the *Post* on April 17 shows that 51 percent of Americans support a deadline for withdrawing from Iraq, and 65 percent oppose the president's surge plan. Further, 58 percent trust the Democrats to do a better job of handling situation in Iraq as opposed to 33 percent who trust Bush more. The polling provides strong support for withdrawal of troops from Iraq, encouraging Democrats who are pressuring the president for a plan to get out of the war. Senate Majority Leader Harry Reid (D-NV) has expressed clear confidence in his party's confrontational approach, saying that Democrats are "going to pick up Senate seats as a result of this war."

Congressional Democrats may have trouble altering the domestic spending provisions added to the bill for similar reasons — because eliminating them may imperil Democratic support for the supplemental.

House and Senate conferees may meet as early as April 17, with the White House-Congress supplemental summit meeting scheduled for the following day. Few expect either side to back away at that meeting from what could become a constitutional conflict. For now, both the president and Majority Leader Reid both seem intent on a first legislative round that ends in veto.

Economic Policy Institute Panel Looks beyond Balanced Budget

A balanced budget can and does have a place in a responsible fiscal policy, but it is not the only element. That was the message presented April 12, when the Economic Policy Institute (EPI) hosted a panel discussion entitled "Beyond Balanced Budget Mania." Indeed, a strict concentration on balancing the budget could have deleterious effects on the economy, continue to leave health care out the reach of millions, and contribute to the ongoing decay of national infrastructure.

Bucking the trend in recent policy discussions, EPI presented a series of speakers who challenged the notion that a balanced budget deserves the undivided attention of fiscal policy planners. Nobel laureate Joseph E. Stiglitz, who served as chair of President Bill

Clinton's Council of Economic Advisers and Chief Economist at the World Bank, delivered the keynote speech. Following Stiglitz was a three-person panel composed of: Henry J. Aaron, Brookings Institution Economic Studies Program Senior Fellow and former Assistant Secretary for Planning and Evaluation at the Department of Health, Education, and Welfare; EPI economist Max Sawicky; and Joan Lombardi, Director of The Children's Project and former Deputy Assistant Secretary for External Affairs in the Administration for Children and Families at the U.S. Department of Health and Human Services.

To be sure, a balanced budget can have significant benefits for the nation. Expenditures on the national debt are becoming a larger part of the federal budget every year. For Fiscal Year 2006, interest payments on the national debt totaled $227 billion. This amount was 46 percent of non-defense discretionary spending and nine percent of all federal spending last year. Additionally, procedures and rules that give rise to a balanced budget force Congress to carefully consider the ramifications of their spending decisions, so there is an increased likelihood that national priorities receive funding. But, as the panel's speakers reminded the audience, focusing solely on the deficit does not guarantee this outcome, and it perniciously excludes other important fiscal policy objectives.

Deficits and the Economy: Context Matters

Stiglitz opened the event by speaking to the macroeconomic impacts of fiscal policy. A budget deficit, while not inconsequential, is not always undesirable. Running a deficit can be used to jump-start an ailing economy, but closing a deficit during a downturn can hasten the onset of a prolonged recession. Responding to a question about the fiscal restraint enacted during the sour economic climate of the early 1990s, Stiglitz offered that it was a combination of good luck and poor banking regulatory policy that produced a fortunate outcome. This explanation challenges the idea that the balanced-budget policies implemented by Clinton Treasury Secretary Robert Rubin were directly responsible for the economic boom of the 1990s.

Rising Cost of Health Care, not Deficits, Responsible for Long-Term Imbalances

The concern among many deficit hawks is that entitlement spending increases in the next twenty years will push budget deficits to an "unsustainable" level, so the hawks agitate for "entitlement reform." Are deficit hawks appropriately addressing the future financial obligations of the federal government by imposing tight budget controls today and "reforming" entitlement programs? Aaron of the Brookings Institution says "not necessarily."

The cost of health care, not an increase in entitlement spending, is the long-term fiscal challenge, and balancing the federal budget does little to address this fact. Government Accountability Office chief David Walker recently told Congress that only by tightening budget controls and "restructuring existing entitlement programs" will we avoid unsustainable deficits. Aaron provided a stark contrast to these remedies, stating the driving force behind the "entitlement crisis" is solely the rapidly rising costs of both

public and private health care. Reforming entitlement programs will not change this, he believes.

Responsible Fiscal Policy More Than Just Deficit Reduction

The message of the EPI briefing is that reducing spending on public investments in favor of balancing the budget is a short-sighted approach to fiscal policy. It ignores the financial returns in years to come as the result of the government making solid, long-term investments. Lombardi's and Sawicky's presentations focused on public investment expenditure as a tool to increase not only economic growth, but also the general welfare of the nation. Lombardi highlighted empirical studies that demonstrate early childhood development programs generate significant financial returns, not only to the individual, but to the nation as a whole. Sawicky illustrated the extent to which spending on other forms of public infrastructure has declined over the past thirty years. Like early childhood development, federal spending on research and development, bridges and roads, physical plants, and education will result in returns on investment and serve to increase economic growth. Restraining government spending on public investments with the singular purpose of balancing the budget could ultimately weaken the fiscal position of the nation.

EPI's attempt to move the fiscal policy discourse "beyond balanced budget mania" is an attempt to address aspects of fiscal policy that are too often ignored. Congress should address deficit reduction in the context of competing national priorities. Given the state of the economy and the level of public investment, a too-narrowly focused policy of reducing the budget deficit could negatively impact the short- and long-term economic and fiscal state of the nation. The pursuit of a balanced budget is laudable, but only insofar as it is part of a fiscal policy that seeks to fully fund national priorities.

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OMB Watch Executive Director Gary D. Bass Comments on USDA's Private Information Breach

On April 20, the *New York Times* broke a story about the U.S. Department of Agriculture (USDA) disclosing personally identifiable information (Social Security numbers and taxpayer ID numbers) of some people who have received financial assistance from the department. The practice, which, according to USDA, affected 38,700 people, has been going on for roughly a decade. The problem was discovered a week earlier by a user of OMB Watch's FedSpending.org, a website providing easy access to information about government spending.

On Friday the 13th no less, Marsha Bergmeier, president of Mohr Family Farms in Fairmount, IL, typed the name of her company on a Google search page, found

FedSpending.org listed, and clicked through. Pulling up information about a loan she received from USDA, she found a field that uniquely identifies information about the financial award also had her Social Security number embedded in it. After Bergmeier notified OMB Watch and the government, it became apparent this was not a unique situation and involved at least two agencies within USDA.

Within a week, there were at least 155 news stories and 88 blog posts about this issue. And the USDA, initially reluctant to acknowledge its mistake, ultimately did so, and agreed to provide free credit monitoring for a year to those affected. The information in the data field, which is called the Federal Award ID, has now been restricted throughout government for all financial assistance awards, which include grants, cooperative agreements, and loans.

The Federal Award ID is a vitally important data field, as it provides a unique identifier about the financial transaction. For anyone investigating particular transactions, that identifier is essential. For example, to request information through the Freedom of Information Act, you need that identifier. Thus, the redaction of the data field is as unacceptable as is disclosing personally identifiable information.

Prodded by Rep. Zack Space (D-OH), the House Agriculture Committee is holding a hearing on May 2 to explore "how the breach happened, the proposed remedies, and recommendations on how to make sure that this never happens again." Additionally, on April 27, Sens. Barack Obama (D-IL) and Tom Coburn (R-OK) wrote a letter to USDA Secretary Mike Johanns stating that the disclosure of personally identifiable information was "improper and unacceptable." They added, "We all should be grateful for the watchful eyes of American citizens," implying support for FedSpending.org and gratitude for people like Bergmeier.

Obama and Coburn called on USDA to provide three things by May 18:

1. An assessment of the harm caused by disclosing Social Security numbers and a report on utilization of the credit monitoring service;

2. A report on what is being done to ensure that data security problems are fixed; and

3. A detailed plan and timeline for adopting a new unique identifier without disclosing personally identifiable information.

On April 16, before the *New York Times* story, the government requested that OMB Watch temporarily remove the unique identifier from the entire database on FedSpending.org. (In the spirit of full disclosure, our website provides a full chronology of communication we had with government officials and others regarding this issue.) We agreed to do so, but only on the condition that the government provide a plan within 30 days on how it will re-generate the unique identifier. This is the same information that

Obama and Coburn requested from USDA.

While USDA has acknowledged its mistake in disclosing Social Security numbers, this issue raises a number of concerns:

1. In an electronic age, there will certainly be mistakes with regard to disclosing personally identifiable information resulting from legacy systems. Government needs a comprehensive approach to inspecting agency websites to discover any problems that may exist today. And it needs a comprehensive plan for addressing problems once it finds them. Reacting by the seat of its pants is not a solution.

2. Should the government establish a uniform approach to applying the unique identifier for financial transactions? The problem arose because every agency employs its own system for crafting a unique identifier, and one department used Social Security numbers as part of its format. Wouldn't it make more sense to create a government-wide format that helps the public understand more about the transaction through the identifier and does not disclose personally identifiable information? For example, the identifier might have a common format that starts with agency code, followed by location of assistance, type of assistance (e.g., a grant or loan), and a sequential numbering.

   This unique identifier is required by law under the Federal Funding Accountability and Transparency Act, commonly called Coburn-Obama, which was signed into law last fall. Coburn-Obama requires the Office of Management and Budget to establish a website like FedSpending.org by January 1, 2008. So the government better get this right — and soon.

3. Why has USDA taken so long to provide re-generation of the unique identifiers? It has now been more than two weeks since USDA was first notified of the problem. Yet OMB Watch still has not received new identifiers to put on FedSpending.org. This is not rocket science, even if USDA cannot make a permanent change in its internal database, which apparently links to its accounting system. What it could do is generate new numbers, without personally identifiable information, as a cross-walk to the older numbers for external use, such as with FedSpending.org. We could post the corrected numbers, and those who still are eager to track government spending could do so.

OMB Watch remains proud of creating FedSpending.org and its role in uncovering USDA's mistake in disclosing personally identifiable information. Since its launch in October 2006, there have been more than four million searches on FedSpending.org. In March, there were about one million searches, and in April there were more than 1.7 million, demonstrating rapid growth in the online service. FedSpending.org was created with support from the Sunlight Foundation, and we plan to continue improving and

expanding the site.

Mapping out the Post-Veto Supplemental Landscape

President George W. Bush and Congress are continuing their power struggle over policies related to the war in Iraq, with a war funding bill containing a "goal" timeline for withdrawal of soldiers headed for an almost certain veto. The funding bill was sent to the president today, May 1, on the fourth anniversary of Bush's "mission accomplished" visit aboard an aircraft carrier, and he is expected to veto it shortly thereafter. With the House unlikely to override a veto, Democrats in Congress are faced with the difficult task of finding a compromise in the next month.

The battle lines have been drawn between the president and Congress, now that the latter has passed H.R. 1591, the supplemental appropriation bill providing all the remaining funding Bush has requested for the wars in Afghanistan, Iraq, and the wider "Global War on Terror" for Fiscal Year 2007, which ends September 30 of this year.

The House cleared the supplemental bill conference report on April 26, 218-212. The Senate did likewise the following day, 51-46. The supplemental bill provides $124 billion in funding for the war and wider military needs, as well as other domestic spending, benchmarks for the Iraqi government to achieve, readiness and equipment standards and combat tour limits for U.S. soldiers, and a deadline "goal" of removing soldiers by March 31, 2008. The bill also provides for an increase in the minimum wage, from $5.15 an hour to $7.25 an hour over two years — the first such increase in close to a decade — and a $4.8 billion dollar tax cut package.

The president promised to veto the bill because he opposes the timelines for the withdrawal of soldiers from Iraq and additional domestic spending items. The House is expected to attempt an override vote that will likely be far short of the necessary two-thirds support to succeed. Democrats have set a May 31 deadline to get a new supplemental bill to the president should Congress be unable to override his veto.

The current impasse has become a momentous confrontation between a president who demands executive authority over war funding and policy, and a Congress that believes it has a mandate to pressure the president for a plan to end the war. The immediate challenge for congressional Democrats should Bush veto the bill is to craft a new version of the bill that will appease the president while not weakening conditions for soldier withdrawal so much that it causes currently supportive anti-war legislators to oppose it. Because of the narrow margin of passage in both chambers, this may be a difficult compromise to strike.

Congressional leaders are scheduled to meet with Bush on May 2 to discuss areas of compromise. Administration officials have suggested that they have flexibility regarding the Iraqi benchmark provision, but the real impasse lies with deadlines for withdrawal of

American soldiers. Some leaders such as House Defense Appropriations Subcommittee chair Rep. John Murtha ☼ (D-PA) have suggested that a pared-down version, stripped of any troop restriction and providing only two months' worth of spending, be sent to the president, enabling all parties to evaluate the progress of the "surge" policies in Baghdad. The chances that the president would find this approach acceptable are likely to be remote.

Another possible compromise that might succeed is for Congress to adopt funding on the president's terms without troop withdrawal provisions, but use the upcoming defense authorization and appropriations bills as vehicles for soldier withdrawal language. Murtha supports this approach, which indicates its viability within the Democratic caucus.

Yet another alternative that some Republicans are interested in would identify benchmarks for accomplishments in the war. In some way, funding might be tied to achieving those accomplishments.

While the impasse continues and Congress awaits the probable veto and subsequent override vote, recent polling shows that a large majority of Americans continue to oppose the war in Iraq and favor a complete withdrawal of soldiers by the end of calendar 2007.

Senate Still Without Strong Earmark Disclosure Provisions

While the House passed earmark disclosure provisions in its initial rules package in January, a stronger proposal for earmark disclosure passed by the Senate as part of a larger lobbying and ethics reform bill has languished for months. Despite the delay, recent rumors of possible action on the companion House ethics and lobbying reform bill have renewed hope the stronger Senate language on earmarks will eventually be adopted in both chambers.

On Jan. 5, the Senate passed S. 1, the Legislative Transparency and Accountability Act of 2007. The bill contains key earmark reform measures that require disclosure of all spending earmarks and targeted tax benefits, the identity of members requesting them, and an explanation of their "essential governmental purpose." In addition, the bill requires earmarks' sponsors to certify that neither they nor their spouses had a personal financial interest in the item and that all this information be made available in a searchable format on the Internet at least 48 hours before a vote. The last requirement was added to the Senate version through an amendment offered by Sen. Jim DeMint (R-SC) and is the key difference between the Senate and House on earmark disclosure issues.

Despite it being a high priority for the House, it has been months since the Senate passed its lobbying and ethics bill, and there is still no House version. Media outlets have once again reported that House leaders plan to introduce their own version this week and

move it quickly to the floor sometime during the first two weeks in May.

Because the House passed a rule change about earmark disclosure, but the Senate chose to enact its provisions on earmarks through legislation, the Senate still does not have any earmark disclosure requirements with the appropriations season fast approaching. In response to this, over the last two weeks, DeMint has tried to introduce his earmark disclosure language as a stand-alone Senate rule (S Res 123), but was met with objections from Sens. Bob Menendez (D-NJ) and Robert C. Byrd (D-WV).

After DeMint's attempts, Byrd, along with appropriations committee ranking member Thad Cochran (R-MS), sent out a press release applying a version of DeMint's language to appropriations committee guidelines.

However, the Byrd/Cochran proposal proved unacceptable to DeMint because it lacked a sufficient enforcement mechanism in the full Senate to ensure appropriations committees "adopt disclosure." Further, there is no requirement in the Byrd/Cochran proposal to make earmark lists searchable online and no requirement that earmark information be made public *before* consideration of the bill.

Because of objections to adopting DeMint's language as a straight Senate rule, it appears disclosure advocates and the general public will have to wait until the House begins work on its version of the lobbying and ethics reform bill for a more rigorous earmark disclosure system to be made accessible to the public.

The Entitlement Crisis That Isn't

On April 23, the Social Security and Medicare Board of Trustees released its annual reports on the two programs. These reports reveal there is not, in fact, an "entitlement" crisis, and that the alarmist language often placing blame on entitlements is generally a pernicious shorthand that glosses over the complicated fiscal challenges facing an aging society with rapidly rising health care costs.

There are no significant changes since last year's reports from the Trustees, but the insolvency date of Social Security — the year in which benefits exceed the program's income — has been pushed back one year to 2041. A more serious concern, however, are Medicare costs, which are being driven almost entirely by faster-than-GDP growth of all health care costs.

While these programs are often mistakenly grouped together in debate about long-term fiscal imbalances, there are different causes of these forecasted imbalances, requiring different solutions. At the recent annual conference of the Committee for a Responsible Federal Budget, current Congressional Budget Office Director Peter Orszag underscored this point by stating, "We do a disservice by uniting the health care issue with the aging issue," adding that neither aging nor "entitlements" in and of themselves are the

problem. Instead, the real problem is health care costs that are spiraling out of control.

Henry Aaron, Senior Fellow in the Economic Studies Program at the Brookings Institution, made a similar argument at a recent Economic Policy Institute forum entitled *Beyond Balanced Budget Mania*. In his PowerPoint presentation, Aaron showed how health care costs are the main factor in driving long-term fiscal imbalances in the federal government.

The imbalance in Social Security is caused by demographic changes — the retirement of the Baby Boom generation — and can be fixed with minor adjustments to taxation and benefit levels or a combination of both. This year, Social Security benefit payments will equal 4.3 percent of GDP. In 75 years, benefit payments are projected to rise to 6.3 percent of GDP, according to the Trustees report.

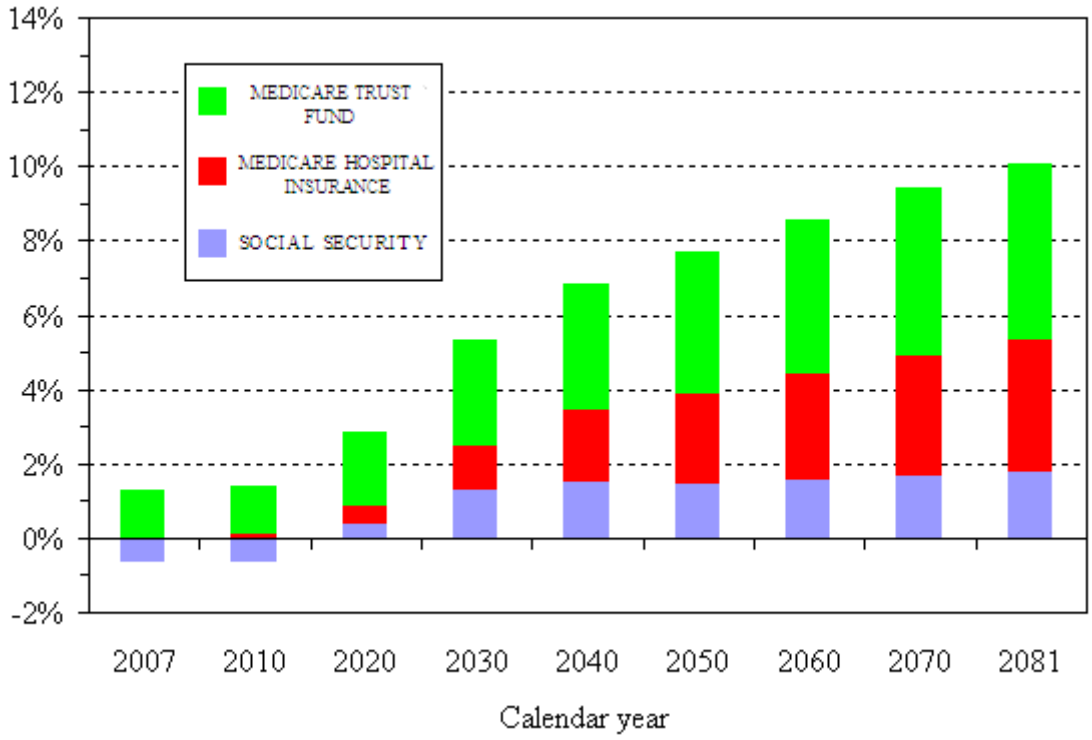
Despite this significant increase, the Social Security program has been bringing in more money from payroll taxes than it pays out in benefits, and will continue to do so until 2017. This is referred to as the Social Security trust fund and has been building a surplus in preparation for Baby Boomer retirements. From 2017 to 2041, projections show that Social Security benefits will be fully paid by a combination of revenue from payroll taxes each year and the Social Security trust fund. In 2041, the trust fund will be exhausted, but the Social Security program itself will continue to collect enough revenue from payroll taxes to pay three-quarters of promised benefits.

The Trustees conclude that Social Security would be fully funded if small changes to the payroll tax rate and benefits paid to retirees over the next 75 years were enacted. In fact, a comparison from the Center on Budget and Policy Priorities helps to put the challenges facing the Social Security program in the proper perspective:

> [t]he cost over the next 75 years of making the [Bush] tax cuts permanent will be about triple the size of the Social Security shortfall. Moreover, the cost over 75 years of the tax cuts just for the top 1 percent of Americans — people with annual incomes over $400,000 in today's dollars — is nearly equal to the cost of closing the Social Security shortfall.

This is hardly worthy of elevation to crisis status.

Unlike Social Security, Medicare's rapidly rising expenditures are more complicated because they are not driven solely by demographic changes, but also rising health care costs. Because of this, the magnitude of the fiscal challenge is significantly greater. As the Trustees report demonstrates, the vast majority of the large increase in future entitlement obligations in these two programs is composed of costs within Medicare (the red and green bars combined):



Projected Social Security and Medicare Shortfall
(Percentage of GDP)

While the demographic changes of the Baby Boomers generation will have an impact on the Medicare program as well, it will face more significant challenges from the steep increase in the cost of health care throughout the U.S. health care system. In both the public and the private sector, health care costs have been increasing significantly faster than economic growth and inflation and are expected to continue to do so.

Over the next 75 years, Medicare expenditures are projected to increase from 3.1 percent of GDP to over 11 percent in 2081. One of Medicare's trust funds, The Hospital Insurance Trust Fund, is projected to be exhausted in 2019. The other, Supplementary Medical Insurance Trust Fund, will never be insolvent because the law ensures that a combination of fees and taxes will keep pace with expenditures.

Because of these factors, controlling Medicare costs should have more to do with reforming and managing the skyrocketing costs in many different areas throughout the U.S. health care system, and less to do with a myopic focus on the structure of the Medicare entitlement program.

None of this is to imply the fiscal challenges that will face the United States are not significant and even alarming. The trustees warn of the extent of the combined financial imbalances in both Social Security and Medicare, noting that "[i]n 2081, the combined cost of the programs will represent 17.6 percent of GDP. As a point of comparison, in

2006 all Federal receipts amounted to 18.5 percent of GDP." While this appears to be a big number, disaggregating it helps to understand the dynamics within the two programs, and yields two very different solutions — neither of which require drastically overhauling either program.

OSHA's Lack of Standard Setting under Fire

This year's Workers Memorial Day, April 28, included criticism of the Occupational Safety and Health Administration (OSHA) — the federal regulatory body charged with ensuring worker and workplace safety. On Capitol Hill and in the media, critics chided OSHA for not fulfilling its mission and falling behind in promulgating new standards to protect the American workforce.

America has observed Workers Memorial Day on April 28 every year since 1989. The day is intended to recognize workers injured or killed on the job and raise awareness of workplace safety. In the week leading to this year's Workers Memorial Day, both chambers of Congress held hearings investigating the record of OSHA.

On April 26, the Senate Health Education and Labor Committee subcommittee on Employment and Workplace Safety held a hearing called "Is OSHA Working for Working People?" AFL-CIO Director of Safety and Health Margaret Seminario criticized OSHA for not creating a progressive standard-setting agenda and instead relying on voluntary industry compliance. "Under the Bush Administration, voluntary efforts and partnerships with employers have been favored over mandatory standards and industry-wide enforcement initiatives," Seminario said in testimony.

During the Bush administration, OSHA has adopted a policy whereby the agency responds to and cooperates with industry in efforts to improve workplace safety. Seminario continued, "With this approach, OSHA has abandoned its leadership role in safety and health, choosing to work with individual employers, rather than taking bold action to bring about broad and meaningful change in working conditions on an industry-wide and national level."

On April 24, the House Education and Labor Committee subcommittee on Workforce Protections held its own oversight hearing. The House hearing maintained a similar tenor. Subcommittee Chairwoman Lynn Woolsey (D-CA) derided OSHA under the Bush administration, saying, "The Administration has the worst record of standard setting of any administration in the history of the law."

OSHA head Edwin G. Foulke Jr. testified at the House hearing and defended his agency. He touted OSHA's enforcement record, saying the agency has "proposed more than three-quarters of a billion dollars in penalties for safety and health violations and made 56 criminal referrals to the Department of Justice, which represents more than 25

percent of all criminal referrals in the history of the Agency."

However, the focus of the hearing continued to be on standard setting. Woolsey claimed a rule protecting workers from hexavalent chromium — a carcinogen found in a variety of industrial products, particularly coatings — to be the only significant standard set during this administration. As Woolsey pointed out, OSHA promulgated that rule in response to a court order.

Franklin Mirer, an expert and occupational health professor from Hunter College, blamed OSHA management for the lack of standard setting. Mirer's testimony repeatedly states OSHA has the resources it needs but is not utilizing them, in one instance stating, "OSHA has staff and other resources to set standards, but that staff has not been permitted to operate."

OSHA's standard setting resources have been consistent for the last several fiscal years. The OSHA program responsible for setting standards was appropriated approximately $17 million in FY 2006 and 2007. For the same years, the program has employed 83 people. However, OSHA promulgated only four standards during FY 2006 and expects to promulgate three in FY 2007. Only one of these, the hexavalent chromium standard, is considered "significant," a term that means the regulation has an annual impact of $100 million or more and is subjected to review by the Office of Management and Budget. FY 2008 resource requests are similar.

Congress is pursuing legislative solutions to the problems at OSHA. Sen. Edward Kennedy ☼ (D-MA) and Woolsey have introduced, in their respective chambers, The Protecting America's Workers Act (S. 1244, H.R. 2049), a bill resurrected from two prior Congresses. The legislation proposes, among other provisions, severe penalties for employers in violation of safety laws, employer-paid protective equipment for workers, and increased protections for whistleblowers.

Off of Capitol Hill, OSHA received its most conspicuous criticism in a front page *New York Times* article published April 25. The article focused on exposure to diacetyl, a food-flavoring agent commonly found in microwave popcorn, which can cause severe lung disease if not properly ventilated. The article chronicled years of neglect by OSHA to promulgate a safety standard for workers who handle diacetyl.

The article frames the issue of diacetyl as reflective of "OSHA's practices under the Bush administration, which vowed to limit new rules and roll back what it considered cumbersome regulations that imposed unnecessary costs on businesses and consumers."

The article quotes David Michaels, occupational health expert and director of George Washington University's Project on Scientific Knowledge and Public Policy, as saying, "The people at OSHA have no interest in running a regulatory agency."

White House Tightens Grip on Regulatory Power Grab

The White House has released a memo instructing agencies on how to implement President George W. Bush's recent changes to the regulatory process. OMB Watch had anticipated the release of such a memo due to the need for clarification of certain controversial provisions within Bush's executive order. However, the memo offers little new information and further confounds issues in some areas.

On April 25, the White House Office of Management and Budget (OMB) and OMB's Office of Information and Regulatory Affairs (OIRA) jointly released a "compliance assistance" memo regarding implementation of Executive Order 13422 (amending E.O. 12866) and OMB's Final Bulletin for Agency Good Guidance Practices. OMB addressed its statement to agency heads. OIRA addressed its statement to agency Regulatory Policy Officers, and the memo was signed by Susan Dudley — her first communiqué as OIRA administrator.

The memo serves to clarify several points of the amended E.O. and the Bulletin. Those documents provide for OIRA review of "significant guidance documents." Under the E.O., "each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with advance notification of any significant guidance documents." However, the way in which agencies would transmit guidance documents to OIRA was unclear, as was the timetable for OIRA review.

According to the April 25 memo, after an agency transmits a request to promulgate guidance, OIRA will notify the agency within ten days whether additional consultation is necessary. The agency's transmittal should include, among other things, a description of the agency's intent and how the guidance will address the issue. It should also include, where applicable, a summary of public comments on the guidance.

If the administrator of OIRA deems additional consultation necessary, OIRA will ensure the guidance is consistent with the president's regulatory philosophy. OIRA will also maintain regular contact with the agency in question as well as other agencies. The memo states, "OIRA will complete its consultative process within 30 days or, at that time, advise the agency when consultation will be complete."

The Bulletin requires special consideration for "economically significant" guidance documents — those with an economic impact of $100 million or more or those deemed to have a material impact on the economy or a sector of the economy. Because guidance documents are non-binding statements, OMB Watch has been concerned the designation of economic significance would be impossible to determine.

In its report *A Failure to Govern: Bush's Attack on the Regulatory Process*, OMB Watch states, "This creates a largely speculative analysis to be conducted by the agencies, even assuming reasonably anticipated effects." OMB Watch also points out, "The Bulletin does not, however, require a formal regulatory impact analysis, so it is unclear just how this

determination is to be conducted."

The compliance assistance memo addresses these concerns. OIRA says, "We expect agencies to use common-sense principles and readily available facts" in determining whether a guidance document is economically significant. OIRA urges agencies to anticipate the adoption rate of guidance as well as the potential for costs and benefits. In cases where such assumptions prove too difficult, OIRA suggests agencies consider guidance "as if it were adopted widely by all affected parties," thus magnifying the estimation of an economic impact.

The memo also addresses the issue of agency Regulatory Policy Officers (RPOs), which are to oversee agency decisions about regulations and communicate with OIRA about regulatory matters. The amended E.O. increases the responsibilities of RPOs and requires that those officials be presidential appointees. OMB Watch and other critics have expressed concern these provisions will further politicize the regulatory process and ultimately allow the White House to exert greater influence in agency proceedings. Not only does the memo fail to allay these concerns, it begs additional questions on the RPO appointment process.

One amendment to the E.O. states "no rulemaking shall commence" without the approval of the RPO. Previously, the White House made no attempt to define the point at which a rulemaking commences.

The memo does little to clarify this point, stating, "As a general matter, a rulemaking commences when the agency has decided as an institutional matter that it will engage in a rulemaking." The memo does not define the terms "institutional matter" and "engage." The memo does state rulemaking shall commence no later than when it receives a Regulation Identification Number (RIN). An RIN is assigned to a proposed regulation upon its first publication in the *Federal Register*. This leaves open issues about the role of the RPO in influencing research that may lead to regulatory activity.

Another amendment to the E.O. states, "Each agency head shall designate one of the agency's Presidential Appointees to be its Regulatory Policy Officer." This implies an existing agency official who the president has appointed to an office will take on new responsibilities as an RPO.

However, the memo implies a position, not an individual, will acquire new responsibilities. According to the memo, non-presidentially-appointed officials would be able to serve as RPOs if the individual is serving temporarily: "If a person who is not a Presidential appointee is serving in the acting capacity in a position that is presidentially-appointed (PA), the amended Executive Order does not require an agency head to designate another official to serve as the Regulatory Policy Officer."

The memo also fails to address whether the newly conferred RPO will require Senate confirmation. Considering the significantly expanded responsibilities of the RPO, this

question will need to be addressed. This might be one area in which Congress may wish to exert its constitutional authority and challenge the RPO provision.

Another amendment to the E.O. places an increased emphasis on identifying a market failure before regulating. In *A Failure to Govern*, OMB Watch expressed concern about this revision: "The new language will institutionalize an anti-regulatory approach by using a market failure criterion in place of actually identifying threats to public health and safety."

The memo addresses this issue only briefly. It states, "This is not a substantive change to the Regulatory Principles of Executive Order 12866. Rather, this change makes clear that agencies must state 'in writing' the problem the regulation seeks to address." If this is true, it is unclear what problem the amendment intended to address with the change in language emphasizing market failure. In other words, the Bush administration did not need to modify an Executive Order to require agencies to submit existing work "in writing"; it simply could have issued a memo to agency heads.

Moreover, it is unclear what the statement "in writing" should entail. The memo gives no further guidance as to what kind of assessment agencies should perform when determining a market failure as a reason to regulate.

Agencies were to have designated an RPO by March 19 and have until July 24 to comply with most other provisions of the E.O. amendments and the Bulletin. As of today, there is no list of the RPOs, no description of their roles in agency rulemaking, or any information on how to communicate with these people who now have enhanced powers to influence rulemaking outcomes. OMB Watch continues to oppose the implementation of the White House directives. As OMB Watch states in *A Failure to Govern*, "There is real danger to our constitutional system from this arrogation of power. Equally significant, in our opinion, is the real danger presented to the American public from the delay or refusal to regulate dangerous activities."

House Subcommittee Steps Up Oversight on Regulatory Changes

A House subcommittee held a second hearing April 26 on the regulatory changes President George W. Bush issued in January. Subcommittee Chairman Brad Miller (D-NC) hoped to discover the reasons that the White House issued the changes, but the hearing turned stormy as Miller's inquiries were repeatedly rebuffed by an administration official. After tense exchanges with the official, Miller promised to seek additional documents from the Office of Management and Budget (OMB) and to hold additional hearings on regulatory changes "that affect the lives of millions of Americans."

The Subcommittee on Investigations and Oversight of the House Science and Technology Committee held the first hearing on Executive Order 13422 and OMB's Good

Guidance Practices Bulletin in February. This time, the hearing focused on the internal process OMB used in drafting the E.O. and how OMB intends to implement the changes these two documents require. Miller summed up the changes in his opening remarks:

> Under this order, not just major regulations, but guidance is subject to review by OIRA. And the order creates a new requirement—"market failure"—for any agency to promulgate any regulation. "Market failure" does not appear in any statute as a consideration in rule-making; in fact, Congress flatly rejected the argument that the market will solve the problem when Congress enacted the legislation granting rule-making authority.

In March, OMB Watch released a report on the potential impacts of these changes. On the same day as the second hearing, OMB released its compliance assistance memorandum to agencies on how they are to implement the E.O. and the guidance bulletin. (See the related article in this issue of the *Watcher*.)

The hearing had two separate panels. The first panel featured Steven D. Aitken, the deputy general counsel for OMB and former acting administrator of OMB's Office of Information and Regulatory Affairs (OIRA). Aitken was testifying solely in his capacity as acting administrator of OIRA, as he held that position at the time Bush issued the E.O.. Aitken is a civil servant, not a political appointee. It is highly unusual for the Bush administration to allow a civil servant to testify before Congress, particularly now that OIRA has an administrator, but the congressional committee decided that Aitken had the most knowledge about the E.O. and, therefore, would testify.

In seeking clarification of the process that led to the E.O., Miller and Aitken sharply disagreed on the range of issues Aitken could discuss without violating what Aitken called the "deliberative process." The executive branch often withholds information from the public during the development of ideas, which is often called the deliberative process, since the public will see the final outcome. Courts have upheld this reason for withholding information, but the claim is less certain when it comes to Congress requesting information about the development of policy approaches.

Miller wanted to discover how the administration, in its seventh year in office, determined that the regulatory process needed changes and who was responsible for the various requirements in the amendments. Aitken described generally the process for issuing executive orders but refused to disclose internal deliberations or identify who participated in the order's creation.

The hearing quickly turned tense when Aitken refused to provide details. Apparently, Aitken was prepared to testify about the content of the E.O. — requirements for market failure analyses, agency guidance reviews by OIRA, and regulatory policy officers (RPOs) — according to his written testimony. Miller was clearly expecting that information relevant to the decision to issue the E.O. would be provided. According to Miller, that was the reason Aitken was testifying instead of the new OIRA administrator, Susan

Dudley, who was not involved in developing the amendments. Dudley was named as one of Bush's recess appointments April 4, before the Senate could complete its planned confirmation hearing.

The second panel consisted of four witnesses who addressed the regulatory changes and their perceived impacts. Robert W. Hahn of the AEI-Brookings Joint Center for Regulatory Studies argued that the Bush amendments are not very substantial but nevertheless represent improvements in accountability, especially by bringing agency guidance documents under OIRA review. He also argued that the changes did not go far enough because independent regulatory agencies, like the Federal Communications Commission and the Federal Energy Regulatory Commission, are not covered by E.O. 13422.

Two experts in administrative law testified that different aspects of the Bush amendments are very problematic. Professor Peter Strauss addressed the constitutionality of giving regulatory policy officers additional responsibility.

> Our Constitution very clearly makes the President the overseer and coordinator of all the varied duties the Congress creates for government agencies to perform. Yet our Constitution's text, with equal clarity, anticipates that Congress may and will assign duties to executive officials who are not the President. Respecting those duties, he is not "the decider," but the overseer of decisions by others. When the President fails to honor this admittedly subtle distinction, he fails in his constitutional responsibility to "take Care that the Laws be faithfully executed."... The important point, in my judgment, is to preserve this distinction between presidential oversight — entirely appropriate and constitutionally commanded — and presidential decision. For any agency's unique responsibilities, Congress's delegation makes the precise formulation of its priorities and plans the legal responsibility of the agency head. Honoring and protecting that responsibility is an important element of the President's obligation to assure that the laws are being faithfully executed. And the recent Executive Order amendments reflect a different view, in effect making the President not just the overseer, but the decider of these matters.

Professor Richard W. Parker argued that expanding OIRA review and requiring further cost-benefit analyses takes us down "the wrong path and the wrong direction." According to Parker, what is needed is an accurate evaluation of the costs and benefits of regulations already in place instead of the estimates industry provides prior to regulations taking effect.

OMB Watch executive director Dr. Gary D. Bass testified about the lack of transparency in the regulatory process in light of E.O. 13422. The improvements he proposed focus on 1) the extent to which RPOs, who now will be initiating regulations within agencies, will allow politics to supersede the need for health, safety, environmental and civil rights protections as determined by the scientific and technical experts within agencies, and 2) the extent to which the regulatory changes create mini-OIRA offices in agencies which

may result in the RPOs dictating agency rulemaking and further decreasing agency discretion, especially in the pre-rulemaking stage. "In addition to helping to restore trust in government by providing transparency, the ability to evaluate regulatory outcomes is greatly enhanced by having the substantive basis of decisions available to the public," Bass concluded.

Court Picks Illusion of Safety over Protecting Public

The Second Circuit U.S. Court of Appeals recently ruled that the U.S. Environmental Protection Agency (EPA) is not liable for any harm resulting from their intentional misinformation about air quality around the World Trade Center (WTC) site following the September 11 attacks. The lawsuit, *Lombardi v. Whitman*, was filed by five emergency responders who worked at the WTC site without adequate safeguards, in part because of the misguided assurances of safe air quality. The April 19 court decision favors protecting government liability over the public's right to know about environmental risks that could compromise their safety.

Based on an investigation into the agency's overall response to the 9/11 attacks, the EPA Inspector General released an Aug. 21, 2003, report revealing that EPA communications to the public immediately after 9/11 were misleading. Statements made by EPA did not fully represent the data the agency possessed and were strongly influenced by the White House. News releases omitted important information on risks, such as potential health effects for vulnerable populations like children and the elderly. Even though EPA did not have sufficient data and analyses to determine if the air was safe to breathe, they issued such reassuring statements anyway.

The court held that EPA's actions did not constitute a "shock to the conscience" and so could not be held responsible for harm caused by misinformation, whether deliberate or not. The "pull of competing obligations" — EPA's mandate to inform the public about environmental dangers and the apparent conflicting duty of the federal government to keep peace and order — neutralizes any claim that government action amounts to "deliberate indifference," the standard required to shock the conscience. Creating such loopholes in the standard severely undermines any attempt to hold the government responsible for publicizing flawed and arguably dangerous information. This decision also encourages the government to "spin" health and safety information in future crises.

Though *Lombardi v. Whitman* did not substantively address whether EPA knowingly endangered WTC emergency and clean-up workers, there is considerable evidence that such a "lesser evil" was chosen. The Environmental Law and Justice Project requested under the Freedom of Information Act (FOIA) hazardous material and water samples EPA took in the month after the WTC collapse. The more than six hundred pages received from the request reveal that EPA found unhealthy levels of toxins after three weeks, yet the agency didn't advise area residents or workers to use respiratory protection. An internal Oct. 5, 2001, EPA letter to the head of New York City's

Emergency Operations Center, found through discovery in another court case, refers to potential health concerns for WTC workers from "asbestos and other contaminants...present in the air." However, none of the health concerns or information on the presence of dangerous toxins were voiced to the public. Instead, only assurances on the safety of the air quality were released.

EPA was not alone in neglecting to adequately provide safeguards for the WTC workers. In response to the EPA's Oct. 5 letter, New York City considered ongoing worker exposure monitoring but never implemented the plan since the "costs of this operation appear[ed] to outweigh the benefits." The five plaintiffs in *Whitman* now suffer from chronic medical conditions most likely caused by their work at WTC. They did not wear protective gear because they thought it was unnecessary expressly because of EPA's assurances and lack of any recommendation to use protection, as well as their own agencies' failure to provide any.

It is understandable that government agencies will make mistakes in the aftermath of a crisis for which they are unprepared. EPA's errors, however, were avoidable, but instead, the government chose to make political perception more important than public safety. This failure is yet another example of the current administration's penchant for suppressing scientific evidence. The Inspector General report also implicated the White House Council of Environmental Quality as having "influenced, through the collaboration process, the information EPA communicated to the public through its early press releases when it convinced EPA to add reassuring statements and delete cautionary ones."

The plaintiffs have decided not to appeal this ruling.

Intelligence Agencies' Contracting Practices Remain a Secret

The government refuses to release the findings of a comprehensive study on contracting at the Central Intelligence Agency (CIA), National Security Agency, and other federal intelligence agencies on the grounds that it is classified information and is sensitive to national security. The amount spent on federal contracts government-wide has doubled, from $209 billion in FY 2000 to $384 billion in FY 2005, but this does not include money spent on intelligence contractors, the figures for which are unknown to the public.

The *New York Times* reported last week that, concerned about the heavy reliance on contractors, senior intelligence officials completed a study on the number of contractors working at federal intelligence agencies. There has been greater reliance on contractors to conduct intelligence work since 9/11 due to a rapid increase in demand. The *Times* states that 25 percent of intelligence work is contracted out. The rest of the findings of the study, though, remain classified, as do the budgets and number of employees for all

intelligence agencies.

Since 1999, the CIA has refused to disclose its budget, and it also refuses to release its annual budgets dating back to 1947, except for 1997 and 1998, in which the overall intelligence budget information was voluntarily disclosed by then-director George Tenet, and 1963, in which the CIA budget was shown to be in the public domain and was released under FOIA.

Steven Aftergood of the Federation of American Scientists has sued the CIA multiple times to release budget information under the Freedom of Information Act (FOIA). The best argument for the refusal to disclose, according to Aftergood, is that the decision to disclose would create a precedent for the disclosure of additional information, which could potentially threaten the nation's security. "I have yet to meet any intelligence professional at any level who claims that disclosure [of the intelligence budget] would pose a threat," states Aftergood. "It's a rhetorical straw man that's been empirically refuted."

There was no documented harm following the release of the 1997 and 1998 budgets and no further disclosure of sensitive intelligence information. Moreover, John Negroponte, the former director of national intelligence, publicly revealed that there are an estimated 100,000 federal intelligence employees, another example of disclosure without harm or further disclosure of sensitive information.

When it comes to intelligence activities, the government needs to ensure that potentially damaging information is not released, but it is just as important that other information essential for exercising oversight and accountability is publicly available. Unfortunately, the balance has traditionally been skewed towards concealment due to the general nature of intelligence work. As the 9/11 Commission recommended, the overall intelligence budget and spending by individual agencies should be publicly released in order to promote accountability and reduce secrecy and unnecessary complexity. To institute the Commission's recommendations, the Senate passed Improving America's Security Act (S. 4), which requires the disclosure of the aggregate totals requested and appropriated for intelligence activities. This provision has been formally opposed by the White House. The companion House bill, Implementing the 9/11 Commission Recommendations Act (H.R. 1), does not include a similar provision.

Supreme Court Hears Oral Argument in Grassroots Lobbying Case

The U.S. Supreme Court heard oral argument on April 25 in Wisconsin Right to Life's (WRTL) challenge to the constitutionality of a campaign finance law that limits certain broadcasts, including grassroots lobbying messages, during federal campaigns. The issue before the Court is whether the law is unconstitutional as applied to the facts of WRTL's 2004 grassroots lobbying radio ads. Much of the argument addressed what standard

should be used to define "genuine issue ads" entitled to constitutional protection. For nonprofits, much depends on whether the Court sets a clear standard for the 2008 election year. A decision is expected during the summer, which allows enough time for Congress or the Federal Election Commission (FEC) to establish rules that comply with the Court's decision.

A Short History

The electioneering communications rule is part of the Bipartisan Campaign Reform Act of 2002 (BCRA), commonly called McCain-Feingold after its sponsors in the Senate. It bars corporations, including nonprofits, from funding broadcasts that mention federal candidates 60 days before a general election or 30 days before a primary. WRTL's radio ads encouraged listeners to contact their U.S. Senators on the issue of judicial filibusters. Because Sen. Russell Feingold ☼ (D-WI) was running for reelection at the time, WRTL had to discontinue the ads when the 60-day blackout period began, even though the ad was not about support or opposition to Feingold's election.

The Supreme Court upheld the overall constitutionality of the electioneering communications rule in *McConnell v. FEC* in 2004, but left the door open to challenges to specific applications of the rule involving genuine issue ads. WRTL brought such a challenge, but the FEC argued in court that the *McConnell* decision barred such "as applied" challenges. In early 2006, the Supreme Court rejected the FEC argument and sent the case back to a lower federal court to review the facts. In December 2006, the lower court ruled in favor of WRTL, finding that ads about a public policy issue that do not link the issue to a candidate/officeholder's fitness for office cannot be banned. The lower court argued that the determination of whether the ad was electioneering should be based on the content of the message in the ad, not on the context of the ad. In other words, while WRTL's political committee opposed Feingold's reelection, the ad in question was solely about contacting the senator to oppose a judicial filibuster. Thus, the court concluded that the ad was not electioneering and is protected free speech that cannot be banned even during the blackout period provided by the McCain-Feingold law. The FEC appealed.

The Arguments against WRTL and Questions and Comments from the Court

Press coverage tended to focus more on the changed make-up of the Court since it upheld the general constitutionality of the rule and less on the actual issue before the Court, which was whether the specific facts of the WRTL ad require an exemption from the rule based on the First Amendment. However, the Justices' questions showed that the Court is taking a close look at the factors to be considered.

Attorneys for the FEC and congressional interveners led by Sen. John McCain ☼ (R-AZ) argued that exemptions should be rare in order to avoid undermining BCRA. They said the vast majority of issue ads in studies before the Court in *McConnell* were meant to influence elections. But Justice Antonin Scalia noted at that time, "We didn't have a

concrete case such as this one, in which the assertions of the other side are very appealing as far as the rights of citizens to band together for an issue ad..."

When asked how to determine which broadcasts should be exempted, the FEC's attorney, Solicitor General Paul Clement, declined to suggest a standard. Instead, he said other challenges could be stronger that WRTL's, noting that 501(c)(3) organizations would have an "inspirational" challenge because it would be "difficult" to set up a political action committee to fund grassroots lobbying broadcasts. He also cited a case in Maine where the federal candidate referenced in the ad was unopposed in the election.

Justice Anthony Kennedy pointed out that public attention is often more focused on issues prior to elections, making it a strategic time to air issue ads. Clement responded that groups can air ads without mentioning the official who is also a federal candidate. Kennedy said a group might want to target an official, "in order to affect his conduct or her conduct once they're reelected, so that they'll take a different position, a second look." This raised the issue of dual purpose broadcasts, and Clement said this is what Congress intended to regulate.

Seth Waxman, arguing for McCain, said the standard should be whether a challenger can show an ad "has characteristics such that no reasonable voter could view it as promoting, attacking, supporting or opposing a candidate." He offered no definitions of these terms. Chief Justice John Roberts replied, "Do we usually place the burden...on the challenger to prove that they're allowed to speak, as opposed to the Government to prove — to carry the burden that they can censor the speech?"

The FEC's defense of the rule is that it does not ban broadcasts that mention federal candidates, but only requires them to be paid for with funds raised separately by a political committee subject to contribution limits under federal election law. Justice Samuel Alito asked Waxman, "What do you make of the fact that there are so many advocacy groups that say this is really impractical?" Waxman responded with examples of groups that have not named members of Congress in their broadcasts, but Roberts responded that the fact that one groups chooses not to do so "doesn't seem particularly pertinent to me."

WRTL's Arguments and Questions and Comments from the Court

James Bopp. Jr., representing WRTL, emphasized that the government has "refused to state a test to determine what's a genuine [issue] ad." Responding to Roberts' question of whether it is possible for a fact-specific challenge to the electioneering communications rule to succeed without overturning BCRA, Bopp cited three key features that would protect grassroots lobbying and genuine issue ads. These are based on the content of the communication. Such ads:

- "focus on a current legislative matter, take a position on it, urge people to contact them, their congressmen and senators, to take a particular action or position."

- "the ads do not mention an election, candidacy, political party, challenger, or the official character, qualifications, or fitness for office."
- "as long as the ad meets this pattern...the fact that the ad mentions the name, the position of a public official on an issue and praises or criticizes him or her for that does not affect its genuineness."

Many of the questions the Justices asked Bopp addressed whether the test should be limited to the content of the ad, or take the political context into account. Justice Stephen Breyer gave the example of ads by former Sen. Lauch Faircloth in North Carolina that said he was fighting against trial lawyers' efforts on liability laws, when "one of the parties had spent millions trying to paint Faircloth's opponent, John Edwards, as the creature of the trial lawyers, that anyone in North Carolina knew it....tell me how anyone could know such a thing without looking at the context." Justice David Souter asked, "Why should we ignore the context?"

Bopp responded that "that test....would invite ads to be prohibited based upon the varied understandings of the listener..." to which Souter replied, "It is impossible to know what the words mean without knowing the context in which they are spoken." Bopp also pointed out, "If there is no workable test that is reasonably ascertainable by small grassroots organizations that separates genuine issue ads from sham issue ads — this court said in *Ashcroft* you cannot throw out the protected speech in order to target the unprotected speech," noting that Congress continues to meet during the blackout periods.

Some of the questions related to the portion of the WRTL ad that referred listeners to a website. Although WRTL had a political committee that was working to defeat Feingold, the special website was limited to the filibuster issue.

What's Next?

The Court's decision could go in many directions. It could decide the lower court was wrong not to consider the context of WRTL's ad and send the case back for further consideration. This would make it next to impossible for nonprofits to know what grassroots lobbying broadcasts are worthy of constitutional protection when the primary elections begin in early 2008. Hopefully, the Court will provide clear guidance by setting a concrete standard to apply to WRTL's fact situation. The standard could be based solely on the content of the broadcast. It could include consideration of the speaker's tax-exempt status and ability to establish and fund a political committee. If no such clear standard emerges from this case, we are likely to see multiple challenges to the electioneering communications rule as applied to myriad fact situations. Since the law now allows these cases to be brought in any federal district court, inconsistent standards could emerge and apply throughout the 2008 election year.

House Bill Seeks Accountability for Anti-Terrorist

Financing Programs

Legislation was recently introduced in the House that would require the Departments of State and Treasury to adopt recommendations of an October 2005 Government Accountability Office (GAO) report, which addressed the effectiveness of the U.S. government's efforts to assist other countries in the war on terrorism. Among other things, the bill would require the Treasury Department to submit in an annual report to Congress more complete information on how the agency tracks and blocks terrorist assets. Although the bill does not include all the GAO recommendations, it opens the door to discussions on the effectiveness of Treasury's strategy, including how it deals with charities, especially since the strategy is inconsistent with the State Department's December 2006 "Guiding Principles on Non-Governmental Organizations".

Reps. Gwen Moore (D-WI), David Scott (D-GA), and House Financial Services Committee Chair Barney Frank (D-MA) introduced H.R. 1993, the Counter-Terrorism Financing Coordination Act, on April 17. In addition to the annual reports to Congress, the bill requires each agency to fully outline and agree to responsibilities in carrying out counter-terrorism financing training and technical assistance in a "Memorandum of Agreement."

The major problems highlighted in the 2005 GAO report, "Terrorist Financing: Better Strategic Planning Needed to Coordinate U.S. Efforts to Deliver Counter-Terrorism Financing Training and Technical Assistance Abroad", reflect the overall flaws with anti-terrorism financing programs that also greatly impact charities. For example, since the assets of U.S.-based Muslim charities were frozen, no information has been provided about what Treasury plans to do with the money or even an exact amount of how much charitable aid is dormant. In Treasury's 2005 Terrorist Assets Report to Congress, Treasury estimated these designations have resulted in more than $13.7 million in frozen assets.

As the GAO report also notes, a lack of meaningful measures only leaves uncertainty as to how effective, if at all, freezing charities' assets has been in stopping terrorist financing. "The lack of accountability for Treasury's designations and asset blocking program creates uncertainty about the department's progress and achievements. U.S. officials with oversight responsibilities need meaningful and relevant information to ascertain the progress, achievements, and weaknesses of U.S. efforts to designate terrorists and dismantle their financial networks as well as hold managers accountable."

The detailed reports called for in H.R. 1993 could shed light on the fate of charitable funds and demonstrate the need for procedures to allow the funds to be used for the charitable purposes for which they were intended.

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In This Issue

House Lobby Reform Bill Expected to Move Soon

The leadership in the House has been working on its legislation to reform lobbying disclosure and ethics practices and is expected to unveil the plan today, May 15, or tomorrow, May 16, with a mark-up of the bill in the Judiciary Committee expected May 17. Despite repeated statements that a bill will be filed soon, controversy over grassroots lobbying disclosure, limits on bundling of campaign contributions by registered lobbyists and expansion of the cooling off period before ex-members of Congress can lobby have stalled progress. Rumors abound that the Democratic leadership bill will address the revolving door issue by doubling the cooling off period to two years. But the other two issues — grassroots lobbying disclosure and bundling of campaign contributions — are not likely to be addressed, although the leadership seems willing to have them offered as amendments or separate bills.

On May 1, Reps. Martin Meehan (D-MA) and Christopher Shays (R-CT) stepped up the

pressure on the grassroots lobbying disclosure issue by filing H.R. 2093, a bill designed to amend the Lobbying Disclosure Act (LDA) by requiring firms that spend more than $100,000 on grassroots lobbying campaigns in a quarter on behalf of another entity to register and disclose their clients' identity, along with how much they are spending. The bill has been referred to the Judiciary Committee, which is expected to consider the leadership's bill on May 17. Meehan and Shays are likely to offer H.R. 2093 as an amendment to the leadership bill in committee and again on the floor if it is not accepted in committee.

The Meehan-Shays bill significantly scales back the proposal that was defeated in the Senate earlier this year by not requiring disclosure of grassroots lobbying activities by registered lobbyists or organizations and individuals acting on their own behalf. Instead, it applies only to lobbying firms, defined as "a person or entity that is retained by 1 or more paid clients *(other than that person or entity)* to engage in paid communications campaigns to influence the general public to lobby Congress, and receives income of or spends or agrees to spend, an aggregate of $100,000 or more for such efforts in any quarterly period." (emphasis added) Paid communications to influence the general public to lobby Congress are defined as a lobbying firm's efforts on behalf of a client to "influence the general public or segments thereof to contact 1 or more covered legislative or executive branch official" to take specific action.

The Meehan-Shays bill exempts communications to members of the lobbying firm's clients (since members are not the "general public") and direct mail campaigns that are "primarily for the purpose of recruiting membership to join the [client] organization."

H.R. 2093 is significantly narrower than the Senate provision that was stripped from S. 1, the Senate lobbying reform bill, earlier this year. That provision would have required lobbyists that meet the LDA registration threshold to also report grassroots lobbying expenditures. Under H.R. 2093, a group that files LDA reports on direct lobbying activities will not have to report grassroots lobbying unless it hires outside consultants or firms to carry out the work, and those consultants or firms accept more than $100,000 per quarter in fees for such activities. In that case, the outside firms would report the identity of the client but would not report information on the client's donors or members.

The sponsors of the Senate proposal said their language would not have triggered registration and reporting based on grassroots lobbying expenditures. Opponents of S. 1 argued that it would have done so, and rather than clarify the provision, they successfully worked to defeat it. Similar arguments are now being advanced by the same groups, including the National Right to Life Committee and the American Civil Liberties Union, in opposition to H.R. 2093. They claim it would require citizens or their organizations to register and report, despite the explicit statement in the bill that "No person or entity other than a lobbying firm is required to register or file a report under the amendments made by this section." A National Right to Life Committee letter sent to the House on May 4 opposing the Meehan-Shays bill says the legislation would "force countless

individual Americans and groups to register and report", ignoring the definitions and threshold specified in the bill. Another opposition letter signed by 39 groups argues that grassroots lobbying should not be referred to as "lobbying" but as "democracy", since "lobbying has a different connotation, and is regulated because of the possibility of corrupting influence." This semantic argument ignores the fact that charities have been reporting "grassroots lobbying" to the Internal Revenue Service for over 30 years, without claims that this advocacy corrupts government. Additionally, labor unions have been required to report such information to the government, and their grassroots lobbying activities are no more corrupt than, say, a corporate grassroots lobbying effort.

Supporters of grassroots lobbing disclosure are also being heard in Congress. OMB Watch's May 8 letter to House members pointed out that "Disclosure of the funding sources, particularly behind big money grassroots lobbying campaigns, is a critical element in rooting out corruption and establishing a system that creates public trust." Urging members not to be fooled by misinformation, the letter said disclosure by for-hire firms will not silence citizen organizations and notes that "23 states empower their citizens with information about the entities funding grassroots lobbying campaigns."

On May 2, a letter to Congress from several organizations often identified as government reform groups addressed constitutional concerns expressed by disclosure opponents. It cites *U.S. v. Harriss*, 347 U.S. 612 (1954), where the U.S. Supreme Court upheld a disclosure requirement for "artificially stimulated letter campaigns to influence Congress." The Court stated, "Present day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures....Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation..." 347 U.S. at 645. The process is no less complex in 2007 than it was in 1954.

Muslim Charity Files Libel Suit over Allegations of Terrorist Ties

KinderUSA, a U.S. charity that provides humanitarian aid to children in war zones, including Palestine, filed suit April 26 against the author and publishers of a book that ties the group to terrorist organizations. The libel suit, which seeks $500,000 in damages and other relief, was filed in Los Angeles Superior Court after the publishers refused a request to discontinue distribution.

Hamas: Politics, Charity, and Terrorism in the Service of Jihad was written by Matthew Levitt, a senior fellow at the Washington Institute for Near East Policy and former Treasury Department official, and published by Yale University Press in April 2006. In

its complaint, KinderUSA (Kinder) states:

> 9. "KINDER-USA is discussed in Chapter 6, *Foreign Funding of Hamas* on pages 151 and 152 and in the related footnotes numbered 21 and 22. The text states: 'Even after the closure of the Holy Land Foundation in 2001, other U.S.-based charities continue to fund Hamas. One organization that has appeared to rise out of the ashes of the HLFRD is KinderUSA.'"
> 10. The Defendants further falsely state that 'the formation of KinderUSA highlights an increasingly common trend: banned charities continuing to operate by incorporating under new names in response to designation as terrorist entities or in an effort to evade attention. This trend is also seen with groups raising money for al-Quaeda.' The footnote to this paragraph mentions two officers of KINDER-USA at the onset and continues with an extensive discussion of al-Quaeda funding networks, without informing the reader that there is no allegation that KinderUSA is tied to al-Quaeda."

The book's basis for tying Kinder to terrorism rests on the fact that the executive director was employed by the Holy Land Foundation for Relief and Development (HLF) before it was shut down by the Treasury Department in 2001 due to alleged ties to Hamas. In addition, a Kinder founder had also served on the HLF board. Currently, seven former HLF leaders are awaiting trial on criminal charges of diverting funds to Hamas. However, the factual basis of Treasury's designation of HLF as a supporter of terrorism and the criminal charges for providing support to Hamas have come under fire as faulty translations and fabricated evidence issues have been revealed in the press.

Kinder issued a press release denying the book's claims, saying Yale University Press failed to conduct a fact-check on these allegations. Attorney Jack Kilroy said, "The book falls far short of Yale University's reputation for excellent academic scholarship." However, on May 9, a Yale spokesperson told the *New Haven Independent* that "of course, the book was vetted. We took it through peer review, as with all our books." Levitt did not respond to the *Independent*'s requests for comment.

Prior to filing the suit, the complaint states that Kinder's attorney contacted Yale University Press and Washington Institute for Near East Policy and requested a public retraction and discontinued distribution of the book. Yale declined the request, and Kinder's complaint says book's allegations "subject the organization to unfair scrutiny or suspicion, damage its ability to raise funds and to recruit and retain volunteers for its charitable mission, and caused irreparable harm to its reputation." In the Kinder press release, board chair Laila Al-Marayati, M.D. said, "We are a transparent and accountable public charity that works diligently to comply with all applicable state and federal regulations." On its website, Kinder's statement on financial accountability says the impact of the book is to "take food out of the mouths of hungry children in Palestine that so urgently need our help. We are a transparent and accountable public charity that works diligently to comply with all applicable state and federal regulations, we use the best practices to insure that the money we raise helps the innocent victims of conflict and

natural disaster in Palestine and elsewhere."

Earlier this year, Kinder requested an investigation into illegal government surveillance, but the Justice Department did not grant the group's request.

Head Start Reauthorization Passes House without Faith-based Discrimination Language

On May 2, the Improving Head Start Act of 2007 (H.R. 1429) passed the House without a provision that would have allowed grantees to discriminate on the basis of religion when hiring for positions funded by Head Start. The 365-48 vote followed the defeat of an amendment sponsored by Rep. Howard McKeon ☼ (R-CA) that would have permitted the religion-based hiring decisions. The long battle over Head Start reauthorization will now move forward as the Senate considers Sen. Ted Kennedy's (D-MA) Head Start for School Readiness Act (S.556), which does not include a religious preference measure. In addition, neither bill contains controversial limitations on use of private funds for voter registration by Head Start agencies.

In March, the House Education and Labor Committee voted down a similar amendment sponsored by Resident Commissioner Louis Fortuno (R-PR). However, the proponents of the religious preference measure fought hard to insert the provision during the floor vote. This included the White House, which released a statement defending the faith-based amendment the day before the House vote. It said, "The Administration strongly encourages the House to amend H.R. 1429 to ensure that faith-based organizations are not asked to forfeit their religious hiring autonomy as a condition of receiving Head Start grants."

The House Rules Committee did not allow Fortuno's amendment to be considered on the floor, instead allowing an amendment introduced by Rep. Heath Shuler (D-NC), that inserted language praising the history and importance of faith-based organizations' contributions to and participation in Head Start programs. It also says, "Faith-based and community-based organizations continue to be eligible, on the same basis as other organizations, to participate in any program under this section for which they are otherwise eligible."

House Minority Leader John Boehner (R-OH) released a Dear Colleague letter advocating that the bill be sent back to the committee to consider the faith-based proposal in order to "prevent the federal government from revoking the rights of religious organizations to hire on a religious basis or to maintain their religious character." The letter charges that "the Shuler amendment is little more than a transparent attempt at political cover for Democrats."

During the debate on the House floor, Rep. Chet Edwards (D-TX) commented ,"Our principle is simple but deeply profound. No American, not one, should ever have to pass

another American's private religious test to qualify for a tax-funded Federal job."

The Coalition Against Religious Discrimination (CARD), made up of religious, civil rights, labor, health, and advocacy organizations, including OMB Watch, worked tirelessly to get a Head Start reauthorization bill passed without the discriminatory language. In the end, a motion to recommit the bill was defeated by a vote of 222-195, and the final bill passed in the House by a vote of 365-48.

The House bill bars use of funds for publicity or propaganda purposes and for funding pre-packaged news stories unless supplied by the Department of Health and Human Services. The Senate version bars use of employee program time for transporting people to the polls on Election Day, but drops previous language that would have barred use of private funds for voter registration activities. The restriction on private funds was a highly controversial issue as the last Congress considered Head Start reauthorization, and it is a good sign that it is not part of either bill.

House Hearing Asks Interior: Entangled in Politics, or Enlightened by Science?

In a May 9 hearing, the House Committee on Natural Resources heard witnesses discuss the extent to which Interior Department officials have manipulated scientific assessments when implementing the Endangered Species Act (ESA). The hearing came on the heels of the resignation of a top-ranking official and the release of a departmental investigation that found rules violations and intimidation of agency scientists.

Committee Chair Nick J. Rahall, II, (D-WV) said in his opening remarks that a range of actions taken by Interior in its implementation of ESA makes it clear "This is an agency that seems focused on one goal — weakening the law by Administrative fiat and it is doing much of that work in the shadows, shrouded from public view." He accused department officials of not cooperating with the committee, providing non-public information to private companies, and attempting to change ESA regulations behind closed doors. The hearing revealed agency practices that exhibit systematic efforts to undermine the information used to make ESA-related determinations.

Interior's Office of Inspector General investigated allegations against former deputy assistant secretary for fish, wildlife and parks Julie A. MacDonald that she intimidated staff and changed the scientific information agency scientists developed for decisions about listing or delisting threatened or endangered species. The report was released to Congress the week of March 26 and confirmed MacDonald's involvement in "editing, commenting on, and reshaping the Endangered Species Program's scientific reports from the field." MacDonald's background is in engineering and management, not biology or other natural sciences. MacDonald resigned her position April 30.

According to the investigation, MacDonald:

- extensively edited the Sage Grouse Risk Analysis;
- bypassed managers to bully field personnel "into producing documents" that suited her political philosophy;
- determined that the cost of designating an area as critical habitat was unacceptable and ordered a report rewritten to reflect her opinion;
- substituted "alternative outside sources" of science for staff scientists' sources and then declared the substitution "best practices"; and
- aggregated three separate species listings of salamander into one in order to change the species designation from endangered to threatened.

The report concludes MacDonald did nothing illegal, but that she violated the Code of Federal Regulations regarding disclosure of nonpublic information and the appearance of preferential treatment. Specifically, she disclosed information to the California Farm Bureau Federation and the Pacific Legal Foundation, a property rights group that often challenges agency endangered species decisions.

In her written testimony, Lynn Scarlett, Deputy Interior Secretary, testified that Interior is committed to scientific integrity, transparency and quality. Yet her testimony emphasized the voluntary nature of many of the programs and grants used in the endangered species program and the de-emphasis on listing species, which is often the focus of the extensive litigation the program regularly faces. She also downplayed the proposed administrative changes to ESA regulations circulating within the agency, about which Rahall complained. According to a BNA story (subscription) describing the oral testimony, Scarlett defended MacDonald's editing actions. MacDonald's editing was only to "ensure quality of product," according to BNA's article.

Witnesses from the environmental community had a different view of Interior's approach to using science. For example, Union of Concerned Scientists' Francesca Grifo provided testimony about the extent to which U.S. Fish and Wildlife Service (FWS) scientists had experienced political interference. A 2005 survey of FWS scientists working in field offices showed that 78 percent of respondents felt FWS was not effective in its habitat protection work, and 69 percent did not think it was effective in the recovery work for currently listed species. Almost two-thirds thought FWS was moving in the wrong direction.

Defenders of Wildlife executive vice president Jamie Rappaport Clark testified that the recovery programs Scarlett emphasized in her testimony were removed from the draft of the administrative rules changes. In addition, she noted:

> The general theme of all the administrative rule changes we have seen from, or discussed with, the administration is a withdrawal of the Fish and Wildlife Service and NOAA-Fisheries* from implementation of the Endangered Species Act. Having hamstrung the endangered species program by starving it of

resources and injecting political considerations into its science, the administration's rewrite of the ESA rules now would have the Fish and Wildlife Service and NOAA-Fisheries shed the responsibility entrusted to them by Congress on the basis that the agencies lack sufficient resources and expertise.

*National Oceanic and Atmospheric Administration's National Marine Fisheries Service, which is also responsible for ESA implementation.

Cost-Benefit Provision Latches onto Fuel Economy Standard

A Senate panel has approved a bill reforming the federal standard for passenger vehicle fuel economy. The bill aims to increase vehicle fuel efficiency over the next 25 years, but a proposal to mandate cost-benefit analysis could undermine meaningful regulation. The bill raises questions as to the limits of cost-benefit analysis in the federal regulatory process.

In 1975, in response to national oil shortages, Congress enacted corporate average fuel economy (CAFE) standards for passenger cars and light trucks. The CAFE program sets a mandatory fuel efficiency rate (measured in miles per gallon) and fines manufacturers who are not in compliance. Manufacturers are evaluated based upon the fuel economy of their entire fleet as opposed to individual vehicles. CAFE standards were widely credited with improving automotive fuel economy in the years immediately following enactment, but progress has since leveled off.

Neither Congress nor the National Highway Traffic Safety Administration (NHTSA), the agency charged with setting standards, has raised the standard of 27.5 miles per gallon since the program's inception more than 30 years ago. As OMB Watch reported in March, legislators from both parties introduced a number of fuel economy reform bills in the 110th Congress's early days.

The first of these bills to move toward a full chamber vote is the Senate's Ten-in-Ten Fuel Economy Act (S. 357), which the Senate Committee on Commerce, Science, and Transportation approved on May 8. The bill's primary aim is to increase the minimum fuel efficiency rate for all passenger vehicles to 35 miles per gallon by model year 2020. The legislation would then require NHTSA to raise the fuel efficiency rate by four percent each year from model year 2020 through model year 2030. The Senate has not yet scheduled a floor debate on the bill.

However, unlike the original CAFE legislation, this legislation would introduce mandatory cost-benefit analysis into NHTSA's standard-setting process. The original CAFE legislation requires federal regulators promulgate the "maximum feasible standard" and instructs NHTSA to consider "economic practicability." The law does not

require any formal analysis.

As proposed, the legislation would instruct NHTSA to consider "cost-effectiveness." The bill states "the term 'cost-effective' means that the total value to the United States of reduced fuel use from a proposed fuel economy standard is greater than or equal to the total cost to the United States of such standard." The proposed legislation uses the term "cost-effective" and "cost-effectiveness" repeatedly, but actually would mandate a cost-benefit analysis. The legislation would require NHTSA to prove a new standard's benefits outweigh its costs before regulating.

The introduction of a mandatory cost-benefit analysis raises two concerns. First, the legislation would mark a departure from the status quo. Currently, the national minimum rate for fuel efficiency is a static 27.5 miles per gallon and remains as such regardless of monetized costs or benefits.

Second, the often criticized requirements of cost-benefit analysis are particularly suspect with regard to fuel economy. The legislation would instruct NHTSA to consider a variety of factors in determining "cost-effectiveness," including national security and greenhouse gas emissions. However, the bill does not provide any indication as to how an intangible benefit such as national security should be monetized. Similarly, monetizing "the resulting costs to human health, the economy, and the environment" from greenhouse gas emissions would prove difficult. Subsequently, NHTSA's decision on whether to raise the CAFE standard may be based on inherently flawed estimates.

Critics of cost-benefit analysis point out the results of an analysis often understate benefits due to the difficulty of monetizing intangibles, as is the case with this proposed legislation. In testimony before Congress in February, OMB Watch's Director of Regulatory Policy Rick Melberth stated, "There are certain values we hold dear that cannot be adequately monetized." He went on, "A decision making process that doesn't provide for the expression of these nonquantifiable benefits is critically flawed."

The Senate legislation would still have to wait until a House proposal emerges. It would also have to be reconciled with President Bush's May 14 directive instructing the U.S. Environmental Protection Agency (EPA) and Departments of Energy, Transportation and Agriculture to collaborate on a regulatory plan for cutting automotive greenhouse gas emissions.

The White House issued the directive in response to an April U.S. Supreme Court decision that determined EPA could regulate greenhouse gas emissions under the Clean Air Act. Though Bush claims to prefer a legislative solution, he is proceeding with the regulatory approach, which may allow the White House to pursue its proposal on its own terms. Bush has instructed agencies to complete regulatory actions by the end of the administration, which may allow the White House to combat congressional initiatives and set less stringent standards.

Senate Passes FDA Reform Bill, Expands User Fees

On May 9, the Senate ended weeks of debate and passed S. 1082, the Food and Drug Administration Revitalization Act. The two primary aims of the bill are to renew the Prescription Drug User Fee Act and to generally strengthen the regulatory authority of the U.S. Food and Drug Administration (FDA).

In 1992, Congress passed the Prescription Drug User Fee Act (PDUFA). PDUFA gives the FDA the authority to collect fees from pharmaceutical companies for the safety review and approval of new drugs. Under the original legislation, Congress must reauthorize PDUFA every five years. PDUFA is set to expire Sept. 30.

If signed into law, the Food and Drug Administration Revitalization Act would renew and expand the user fee program. FDA would increase the amount of user fees it collects to almost $400 million, up from approximately $300 million. User fees would fund approximately half of the agency's drug review program and a fifth of the agency's overall budget.

While user fees account for a significant portion of FDA's funding, critics say the program ties the interests of FDA's drug approval office too closely to those of the pharmaceutical industry. In an open letter, the public interest group Public Citizen tells Congress "the agency has become dependent for its funding upon the very industry over which it has regulatory authority." Due to the dependence on user fees, the letter says, "pharmaceutical companies are increasingly seen as stakeholders, customers or even clients."

However, because user fees account for such a large portion of FDA funding and expiration of PDUFA is looming, a reauthorization bill is considered must-pass legislation. FDA has indicated it will notify drug review employees of potential layoffs if reauthorization is not signed into law by July.

In addition to reauthorizing PDUFA, the Senate bill proposes expanding the regulatory authority of the FDA. Recent controversies concerning the safety of the food and drug supply has subjected FDA to increasing public and congressional scrutiny. PDUFA reauthorization provided a vehicle for senators to address public concerns and to attempt to solve FDA's problems. Subsequently, the legislation morphed into a broad-based FDA reform measure.

In response to controversy over the arthritis drug Vioxx and other high-profile FDA missteps resulting in recalls, the Senate bill includes provisions to strengthen FDA's regulatory authority for drugs already on the market. The legislation would expand FDA's ability to require drug companies to perform post-market safety studies and perform "risk evaluation and mitigation" for drugs exhibiting adverse effects.

The legislation would also allow FDA to promptly order drug companies to change the labeling for a drug, a process which industry is now able to delay. Other post-marketing provisions include the creation of a database allowing FDA to collect information on adverse health effects and the expansion of a program rewarding drug makers who study adverse effects of drugs on pediatric health.

The legislation would expand FDA's ability to impose civil penalties on drug manufacturers. One measure would give FDA the authority to fine drug companies for false or misleading direct-to-consumer advertising. One of the bill's amendments inserts language that would allow FDA to impose fines of up to $2 million on delinquent pharmaceutical companies. Sen. Charles Grassley ☼ (R-IA) introduced the amendment, and the Senate agreed to it.

Another measure would expand FDA's regulatory authority on pet food. The recent controversy over melamine contamination exposed the inability of FDA to adequately regulate or recall pet food. Sen. Richard Durbin ☼ (D-IL) sponsored an amendment inserting language which would require FDA to promulgate better standards for pet food ingredients, improve labeling and make it easier for FDA to conduct recalls. The Senate agreed to the amendment without a dissenting vote.

Much of the debate on the Senate floor centered on controversial amendments related to drug importation. Sen. Byron Dorgan ☼ (D-ND) led the charge in attempting to insert language which would allow the importation of drugs from Canada and the European Union. Dorgan cited a Congressional Budget Office study claiming drug importation would generate savings of $50 billion over ten years.

Sen. Thad Cochran (R-MS) introduced an amendment to Dorgan's amendment. Cochran's provision would require the Department of Health and Human Services, of which FDA is a part, to approve all imported drugs. Due to the substantial burden the requirement would impose on the agency, the measure essentially nullifies Dorgan's amendment. The Dorgan amendment passed by voice vote, but only after the Senate attached the Cochran amendment by a vote of 49-40.

Several amendments the Senate failed to approve proposed expanding the scope of the bill. Moments before the final vote on the bill, Durbin introduced an amendment that would have inserted language making it more difficult for scientists with financial conflicts of interest to serve on FDA advisory panels. The Senate did not agree to the amendment in a 47-47 vote. Grassley introduced a provision which would have involved the Office of Surveillance and Epidemiology in post-market safety reviews, a responsibility currently left to the Office of New Drugs. The amendment was rejected 47-46.

The Senate voted 93-1 on the final bill, with Sen. Bernie Sanders (I-VT) voting "nay," citing dissatisfaction over the nullified drug importation provision. The House is in the early stages of developing companion PDFUA reauthorization legislation, which is

expected to contain similar regulatory expansion measures.

On May 1, the White House released a statement saying President Bush would veto the bill if it contained the Dorgan drug importation amendment. However, since the Cochran amendment has eliminated the chance of mass drug importation, prospects of a presidential signature have significantly improved.

Social Programs Are Collateral Damage of the War Funding Debate

Congress and the president have yet to resolve their differences over an emergency spending bill for the wars in Iraq and Afghanistan. Caught in the middle of this fight are high-priority proposals to raise the minimum wage, provide stopgap funding for a children's health insurance program, and restore some cuts for energy assistance. A drawn-out debate over war funding could end up causing unnecessary hardship for people who depend on the passage of these initiatives.

War Funding

President Bush vetoed the first FY 2007 supplemental appropriations bill, H.R. 1591, demanding that Congress strip it of language that set a goal for redeploying most soldiers out of Iraq by March 31, 2008. As an alternative, some Democrats and moderate Republicans had proposed using "benchmarks" for improvements in Iraq as a gauge for funding. But the Bush administration said that too would not fly. Yet under heavy pressure from moderate Republicans, the president appears to have shifted his position and is willing to accept legislative "benchmarks" for improvement in Iraq, but no further details as to the preferred timing, type and consequences of the benchmarks have been publicly discussed.

Following the veto of the supplemental appropriations bill, the House divided the original bill into two. H.R. 2206 includes all spending from the original bill except for agricultural programs and certain aid for western states. The $96 billion in military funding within the bill lacks withdrawal timetables and goals. However, this war funding is broken up into two installments, and the bill conditions the release of the second installment on congressional approval in July. The $4.5 billion H.R. 2207 contains the funding measures for agriculture programs and aid to western states that were excluded from H.R. 2206. The House passed both bills on May 10 (221-205 and 302-120, respectively), and the president responded with promises to veto each bill should it reach his desk.

The Senate has not taken action since the president's veto of H.R. 1591, though an agreement between the House and Senate on the supplemental bills is expected by the end of the week of May 21.

Minimum Wage Increase

Held up by the debate over military funding are a host of high-priority initiatives, the most consequential of which is arguably an increase in the minimum wage. A provision contained in H.R. 2206 would raise it from $5.15 to $7.25 per hour, phased in over two years. The original supplemental vetoed by Bush also included this minimum wage language.

The minimum wage was last adjusted in 1997. Since then, the cost of living has risen 26 percent nationally. Indeed, the real value of the minimum wage is the lowest it has been in over 50 years, according to the Economic Policy Institute.

It has been over five months since the House first passed the minimum wage increase, which it overwhelmingly did on Jan. 10, while the Senate passed the same increase on Feb. 1. Until the supplemental debate, an attached tax cut package that the Senate initiated had delayed the passage of the minimum wage bill. The value of these tax cuts was as high as $12 billion, but the House and Senate have now agreed to a $4.8 billion package. The tax cuts principally benefit businesses in the view of some and are fully offset.

Children's Health Insurance

The war funding debate has also delayed a stopgap appropriation for the State Children's Health Insurance Program (SCHIP). The Center on Budget and Policy Priorities estimates that in the current fiscal year, SCHIP funds are about $750 million short of the amount needed to cover the same number of children as it did in 2006. This would be the same as the cost to insure 510,000 children. A more recent estimate by the Department of Health and Human Services (HHS), supported by the Congressional Budget Office, put the shortfall at $650 million.

H.R. 2207 provides about $650 million in SCHIP funding. The total cost of the stopgap funding is about $400 million, because additional SCHIP funds reduce expenditures in Medicaid by about $250 million.

As many as 14 states are projected to have insufficient SCHIP funding by the end of 2007. Georgia has already run out of SCHIP funding for some beneficiaries, all of whom have been moved to a similar, but less comprehensive plan under Medicaid. Bruce Lesley, the president of First Focus, a children's advocacy organization, told *The Hill* that more states will run behind on funding by late summer.

Energy Assistance, Hurricane Relief, and Rural Schools

H.R. 2206 also includes a $400 million boost for the Low-Income Home Energy Assistance Program (LIHEAP). Despite high energy costs, funding for the LIHEAP

program was cut from $3.2 billion in FY 2006 to $2 billion in FY 2007.

There is also $6.8 billion in funding for Gulf Coast hurricane relief, about $3 billion above the president's request. About $1.4 billion of the unrequested funding would go toward rebuilding the levee system in New Orleans.

About $400 million is also included in H.R. 2207 for educational aid to communities that have been hurt by a long-term decline in the timber-harvesting industry.

It seems only a matter of time before Congress and the president finally reach a deal on the war funding issue. But the slow pace of the negotiations — as well as the inclusion of these provisions in the debate — could carry high costs.

Budget Resolution Report and Vote Could Come Soon

During the week of May 7, House and Senate budget resolution conferees began meeting to settle differences between the House- and Senate-passed $2.9 trillion budget resolutions. Despite a pre-emptive veto threat by the Bush administration, conferees are expected to produce a more generous and more fiscally sound budget plan than the president has proposed.

Since the beginning of March, the attention of much of Congress has been on the war in Iraq and whether or how to end it. But a small group of budgeteers, like House Budget Committee chair John Spratt (D-SC), his Senate counterpart Kent Conrad (D-ND), and other Democratic congressional leaders, have been quietly trying to work out compromises over the last few weeks that the budget resolution conference committee can ratify.

The day after conferees first met last week, OMB Director Rob Portman sent a letter to Congress, threatening presidential vetoes of any appropriations bills that exceed the amount requested in President Bush's original FY 2008 budget. The timing of Portman's letter was intended to suggest sudden White House fiscal disciplinarianism. The budget resolution will set overall spending and revenue targets for fiscal 2008-2012, including the specific FY 2008 discretionary spending total — which is expected to be about $20 billion above the president's request. Given the president does not have authority to veto the congressional budget resolution, Portman took a shot at the spending bills that might result from the budget blueprint. The president does have authority to veto spending bills.

The Portman letter was more about power struggles in Washington than it was about fiscal discipline. Conrad responded to Portman's letter in the *Washington Post* on May 12: "After racking up more than $3 trillion of new debt under its watch, the Bush administration now pretends to be fiscally disciplined by threatening to veto

appropriations bills."

As the House and Senate continue to negotiate over the total for discretionary spending, in addition to other issues, Conrad was arguing that the White House has sent an ironic message to Congress about fiscal discipline. Conrad, other Democrats and many fiscal conservatives have pointed out that the last six years have seen some of the worst fiscal management and debt accumulation in history — and many blame Bush for this situation. Now, as the Democrats wrestle with their first budget resolution during the Bush administration, the president says he is finally "serious" about fiscal discipline.

Democrats in Congress are certainly serious about passing a final budget — something their GOP counterparts were significantly worse at achieving, having failed to enact one in three of the last five years. The budget resolution sets an outline for subsequent tax and spending bills and is an early test of the Democrats' ability to prove they can govern. It is also essential in re-establishing PAYGO rules in the Senate — a crucial step in enacting more fiscally responsible legislation in the future.

While the conference committee is closing in on a final agreement, there are still a number of issues yet to be resolved:

- **The Baucus Amendment**: a provision in the Senate version of the resolution dedicating the $132 billion surplus *projected* for fiscal 2012 to pay for extending popular tax cuts over 2010-12, such as those benefiting married couples and the child tax credit, while fixing the estate tax at 2009 levels.

  The Senate indicated a preference to waive the offset requirements for certain tax breaks affecting the middle class and family farms, given that the Baucus amendment passed on a 97-1 vote, far in excess of the 60 votes required to waive the Senate's PAYGO rules. The House is less comfortable with that proposal, and it appears negotiators are trying to design a "trigger" mechanism in the House that would allows extensions of tax cuts expiring in 2010 under the Baucus Amendment to go forward only if surpluses actually materialize. This "trigger" would apply to legislation in the House but not the Senate. If the government does not produce surpluses in 2010, the tax cuts would have to be offset with spending cuts or other tax increases, as under the PAYGO rule.

- **Reconciliation Instructions**: The House version seeks special procedural protections from filibuster and amendment in the Senate, afforded by a "reconciliation instruction" to expand direct government aid to college students by cutting private lender subsidies. Conrad opposes instructions to the Education committees; he is on record saying that reconciliation is meant to be reserved for deficit reduction. He notes that Democrats criticized Republicans for misusing the reconciliation process and does not want Democrats to repeat those errors. Accordingly, Conrad does not like the precedent the House would set, since they only set aside a paltry $75 million in savings.

- **Discretionary Spending Caps**: The House and Senate are roughly $7 billion apart, with the Senate proposing a $948.8 cap on overall discretionary spending and the House proposing $955 billion. Rumors on Capitol Hill have pointed to a compromise figure tilting toward the House level. The numbers fly in the face of Portman's warning that he will recommend a veto of any spending bill that exceeds President Bush's discretionary FY 08 budget request of $933 billion.

The conferees have a lot to work out in a tightening timeframe if they intend to not extend much beyond today's (May 15) deadline for Congress to produce a budget resolution. The appropriations cap in the budget resolution is particularly important for the appropriations committees, which are permitted to report their spending bills to the floor of their respective chambers starting today. Without the guidance the budget resolution provides, the spending process becomes more of a free-for-all, first-come, first-served, with the faster-acting subcommittees leaving budget crumbs for the slower ones.

Conrad and other budget leaders are still more focused on finishing the budget before appropriators are forced to move ahead on their own — likely by the end of this week — than on the premature threats issued by Portman.

Open House Project Calls for New Era of Access

At a briefing in the U.S. Capitol on May 8, the Open House Project, a collaborative effort by government information experts, congressional staff, nonprofit organizers and bloggers to develop attainable reforms to promote transparency in the House of Representatives, publicly launched its new report and recommendations. The project was initiated and is managed by the Sunlight Foundation, a nonprofit that strives to use the Internet and technology to ensure greater government transparency and accountability.

The Open House Project recommended a series of technological reforms that would increase transparency and public access to the work of the House, as well as the elected leaders themselves. The project's report, *Congressional Information and the Internet*, included chapters explaining each major area for reform, including legislative data, member websites, congressional research materials and more. More than 30 groups from across the political spectrum participated and supported the project, including the Center for Responsive Politics, DailyKos, the Heritage Foundation, and OMB Watch.

Strikingly, regardless of ideological leanings, the groups all found common ground in the principle that government, and Congress specifically, should be more open to the public. "The Open House Project convened a diverse, bipartisan group of experts to help open the proceedings of the House of Representatives so it can be the transparent, open-source kind of legislature appropriate for the 21st century" said Ellen Miller, executive

director of the Sunlight Foundation.

The May 8 briefing included statements of support from House Minority Leader John Boehner (R-OH) and Rep. Brad Miller ☼ (D-NC), the chair of an influential subcommittee of the Science and Technology Committee, further underscoring the bipartisan nature of government transparency as an issue. "Good government isn't a liberal idea. It isn't a conservative idea," said Boehner. Miller followed by pointing out the practical dynamics of how transparency creates a more accountable and responsible government when he said, "Never underestimate the deterrent effect of being embarrassed."

House Speaker Nancy Pelosi (D-CA), also sent the group a letter welcoming the Open House Project report and expressing interest in using technology to improve communication and transparency of the House.

The Open House Project's suggested reforms include:

- Legislation Database — publish legislative data in structured formats
- Preserving Congressional Information — protect congressional information through archiving and distribution
- Congressional Committees — recognize committees as a public resource by making committee information available online
- Congressional Research Service — share nonpartisan research beyond Congress
- Member Web-Use Restrictions — permit members to take full advantage of Internet resources
- Citizen Journalism Access — grant House access to non-traditional journalists, including bloggers
- The Office of the Clerk of the House — serve as a source for digital disclosure information
- The Congressional Record — maintain the veracity of a historical document
- Congressional Video — create open video access to House proceedings
- Coordinating Web Standards — commit to technology reform as an administrative priority

The group practiced what it was preaching to Congress by using technology to develop its recommendations online in a collaborative and fully transparent way. Tools used by the group included an online list-serve, a blog, a project wiki and a YouTube video promoting the project.

As next steps for the Open House Project, those involved in the project will promote the recommendations more broadly to the House — and eventually the Senate — and explore the possibility of getting the legislators to champion these ideas for actual implementation.

EPA Increases Information on Dioxin

The U.S. Environmental Protection Agency (EPA) announced a final rule on May 10 to increase reporting of dioxin compounds, some of the most potent carcinogens, under the Toxics Release Inventory (TRI) program.

In accordance with the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986, all facilities have been required to report the combined amount of seventeen dioxin and dioxin-like compounds that are released or transferred from a facility. EPA is now expanding the reporting to include requirements that facilities report on each compound individually, beginning June 9. Such detailed reporting will enable EPA to more accurately track the toxicity of dioxin releases at a facility, as the different compounds have varying levels of toxicity. This "toxic equivalent" (TEQ) — a weighted toxic value using the most toxic compound as a baseline — provides a more accurate and useful comparison of facility releases. The new reporting should also allow communities to better determine the level of risk posed from dioxin and dioxin-like compounds released in their area.

Dioxins, unintentional byproducts of combustion and industrial chemical processes, are extremely toxic and mobile. Typically released as airborne pollution, they often contaminate air, soil, sediments and food, causing cancer, reproductive problems, and developmental delays. Not naturally found in the environment, dioxins are entirely a human creation with no known "safe" level. TRI requires disclosure of any release greater than a single gram, as opposed to the five-thousand pound threshold of other toxic chemicals. In 2005, more than 1,200 facilities released or disposed of approximately 84,500 grams, or 186 pounds, of dioxin compounds.

While this increased specificity in dioxin reporting is an improvement, it seems a very minor advance in the face of the larger rollbacks promulgated by EPA's December 2006 rule change, which reduced reporting on more than 600 other chemicals tracked under TRI. The December rule raised the reporting threshold for most chemicals from 500 pounds to 5,000 pounds, of which up to 2,000 pounds can be released directly to the environment.

DHS Doesn't Share Well with Others

The Homeland Security Act of 2002 granted the Department of Homeland Security (DHS) statutory authority to coordinate information-sharing networks with state and local governments. As the five-year anniversary of the creation of the Department approaches, along with the six-year anniversary of the 9/11 attacks, the U.S. Government Accountability Office (GAO) has found that DHS is falling short of its responsibility to effectively share information within the federal government, or with state, local and tribal governments and the private sector.

Congress created DHS to better coordinate homeland security efforts across the federal government. A large piece of the agency's mission is managing homeland security information and ensuring that the right information gets to the right people at the right time. Of particular importance is providing first responders and state and local governments with timely access to valuable nationwide information-sharing networks.

Despite these needs, a new GAO report and recent GAO testimony before the House Homeland Security Subcommittee on Intelligence, Information Sharing and Terrorism Risk Assessment find that DHS is not fulfilling its responsibilities. "While DHS is responsible for coordinating these network and system efforts among federal, state, and local governments, it has not done so effectively with regard to its primary information-sharing system and two key state and local initiatives," states the report.

GAO testified on May 10 before the subcommittee that DHS failed to coordinate with state and local governments in developing the Homeland Security Information Network (HSIN), the agency's leading web-based application to share homeland security information with the federal government, all fifty states and local governments:

> DHS did not work effectively with two key Regional Information Sharing Systems program initiatives. This program, which is operated and managed by state and local officials nationwide, provides services to law enforcement, emergency responders, and other public safety officials. However, DHS did not coordinate with the program to fully develop joint strategies and policies, procedures, and other means to operate across agency boundaries, which are key practices for effective coordination and collaboration and a means to enhance information sharing and avoid duplication of effort.

GAO's testimony states that, as a result, information sharing may not be occurring, and HSIN may be an unnecessary duplication of already-existing programs. Rep. Bennie Thompson ☼ (D-MS), chairman of the House Committee on Homeland Security, stated that "Every month, only 6% of HSIN law enforcement users and only 1% of counter-terrorism and emergency management users actually post something on the system."

In response to the GAO report, DHS has agreed with the findings and committed that within 60 days of the report's release, DHS will provide an update to the relevant committees on a series of agency actions to meet GAO's recommendations.

Also of concern is the failure to develop government-wide policy for sensitive but unclassified (SBU) information. The Office of the Director of National Intelligence (ODNI) reported that 107 separate SBU categories of information have been created since 9/11. The office concludes, "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."

The Secretary of DHS and the ODNI were required by a Dec. 16, 2005, memo from

President Bush "to standardize procedures for sensitive but unclassified information." The Information Sharing Environment (ISE) plan, established under ODNI, states that policy recommendations will be submitted to the White House in first quarter of 2007, but no such plans have been publicly released.

The Democratic and Republican leaders of the Senate Homeland Security and Governmental Affairs Committee submitted a May 1 letter to the Secretary of DHS and the Director of National Intelligence inquiring into the status of the standardization of SBU policies. "If we are to prevent future terrorist events and be better prepared to respond to such events, as well as natural disasters, there must be better information sharing between federal agencies and with our state, local, and tribal partners and the private sector," said Sens. Joseph Lieberman (ID-CT) and Susan Collins (R-ME), respective chairman and ranking member of the committee. They continued, "We believe that prompt attention to the standardization of SBU designations is essential to improving information sharing."

DHS and ODNI have yet to issue a response to the senators' letter.

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In This Issue

Lobby Reform Bill Passes House without Grassroots Lobbying Disclosure

By a vote of 396-22, the House approved new lobbying reform legislation on May 24 when it passed the Honest Leadership and Open Government Act of 2007 (H.R. 2316). The bill increases the reporting requirements for registered lobbyists, establishes a new electronic disclosure system, imposes new penalties for violating lobbying laws, and includes the controversial proposal to require registered lobbyists to report their bundled campaign contributions (H.R. 2317). The bill will now go to conference committee with a similar Senate bill that was passed in January.

The bill contains several important reforms including expanding the rules governing

registered lobbying and requiring electronically filed quarterly reports, which would be available to the public. Lobbyists and firms that employ them would have to certify they have not provided any gift, including travel, to a member of Congress. It also would amend House rules to bar contact with a member's spouse who serves as a lobbyist and require members and senior staff to disclose job negotiations to the ethics committee after they leave Congress, and create penalties for attempts to influence partisan hiring by outside firms. The House bill also doubles the civil penalties for violating the disclosure rules, from $50,000 to $100,000, and adds criminal penalties of up to five years for those who "knowingly and corruptly" fail to comply.

The Democratic leadership in the House filed two lobby reform bills on May 15, H.R. 2316, and a separate bill to require registered lobbyists to report their bundled campaign contributions, H.R. 2317. Neither bill included grassroots lobbying disclosure, but Rep. Martin Meehan ☼ (D-MA) offered it as an amendment during the Judiciary Committee's mark up on May 17. In introducing his amendment, Meehan made important clarifying points. "Many different groups are trying to distort what the amendment will and won't do . . . This bill does not cover groups or individual people. This amendment only covers firms retained by clients to engage in these communication campaigns. This bill will not require average people interested in their government to suddenly register as lobbyists."

However, the amendment faced strong opposition from both Democratic and Republican committee members. Rep. Artur Davis ☼ (D-AL) commented during the hearing, "Imposing a reporting requirement does create a burden. My concern is that the individuals, or the entities rather, who will most likely clear that burden, are the well-heeled, those on the corporate side, as opposed to those who may be more on the public interest side." The amendment was rejected by the committee. Given the defeat and strong reaction during mark up, Meehan decided against bringing up the provision again when the bill reached floor debate.

The House Judiciary Committee made slight alterations to the two lobbying reform bills before they went to the floor. The committee approved H.R. 2316 after Chairman John Conyers (D-MI) successfully added a manager's amendment which made three changes to the bill. One of the changes was the removal of the "revolving door" provision that was originally part of H.R. 2316, which would have extended the prohibition on lobbying from one year to two after a lawmaker or senior staff member left Congress. This turned out to be very unpopular among House members who expressed a concern about retaining highly qualified staff and their own future income. The revolving door measure seemed to be voluntarily dropped in return for support of Rep. Chris Van Hollen's (D-MD) bundling bill (H.R.2317).

Retreat on the revolving door provision received negative media attention, especially after many freshman Democrats campaigned on a platform promising to change ethical standards in Congress. For example, a *Boston Globe* editorial titled "It came from the ethics swamp" lamented that the "revolving door provision was allowed to die ostensibly to clear the way for a more significant reform: a bill that would require disclosure by

lobbyists who sponsor 'bundled' campaign contributions."

The manager's amendment changed the details of the provision requiring members and congressional staff to disclose employment negotiations to the Ethics Committee, which does not disclose the information, as opposed to notifying the House Clerk's office, where the information would be public. Additionally, a provision to disclose who is behind various coalitions that lobby was changed to exempt nonprofit coalitions from disclosing. A measure to prohibit lobbyists from sponsoring extravagant events at political party conventions was also resoundingly voted down.

Over forty amendments were submitted to the Rules Committee, but only five were allowed for floor consideration. The House adopted a Republican "motion to recommit" with further reforms. These removed the House gift rules exemption for state and local governments and public universities, placed restrictions on former lobbyists who take jobs on Capitol Hill ("reverse revolving door"), and required more detailed disclosure of lobbying for earmarks. A Republican-sponsored change was also approved that expands the bundling provision to cover contributions lobbyists arrange for outside political action committees.

The bundling provision covers campaign contributions of $200 or more per quarter collected by registered lobbyists and forwarded to candidates or their political committees, and $5,000 or more bundled from all federal political action committees, including independent 527s. The new lobbying disclosure requirements would force lobbyists to disclose on a quarterly basis, instead of semi-annually, and the threshold to trigger reporting would be $10,000 per quarter. The lobbying disclosure information would be made available through a searchable database on the Internet — and the data would be linked with campaign contributions recorded by the Federal Election Commission.

In addition to the bill not addressing grassroots lobbying disclosure and the revolving door, it also did not address ethics enforcement. Advocates have been calling for an independent office to provide enforcement. The House is expected in June to provide a plan for ethics enforcement.

IRS Urged to Use Terror Watch Lists to Check Nonprofits

When it comes to the effectiveness of using watch lists to identify terrorist threats, theory and reality yield very different results. On May 21, the Treasury Inspector General for Tax Administration (TIGTA) issued a report criticizing the Internal Revenue Service (IRS) for not using the FBI's Terrorist Screening Center's (TSC) consolidated watch lists to check nonprofit tax filings for possible matches to suspected terrorists. At the same time, non-governmental groups have criticized the watch lists as being riddled with errors and said no clear reason exists as to why some people or groups are put on the lists. Additionally, a 2005 Justice Department Inspector General report confirmed many

deficiencies with the TSC.

The TSC was created December 1, 2003, and is run by the FBI to consolidate terrorist watch lists and provide 24-hour, 7-day-a-week operational support for federal, state, local, territorial, tribal, and foreign governments as well as private sector screening across the country and around the world. TIGTA assumes the larger TSC list would produce better information than Treasury's own Office of Foreign Assets Control's (OFAC) list of 1,600 entities and individuals officially designated as terrorists.

Use of the OFAC list by private companies for similar screening has caused innocent people to be flagged as terrorists, creating problems with everything from buying a car to getting a job. This led the Lawyer's Committee for Civil Rights of San Francisco Bay Area (LCCR) to file a lawsuit against the Treasury Department on May 16 to force disclosure of public records that would document the extent of the problem. This raises the question of why the IRS should expand its screening program before fundamental problems with the lists are addressed, including lack of a process to remove erroneous listings.

The TIGTA report primarily addressed inefficiencies in the IRS process, including failure to automate its list checking and manually screening tax-exempt status applications (Form 1023) and annual information reports (Form 990) for "Middle eastern sounding names." It based its recommendations on **two questionable assumptions**:

- That use of the OFAC list with 1,600 names instead of the TSC list, which has over 200,000 names, "increases the possibility of identifying individuals already known to be or suspected of being involved in terrorist-related activities"
- That charities and nonprofits are a "significant source of alleged terrorist activities."

The Treasury Department has never provided documentation to back up its claims that the charitable sector is a significant source of terrorist financing or activity. It is equally possible that expanded list checking would not produce terrorist links, since the U.S. nonprofit sector is not a significant source of terrorist financing. In fact, only six of the 43 charities on OFAC's list are based in the United States and subject to IRS regulation.

The report recommended that the IRS Director of Exempt Organizations, "in coordination with key IRS and external stakeholders, develop and implement a long-term strategy to automate the process used to initially identify potential terrorist activities related to tax-exempt organizations" and "evaluate whether more comprehensive terrorist watch lists, including any applicable TSC information, should be used ..." The IRS has accepted the recommendations and "agreed to meet with Federal Bureau of Investigation personnel to evaluate how the TSC information may serve their needs and will evaluate whether other, more comprehensive terrorist watch lists can be used."

By agreeing to automate its process, whatever watch list the IRS uses will be checked

against data submitted in Forms 1023 and 990, including:

- names, titles and addresses of officers, directors and trustees
- names and addresses of the five highest paid employees and independent contractors
- contributors of more than $5,000 per year.

The question then becomes whether the results will provide useful leads to the IRS Criminal Investigation Division or FBI. TIGTA assumes that the minimal results to date are due to the inefficient manual system and use of the smaller OFAC list. The report says that the IRS only identified 93 potential connections between October 2005 and September 2006 based on Form 1023. Of these, only three merited further review, and one was cleared and granted tax-exempt status. The other two were still under review as of December 2006. List checking against Form 990 between April 2005 and October 2006 produced 201 potential connections, and further review revealed that none were positive matches.

The OFAC list is composed of "Specially Designated Nationals and other persons whose property is blocked, to assist the public in complying with the various sanctions programs administered by OFAC." The designation process has been criticized for being arbitrary, using secret evidence and lacking a meaningful independent review of OFAC decisions. The larger TSC list combines data from federal agencies, states, and local government and the FBI's massive Terrorist Identities Datamart Environment (TIDE). According to a March 25, 2007, *Washington Post* article "Terror Database has Quadrupled in Four Years," TIDE is a huge database used by various agencies to create watch lists. Its manager, Russ Travers, told the *Post*, "The single biggest worry that I have is long-term quality control."

This raises legitimate questions about whether the IRS should use the expanded list. The lack of standards and the inability of erroneously listed persons to get taken off the list create huge potential for mistakes and negative consequences for innocent victims. This has been amply demonstrated with the OFAC list. A report from LCCR details multiple examples of how many Americans are being denied jobs and various services because their names are similar to others who are designated. After Treasury failed to respond to its Freedom of Information Act requests to learn more about these impacts, LCCR sued to force further disclosure. The complaint notes that Treasury has no process for removing names placed on the list erroneously, or for distinguishing common names similar to those on the list, saying "An increasing number of private companies, including banks, mortgage companies, car dealerships, health insurers, landlords and employers screen consumers names against the OFAC list . . . Consumers discover the OFAC list when they are told that they cannot make a purchase, open an account or do business because their name appears on a terror list."

Use of additional lists can only exacerbate the problems experienced with the OFAC list. For example, adding names from state lists could cause nonviolent advocacy groups to be

flagged. Another *Washington Post* story "Ala. Ends Terror Watch List," published May 28, 2007, details how a state terror list had to be taken down from the Web because it listed environmental, gay rights and other groups.

Congress Passes Supplemental; Cease-Fire in the Capital

The struggle between Congress and the White House over the $120 billion supplemental war funding bill ended last week when, on May 24, Congress sent President Bush a version of the bill that he signed into law. The final bill (H.R. 2206) — the largest supplemental spending bill in the history of the United States — also raises the minimum wage for the first time in over ten years, a fact that seems to have been lost in national news coverage.

Bush vetoed Congress' first supplemental bill on May 1 because the legislation included a timetable for the withdrawal of U.S. soldiers from Iraq. Democrats in Congress removed those timetables and did not include any language about redeployment of soldiers out of Iraq, but did provide benchmarks for the Iraqi government to meet.

The supplemental, which provides funding for four months, specifies 18 political and legislative benchmarks applying theoretically to the Iraqi government. President Bush is also required to issue periodic reports on Iraq's progress, starting in late July. If the Iraqis fall short, they could forfeit U.S. reconstruction aid, though the president is free to waive any consequences the Iraqis might face.

Despite the final compromise with the president over the bill, 63 percent of Americans believe that U.S. soldiers should leave Iraq by the end of 2008, according to a *New York Times*/CBS News poll published May 25. And many key legislators in Congress were also less than pleased, including Appropriations chair David Obey (D-WI), the mastermind behind the compromise. Obey said:

> I hate this agreement. I'm going to vote against it even though I negotiated it.... But I take some comfort in the knowledge that even Babe Ruth struck out more than 1,300 times.

After the House vote on the bill, Speaker Nancy Pelosi (D-CA), who voted against the measure, sought to assure antiwar Americans, saying the debate over the war will continue. Pelosi was referring to the upcoming defense appropriations and authorization bills as well as other legislation that Congress will consider throughout the rest of 2007.

The Senate vote was 80-14. Unlike the House, where 140 Democrats opposed the measure and 86 supported it, Senate Democrats supported the bill 36-10. An exception was Illinois Sen. Barack Obama ☼, who said, "This vote is a choice between validating the same failed policy in Iraq that has cost us so many lives and demanding a new one.

And I am demanding a new one."

The bill provides the full complement of the war funding the president says is needed for the rest of Fiscal Year 2007. Most of the funding, just under $100 billion, goes toward continued military operations in Iraq and Afghanistan; non-military spending is spread among:

- Gulf Coast hurricane recovery ($6.4 billion)
- emergency aid to farmers ($3 billion)
- conversion of closing U.S. military bases ($3 billion)
- drought and natural disaster relief ($1 billion)
- improvements to mass-transit and port security ($1 billion)
- emergency road repairs ($0.9 billion)
- children's health care ($0.6 billion)

Additional domestic spending items cover state HIV grant programs, mine safety research, youth violence prevention activities, and pandemic flu protection.

Less noticed, with all the attention focused on the war, is the bill's federal minimum wage package, which phases in an increase to $7.25 an hour from $5.15 over two years, accompanied by a $4.8 billion package of business tax cuts that are fully offset. Congress had not changed the minimum wage in a decade, the longest such stretch since a federal minimum was established in 1938. Yet the provision was so low-profile in the debate on the supplemental that even longtime champion of the increase, Sen. Edward Kennedy ☼ (D-MA), voted against the bill.

While the supplemental funding debate has ended, there is little doubt the issue of removing American soldiers from Iraq and the general course of the war will be taken up again in Congress with the FY 2008 defense authorization and appropriations bills to be debated this summer.

Congress Approves Budget Resolution

On May 17, Congress achieved a basic benchmark of responsible fiscal governance — passing a final budget resolution. While this accomplishment has become somewhat of a rare event in Washington (spending in three of the past five fiscal years has not been guided by a budget resolution), and the votes were close (Senate 52-40, House 214-209), Democrats were able to reach final compromises on a few contentious issues.

The budget resolution is a blueprint for government spending for the upcoming fiscal year and the four subsequent years. The final FY 2008 resolution establishes a $954 billion discretionary cap for the twelve federal spending bills that will be passed later in 2007, which is $21 billion higher than the president's request. The House and Senate

appropriations committees can now officially begin their work for FY 2008.

The fiscal 2008 budget also returns strong "pay-as-you-go" (PAYGO) rules to the Senate. With slight differences in the time frames to which the rules apply, the Senate's version mirrors the PAYGO rules adopted by the House earlier this year as part of the Democratic leadership's new rules package.

In addition to Senate PAYGO rules, the budget:

- Significantly increases funding for children's health care, education, and veterans health care
- Calls for a one-year "patch" for the AMT
- Increases the national debt limit to $9.8 trillion, an increase of $800 billion
- Fully funds the president's request for war spending through Fiscal Year 2009

Before the House and Senate agreed to the spending blueprint, conferees had to iron out a few key differences between each chamber's initial budgets.

Discretionary spending caps: The Senate's version called for $948.8 billion in discretionary spending. However, the final total, $954 billion, is much closer to the House's initial request of $955 billion. This discretionary spending cap is $21 billion higher than the president's $933 billion suggestion.

OMB Director Rob Portman issued a pre-emptive veto threat on May 11 in a letter to House Budget Committee Chairman John Spratt (D-SC). In the letter, Portman said he would recommend the president veto "any appropriations bill that exceeds [the president's] request." Portman was referring to spending bills that are developed later in the year that derive from the limits set by the budget resolution.

Baucus Amendment: The Senate's budget contained a provision, known as the Baucus Amendment (named for the sponsor, Sen. Max Baucus ☼ (D-MT)), that would claim the projected $132 billion surplus in fiscal 2012 for additional tax cuts aimed at the middle class and a further roll-back of the estate tax for the wealthy. The amendment, which reduces the projected surplus to $41 billion, was approved by conferees in the final version, but the future tax cuts will still face PAYGO rules and a so-called "trigger" in the House. The House trigger mandates that future tax cuts not exceed the lesser of either $179.8 billion or 80 percent of the 2012 surplus and requires that the surpluses currently projected for 2012 actually materialize.

Spratt describes the budget as "not the perfect solution, but it is a long step in the right direction." The fiscal 2008 budget signals a commitment to fiscal responsibility while increasing funding for national priorities. But perhaps more importantly, by establishing a spending framework and implementing PAYGO rules, the budget serves as a guide by which these goals can be met.

Congress Demands Answers to USDA Security Breach

On April 13, a user of FedSpending.org, an online database on government spending run by OMB Watch, discovered that the U.S. Department of Agriculture (USDA) was publishing personally identifiable information about a loan she received from the agency.

The data in question appears in the Federal Assistance Award Data System (FAADS), which is a government database of all federally provided financial assistance (not including procurement). The database is run by the U.S. Census Bureau. FedSpending.org makes FAADS and publicly available data about government contracts accessible to the public in a searchable format in order to shine a light on government spending patterns. The individual found her Social Security number embedded in a field that provides a unique identifier about the financial award. After the breach was discovered, the FAADS database was completely removed from the Internet, and USDA and the Census Bureau began to request other institutions who posted the data to remove it from the public sphere. (Read more about OMB Watch's involvement in and response to this issue.)

On April 27, Sens. Barack Obama (D-IL) and Tom Coburn (R-OK) wrote a letter to USDA Secretary Mike Johanns stating that the disclosure of personally identifiable information was "improper and unacceptable." Obama and Coburn called on USDA to provide three things by May 18:

1. An assessment of the harm caused by disclosing Social Security numbers and a report on utilization of the credit monitoring service;
2. A report on what is being done to ensure that data security problems are fixed; and
3. A detailed plan and timeline for adopting a new unique identifier without disclosing personally identifiable information.

On May 2, at the request of Rep. Zack Space (D-OH), the House Agriculture Committee held a hearing to review the release of personal information by the USDA. At the hearing, USDA Chief Financial Officer Charles Christopherson, Jr. testified about the incident, providing additional information and some answers for Obama and Coburn. Christopherson testified that since first being notified of the breach, the USDA had narrowed its estimate of the number of affected individuals from 93,000 down to 38,700. These individuals participated in one of two different loan programs within the USDA — the Farm Service Agency and Rural Development.

The USDA said it contacted each of the affected individuals by mail from April 23 through May 1 to notify them of the security breach and offered free credit monitoring services to all those affected for 12 months.

While USDA testified it acted quickly to discover the extent of the problem and identify solutions, it attempted to downplay the breadth of the security issue. USDA testified it knew of 92 entities or individuals who had signed up to receive quarterly updates about FAADS data from the U.S. Census and that USDA had begun contacting each of them. At the time of the hearing, USDA said it had been able to contact 65 percent (58) of those entities. Most committee members, especially Rep. Earl Pomeroy ☼ (D-ND), were not at all satisfied with the 65 percent success rate. Unfortunately, USDA implied this was the extent of the entities that had downloaded the data from the U.S. Census website and possibly still had copies of the database.

In truth, the USDA has absolutely no way of determining the number of times the data had been downloaded or the number of people who have copies of the older data that contained personally identifiable information. There is no requirement to sign up or register to download the information from the Census or FedSpending.org websites. USDA could have made a more accurate estimate of the exposure of this data by compiling website visit statistics for the FAADS section of the Census website and other popular sources of the data like FedSpending.org. In the month of April alone, there were over 680,000 searches of the FAADS section of FedSpending.org.

Currently, the USDA has regenerated unique identifiers for the data in question and the Census Bureau is reloading the FAADS database. The Department of Commerce (where the Census is located) claims all FAADS data from 1996 through the third quarter of 2006 will be made available again through the FAADS database on the Web by June 1.

Congressional Hearing Reveals Flaws in Outsourcing Tax Debt Collection

On May 23, the House Ways and Means Committee heard testimony on the Internal Revenue Service's (IRS) private debt collection program that lets outside contractors pursue federal tax debts. At the hearing, Chairman Charles Rangel (D-NY) requested that the IRS not issue additional contracts to private collection agencies (PCAs).

The hearing resulted in an extensive discussion of the costs and benefits of the program, as well as a deeper understanding of how the program works and what is known about its results since it began in September 2006. The hearing's witnesses often made the point that IRS employees could perform the debt collection work more effectively, cheaper, and safer than the PCAs.

Nina Olson, chief of the National Taxpayer Advocate Service, an independent agency within the IRS to protect and resolve taxpayer issues, opposes the program. She testified that IRS employees are more productive in part because they can use tools that PCAs cannot. The only way PCAs can bring taxpayers into compliance is to make telephone calls and send letters to noncompliant taxpayers. PCAs have access to only limited information about taxpayers, out of concerns over taxpayer privacy. They are not

empowered to enter into complex payment agreements. IRS employees, on the other hand, can see a taxpayer's complete records and are empowered to make special arrangements when required by circumstances. Olson testified that contrary to claims that the cases that have been outsourced are "easy," many require the discretion and personal information that only IRS employees can provide.

As a result, Olson said IRS employees bring in $20 for every dollar IRS spends, whereas PCAs bring in only four. Acting Commissioner Kevin Brown, however, said that the proper ratio for work done by IRS employees was actually closer to 13:1.

Without these tools, PCAs have trouble communicating with taxpayers. When PCAs call taxpayers by phone, they must confirm whom they are speaking with, but they cannot reveal private information about the tax debt they are pursuing. To confirm their identify, the taxpayers — on faith — have to divulge their Social Security numbers over the phone, which the PCA representative will then compare to his or her copy of the taxpayer's Social Security number.

Rep. John Lewis ☼ (D-GA) presented disturbing audio tapes of phone conversations between PCAs and taxpayers, as well as answering machine messages PCA representatives left for taxpayers. (See the committee's written transcripts.) PCA employees did not identify themselves, the nature of their business, or the purpose of their calls, and haggled with taxpayers to obtain their Social Security numbers. The taxpayers in the conversations refused to reveal their Social Security numbers and responded angrily when PCA employees asked repeatedly for the numbers but did not disclose the purpose of the conversations.

Most would agree this type of interaction is unacceptable, but PCAs claim it is unusual. Witnesses who supported the program cited a survey that found taxpayers who had been called by the PCAs reported a 94 to 96 percent "overall satisfaction" rate. The report was conduced by the PCAs themselves, however, and IRS employees typically score in the same range.

Further casting doubt on the validity of the survey cited, Gregory D. Kutz of the Government Accountability Office (GAO) testified the PCAs used flawed methods when they obtained data for the survey. The three PCAs administered the survey only for the cases where the taxpayer was cooperative. Each used different methods to select respondents, and only taxpayers whose identities had been confirmed were surveyed. What's more, GAO was unable to verify the results of two of the surveys, as the PCAs failed to keep the necessary records. Kurtz testified that the results of the survey were not valid because of these methodological flaws.

Thomas Penaluna, the president of the CBE Group, a PCA, testified there has been only one complaint against the PCAs that IRS has been able to validate. However, IRS evaluates complaints only when PCAs "self-report" them, and Olson testified the IRS uses a narrow definition of both what a complaint is and what a valid complaint is.

(Examples of complaints.)

Chairman Rangel questioned Brown, the acting commissioner, about the incentive structure under which PCAs operate to collect taxes. Rangel proposed that because the private company gets to keep 21 to 24 percent of the taxes it is able to collect, the situation creates an adversarial relationship between the taxpayer and the PCA.

IRS employees, on the other hand, are prohibited from being compensated based on how much money they bring in as an individual in order to prioritize customer service and preserve taxpayers' rights. This creates an environment where the IRS can meet the needs of both the taxpayer and the federal government, while private companies have incentives to do whatever they can to bring in as much money as possible.

Underfunding the IRS

Brown, who supports the program, claimed underfunding of the collection function of the IRS made it necessary to outsource debt collection. Even if Congress increased the collection function's budget, Brown said these cases would not be pursued, as IRS would rather use the additional funding to pursue cases that would produce a high yield. According to Brown, the average tax owed by taxpayers whose cases are handled by PCAs is about $5,000.

Some members questioned why Congress had not fully funded the collection functions of the IRS, which would allow the agency to pursue all cases, including those that have been outsourced. Brown acknowledged that if IRS were fully funded, it would not need to run the outsourcing program.

The IRS has spent $71 million to get the program started, while PCAs have collected only $19 million, $3 million of which has been kept by the PCAs. If that money had been spent on IRS employees, by the IRS's rough return-on-investment ratio, the agency could have brought in $962 million.

States Battle Administration on Vehicle Emissions

At least 12 states are considering developing regulations for vehicle greenhouse gas emissions that would exceed federal standards. These states cannot promulgate the rules because the primary federal framework for air pollutant regulation, the Clean Air Act, reserves the federal government's right to block state efforts. Critics are charging the Bush administration with impeding the environmental progress of states and delaying meaningful regulation of vehicle emissions.

In 2002, California Gov. Gray Davis (D) signed into law the California Clean Cars law. The legislation called for state regulators to impose strict emissions standards for new vehicles beginning with model year 2009. Eleven other states (Connecticut, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island,

Vermont and Washington) have adopted similar legislation. Various state agencies are seeking to fully enforce the Clean Cars laws, but their plans require federal approval.

The controversy raises concerns over the sovereignty of the states in pursuing environmental regulations stricter than federal standards. The supremacy clause of the U.S. Constitution reserves to the states a wide range of powers for which the federal government isn't given specific constitutional authority, but the debate over federal versus state roles has continued for most of our nation's history. In the area of environmental regulation, scholars have traditionally viewed the states as having rights to adopt standards which go beyond what the federal government has mandated.

However, the Clean Air Act includes language specifically forbidding states from pursuing emissions regulations for motor vehicles. Section 209 of the act states: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." This was primarily inserted so car manufacturers did not face different standards in various parts of the country.

The act does provide a caveat allowing the federal government to waive the provision. Historically, the U.S. Environmental Protection Agency (EPA) has granted waivers to the states to allow them to implement state-specific regulations. For example, in 2006, EPA granted a waiver to California allowing the state to require on-board displays to monitor emissions from certain diesel trucks.

California requested a waiver in December 2005 in order to pursue its broader vehicle emissions plans, but EPA has yet to decide on the request. If EPA grants California a waiver, it will set the precedent for other states to request waivers to enforce stricter standards, using California's approach as a model. EPA opened the waiver request for public comment and has held two public meetings. The agency has not committed to a timetable for a decision.

Recently, the call for a decision by EPA has grown louder in light of an April 2 U.S. Supreme Court opinion , in which the court found greenhouse gas emissions from vehicles should be studied for harmful effects. If emissions are determined to be harmful air pollutants, they would require regulation under the Clean Air Act. The Bush administration had previously contended greenhouse gases could not be regulated legally under the act, so EPA's waiver authority would not have applied.

In an opinion column published in *The Washington Post*, Govs. Arnold Schwarzenegger (R) of California and Jodi Rell (R) of Connecticut chided the Bush administration for failing to grant or even act on the waiver request. The governors wrote, "It borders on malfeasance for [the federal government] to block the efforts of states such as California and Connecticut that are trying to protect the public's health and welfare."

California has indicated it will file suit against EPA if the agency does not decide on the

waiver in the coming months. On April 25, Schwarzenegger sent a letter to EPA Administrator Stephen Johnson warning him of California's intent to sue if EPA does not make a decision by the end of October.

Critics have also charged the Bush administration with employing delay tactics on developing policies to reduce greenhouse gas emissions. By not deciding on California's request, the administration is further delaying meaningful policy on vehicle greenhouse gas emissions, which it has failed to regulate over the past six years. In a statement, Environmental Defense Senior Attorney Vickie Patton said, "It's time for this administration to give states the green light to fight global warming instead of burying their plans in bureaucracy."

The standoff between EPA and the states comes as President Bush recently signed Executive Order 13432 instructing federal agencies, including EPA, to develop emission reduction policies. Bush issued the E.O. in response to the Supreme Court ruling.

Bush's E.O. and accompanying statements outline a process for studying emission regulations for the remainder of his administration. The E.O. calls for collaboration among EPA and the Departments of Defense, Agriculture and Transportation as well as the White House Office of Management and Budget and Council on Environmental Quality.

However, at no point has the president addressed the issue of California's waiver request. Permitting the states to move forward would allow vehicle emission regulation to begin almost immediately. While the Clean Air Act does reserve the administration's right to deny California's request, environmental federalism principles, a precedent of granting waivers and the Supreme Court's decision strengthen the argument of the states.

Senate Watching Carefully as Risk Guidelines Reemerge

Two senators sent a letter to White House Office of Management and Budget (OMB) Director Rob Portman urging OMB to abandon its plans for government-wide risk assessment standards. The letter comes shortly after the White House indicated it may renew its efforts on finalizing the standards.

In January 2006, OMB issued its Proposed Risk Assessment Bulletin. The Bulletin calls for strict and uniform standards for agency risk assessments. Federal agencies use the process of risk assessment to evaluate the extent to which public hazards may adversely affect health, safety and the environment. Risk assessments are important to scientific and technical understanding of a wide array of issues. They may also be a component of the cost-benefit analyses OMB requires for many proposed regulations.

OMB subjected the Bulletin to a notice-and-comment period and a peer review. Both

commenters and peer reviewers found fault with the proposed guidelines. In comments, OMB Watch and Public Citizen argued the Bulletin, if finalized, would "hinder agency response to risks facing the public" and "taint science with White House politics." The Bulletin was also consistently criticized for reducing agency discretion and attempting to institute a one-size-fits-all approach across a wide range of scientific disciplines and their respective risk assessment methods.

The peer review produced the most damaging criticism of all. OMB asked the National Research Council (NRC) — an arm of the National Academies of Science often providing science policy advice to decision makers — to peer review the Bulletin. In January 2007, NRC completed its review and issued a stinging rebuke.

NRC did not oppose the idea of OMB guidelines on risk assessment but determined the Proposed Risk Assessment Bulletin, in its current form, "could not be rescued." NRC criticized the Bulletin on specific matters such as its manipulation of statistical risk interpretation, which could discount vulnerable populations. More generally, NRC criticized the Bulletin's definition of a risk assessment — which incorrectly defined it as a document instead of a process. Ultimately, NRC found that "the OMB bulletin is fundamentally flawed and recommends that it be withdrawn." It is rare for NRC to make such strong recommendations.

In response to the peer review, OMB tabled the proposal. Lawmakers on Capitol Hill supported withdrawal of the Bulletin. Rep. Bart Gordon (D-TN) said, "Congress has repeatedly rejected one-size-fits all approaches to developing scientific and technical information." He went on to say, "OMB should withdraw this Bulletin promptly and abandon its attempts to micromanage agencies' work."

The issue of the Bulletin did not emerge again until May 9. In an interview with BNA news service (subscription), Susan Dudley, the new, recess-appointed administrator of OMB's Office of Information and Regulatory Affairs, indicated the White House may make a renewed push on the Bulletin. In the article, Dudley is quoted as stating, "The National Academies didn't say 'you shouldn't do this.' They said 'this is a good idea but here are some problems.'" Dudley's statement appears to be at odds with the written recommendations of the NRC peer review.

On May 14, unrelated to the Dudley statement, Sens. Jeff Bingaman (D-NM) and Joe Lieberman (I-CT) sent a letter to Portman urging OMB to permanently withdraw the Bulletin. The letter extensively cites the flaws identified by NRC. In concluding the letter, the senators state, "Finalizing the proposed OMB guidance would impede federal agencies' ability to develop public health and environmental protections, promote public safety, encourage good business practices, improve consumer protections, and efficiently use taxpayer funds."

The fate of the Risk Assessment Bulletin is unclear. However, it is quite likely OMB will make a concerted attempt to impose some form of risk assessment guidance before the

end of the Bush administration. The letter from Bingaman and Lieberman indicates OMB will not be able to do so without Congressional scrutiny, especially since Lieberman chairs the Senate committee that oversees OMB.

Improved FOIA on Hold

On April 12, the Senate Judiciary Committee unanimously passed the Openness Promotes Effectiveness in Our National (OPEN) Government Act, sponsored by Sens. Patrick Leahy (D-VT) and John Cornyn (R-TX). However, the bill is now stuck after an unidentified senator placed an anonymous hold on the legislation that would improve the government's implementation of the Freedom of Information Act (FOIA). Increasing pressure is being brought to bear on the Senate to uncover the hold and move forward with the bill.

The hold prevents the bill from moving forward in the Senate under unanimous consent procedures, even though the House passed similar legislation, the Freedom of Information Act Amendments of 2007, on a strong bipartisan vote of 308-117 on March 14. Placing a hold on legislation is part of the Senate's unwritten code, in which a senator indicates that he or she objects to the legislation and wants it considered under regular procedures. Under regular procedures, which would require floor time for debate, amendments would be in order, and it would be possible for the bill to be filibustered. Such holds are often followed by the concerned senator working with the bill's sponsors to make the fixes that allow non-controversial bills to move forward. On the other hand, if the senator placing a hold chooses to remain anonymous, there is little that the sponsors of a bill can do, especially since it is very hard to use floor time in the Senate for non-controversial bills. In essence, an anonymous hold can become the death knell for non-controversial legislation.

This particular hold has attracted the attention of numerous public interest groups. More than 100 groups signed on to a letter asking Senate leaders to pass the OPEN Government Act as soon as possible. The groups, including Public Citizen, the National Treasury Employees Union and OMB Watch, claim, "FOIA's promise of ensuring an open and accountable government has been seriously undermined by the excessive processing delays that FOIA requesters face across the government." The letter was sent to Senate Majority Leader Harry Reid (D-NV) and Minority Leader Mitch McConnell (R-KY).

The Society of Professional Journalists has established a webpage to encourage people to help identify the anonymous senator responsible for the hold. Those interested in participating are encouraged to contact their senators and inquire if they are responsible for the hold. As Senate offices go on record as not being the source of the hold, the SPJ will eliminate them as suspects. A similar effort by bloggers a few months ago was very effective in helping get the Federal Funding Accountability and Transparency Act passed

after a hold was placed on the bill.

Oversight and Accountability of the Intelligence Community Strengthened

On May 24, the Senate Select Committee on Intelligence passed the 2008 Intelligence Authorization Bill, which includes a number of important open government and accountability measures. Having failed to pass an intelligence authorization bill for the previous two years, the full Senate is expected to consider the measure later this summer, and the House passed the bill 225-197 earlier in May.

"Intelligence Authorization bills are the most important tools we have in Congress to strengthen existing programs and better prepare for the future," stated Sen. John D. Rockefeller IV (D-WV), chairman of the Senate Select Committee on Intelligence. "The Congress failed to pass an authorization bill the past two years. That is unacceptable, and Vice Chairman Bond and I are committed to making sure that it doesn't happen again."

The 2008 Intelligence Authorization Bill would institute a number of important open government and accountability provisions, requiring increased reporting and oversight of the intelligence community:

Inspectors General: creation of an inspector general in the Office of the Director of National Intelligence to oversee the intelligence community and of inspectors general at the National Security Agency (NSA), National Reconnaissance Office (NRO), Defense Intelligence Agency (DIA) and National Geospatial-Intelligence Agency (NGA).

Spending Disclosure: requirement to disclose the total amount of funding requested, authorized and appropriated for the intelligence community. This has been recommended by the 9/11 Commission and others but opposed by the White House.

Contractor Oversight: requirement for intelligence agencies to report to the House and Senate intelligence committees on the number of contractors used and in what capacity. As previously reported, intelligence agencies heavily rely on contractors but, even though a comprehensive study was recently completed, little to no information about such practices has been released.

Anti-spying: restatement that the Foreign Intelligence Surveillance Act is the exclusive means for wiretapping to gather foreign intelligence information. This would prevent the executive from collecting foreign intelligence through such programs as the now-defunct Terrorist Surveillance Program.

Disclosure of Reports: requirement to provide the House and Senate intelligence committees with all of the Presidential Daily Briefings (PDBs) concerning Iraq from 1997 to 2003 and a requirement to publicly disclose a declassified version of the executive

summary of a Central Intelligence Agency Inspector General report on the lead-up to 9/11.

The 2008 Intelligence Authorization Bill is expected to make its way to the Senate floor in June or July, but its eventual fate is uncertain. Sen. Kit Bond (R-MO), Vice Chairman of the Senate Select Committee on Intelligence, opposed some of the reporting requirements, including the requirement to make all PDBs available to the intelligence committees. "Unfortunately, a few amendments were adopted by the [Senate Intelligence] Committee that will make final passage more difficult, but we will continue to work to improve the bill when it gets to the floor and in conference."

Setback on Chemical Security

The effort to establish stronger chemical security measures suffered a significant setback the week of May 21 with the loss of a provision from the Iraq supplemental spending bill that would have prohibited the Department of Homeland Security (DHS) from preempting state law on matters of chemical security. In order to galvanize support for comprehensive chemical security reform, a group of public interest and environmental organizations wrote to Rep. Bennie Thompson ☼ (D-MS), Chairman of the Homeland Security Committee, and Rep. Sheila Jackson-Lee ☼ (D-TX), Chairwoman of the Homeland Security Subcommittee on Transportation Security and Infrastructure Protection. The letter encouraged the members to continue their work on ensuring strong chemical security protections.

In April 2007, DHS finalized chemical security regulations, which included assertions of authority to preempt state chemical security programs. OMB Watch commented on the shortcomings of the regulations. Preemption by DHS may block stronger state chemical security programs, thereby nullifying state programs like New Jersey's that require companies to consider or implement safer technologies and procedures.

Receiving bipartisan support, measures were passed in the House and Senate that would have prevented DHS from nullifying stronger state chemical security programs. Normally, matching provisions in House and Senate legislation all but guarantee the inclusion of the provision in the final legislation reported out of conference. But in this case, during negotiations between the White House and conference committee members, the provision was removed from the final version of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act (H.R. 2206). The *New York Times* reported that, in addition to the White House, the National Association of Manufacturers encouraged members of the conference committee to remove the provision.

Following that action, a coalition of environmental and public interest organizations encouraged the House Homeland Security Committee to move forward on comprehensive chemical security legislation. In a letter sent May 24 to Thompson and

Jackson-Lee, OMB Watch, US PIRG, Greenpeace, National Environmental Trust, United Steelworkers and other unions urged the members "to reintroduce comprehensive chemical security legislation at the earliest possible date."

The groups advocated for the reintroduction of the Chemical Facility Anti-Terrorism Act of 2006 (H.R. 5695), as reported out of committee last year, with important modifications on matters of state preemption, safer procedures and technologies, and accountability. Given the already full congressional schedule, the earliest Congress, which is currently in recess, might be able to begin discussions on new chemical security legislation would be several weeks from now.

Whistleblower Week in Washington Succeeds

The first national Washington Whistleblower Week (May 14-21) highlighted the importance of whistleblowers in our country and urged the Senate to pass new protections for whistleblowers. The week of events included participation by hundreds of whistleblowers and dozens of public interest organizations.

The highlight of the week was a series of panels, held by non-governmental groups in a Senate office building, addressing congressional oversight and legislative efforts to protect whistleblowers. The panel discussions raised topics such as political pressure to influence scientific research, oversight of the Federal Bureau of Investigation, and the performance of the Office of Special Counsel, which is responsible for reviewing whistleblower claims and enforcing the existing protections. The focus on the Senate was an attempt to build on the momentum of the House's March 14 vote of 331-94 to pass the Whistleblower Protection Act of 2007 (H.R. 985). Though President Bush threatened to veto the legislation shortly before it passed, the vote appears to indicate enough support to override a veto.

The focus on the Senate appeared to pay off. Whistleblower protections moved forward in the Senate following the Washington Whistleblower Week event. The Senate Armed Services Committee approved by voice vote an amendment to the National Defense Authorization Act for the Fiscal Year 2008 (S. 567) offered by Sen. Claire McCaskill ☼ (D-MO) to enhance whistleblower protections for employees of Department of Defense contractors.

The amendment, if signed into law, will allow contract employees to pursue jury trials in federal court if the Secretary of Defense fails to issue a timely administrative ruling to any allegations of reprisals brought to the Inspector General. Contract employees of other agencies such as the Department of Energy and the Nuclear Regulatory Commission have already had these protections. The whistleblower legislation passed in the House, H.R. 985, includes similar protections for contractor employees.

Coming to a Dump Near You — Nuclear Waste

The Nuclear Information and Resource Service (NIRS), a nonprofit organization, released a report on May 14 that exposes Department of Energy (DOE) practices of dumping nuclear-related waste in facilities that are unregulated and not designed for radioactive material. NIRS found that DOE's policies and procedures are geared toward the "release of radioactive waste, materials and property from regulatory control."

After reviewing seven DOE/NNSA (National Nuclear Security Administration) sites, NIRS' report discusses various loopholes through which these wastes have continued to be released into the environment.

- "Brokers" licensed to handle radioactive material sell or donate material to other processors not licensed
- Unchecked metal not directly part of nuclear processing (building structures, furniture) is regularly auctioned, exchanged to other federal agencies, donated or rented to public or private entities
- Radioactive waste is mixed with other wastes to be re-characterized as low-level radioactive waste with fewer or no release restrictions

In Tennessee, the leading state in licensing nuclear waste processors, four landfills have been approved to take "deregulated" nuclear waste from licensed processors. These processors frequently have the discretion to determine what waste they have to pay to have processed according to nuclear waste guidelines, and what waste can be considered deregulated. This creates a clear profit incentive for these processors to deregulate more waste.

NIRS found many examples of questionable material redirected into the public sphere. For instance, Los Alamos sends potentially contaminated metal to Rio Rancho landfill in Albuquerque, New Mexico, which is regularly canvassed by Habitat for Humanity for supplies. The landfill does not ensure that the potentially contaminated material is not taken by Habitat for Humanity. Instead, the burden is placed on Habitat for Humanity to know which supplies not to choose.

When DOE holds auctions for excess property, scanning is considered too time-consuming and is instead done "statistically and in conjunction with 'institutional knowledge' about the likelihood the items ever came in contact with radioactivity."

What is a "safe" radioactivity level, and who has the authority to deregulate radioactive material, is less clear than one would think. DOE permits "a few milliards per year" to be released for an "unlimited number of releases." The NIRS determined that a person has a 1 in 28,571 chance of developing cancer with a milliard of exposure every year for thirty-five years.

One of the pervasive threats to communities remains their ignorance. Most have no way

of knowing if radioactive material is in their local landfill. A 2000 DOE secretarial ban on recycling potentially radioactive metals included requiring "comprehensive and publicly available records" of radioactive releases. However, NIRS could not find any such records. Even more troubling, there is little information to discover even if it were accessible, as the NIRS report states that "there is *no cumulative* tracking, measurement, quantification, record keeping or reporting *on all of the DOE's radioactive releases.*" Whether or not communities are safe remains unanswerable.

EPA's Diagnosis of the Environment is Unclear

The U.S. Environmental Protection Agency (EPA) released its draft *2007 Report on the Environment: Science Report* on May 10. The draft version of the report, open for public comment until June 25, attempts to provide a "snapshot" of the current state of the environment and its impact on Americans' health.

The 2003 version of the report was roundly criticized for presenting data in an overly biased manner. Most notable in the 2003 controversy was the deletion of a section on climate change, which occurred after politically motivated edits by the Council on Environmental Quality made the section unusable.

The draft "Air" and "Ecological Condition" chapters of the 2007 draft both contain the welcome acknowledgment of the scientific reality of rising planetary temperatures and its "likely" human causes. However, the 2007 report falls short of calling this "climate change" and tempers the statement with a quote from the National Research Council: "We cannot rule out that some significant part of these changes is also a reflection of natural variability."

Ultimately, the 2007 report makes no conclusive statements about our environment's health. This is primarily due to a lack of both baseline and comparative data. Additionally, the report mostly considered trends over the past twenty years — a time frame suited to determining whether environmental policies have had an impact but not to providing an assessment of the environment.

To comment on the draft report, either use the main search page on regulations.gov to find the report (listed by its title), or use the "Advanced search" option in the upper left menu and select "Docket Search" for the Docket ID Number EPA-HQ-ORD-2007-0198.

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In This Issue

Democratic Disarray on Greenhouse Gases May Let Bush off the Hook

Two House Democrats are circulating a draft of legislation that, if passed, would effectively implement the position the Bush administration held regarding greenhouse gas (GHG) emissions prior to a recent U.S. Supreme Court ruling. The legislation threatens to create enough disarray among Democrats that the hope for progress on GHGs generated by the court decision and the 2006 elections could be dashed.

The draft legislation is the product of John Dingell (D-MI), the chairman of the Energy and Commerce Committee, and Rick Boucher (D-VA), the chairman of the committee's Subcommittee on Energy and Air Quality. The bill would amend the Clean Air Act and overturn the important April 2, 2007, decision by the Supreme Court which held the U.S.

Environmental Protection Agency (EPA) has the power to regulate greenhouse gas emissions from vehicles. The EPA had argued it did not have the authority under the Clean Air Act to regulate these emissions, but the Court clearly disagreed.

The bill would affect the ability of the U.S. to control its share of GHGs in several ways, even after the Bush administration leaves office. First, it would weaken fuel economy standards to below what the administration has proposed and below what the National Academy of Sciences has said could be achieved by off-the-shelf technology, according to a *New York Times* editorial. Second, it promotes new coal-to-liquid fuel plants that would produce alternative fuels. These coal-based fuels would actually increase the GHG emissions of conventional gasoline, according to the editorial.

The legislation would also preempt states' abilities to move forward with state and regional initiatives to reduce GHG emissions. One section of the draft adds language forbidding EPA from issuing waivers under the Clean Air Act, which currently allows EPA to permit states to implement tougher regulatory standards. California, for example, has been seeking a waiver from the EPA to allow the state to implement its more stringent air emissions program. In turn, eleven other states are waiting on this same waiver to implement their programs. (See the article in the last issue of *The Watcher* for details.) Both the waiver powers and the ability of states to set stricter standards (while the federal standards become a regulatory floor) have been hallmarks of environmental legislation. The Dingell-Boucher legislation would roll back these environmental safeguards.

Furthermore, actions taken by several cities across the nation would also become endangered. Cities from Boston to Portland, OR, have initiated plans to reduce GHG emissions. One characteristic of our federal system of government is that cities are the administrative arms of state governments, meaning that local jurisdictions often need state approval to conduct some activities. A June 9 *Washington Post* article describes the extent to which some cities are enacting programs without waiting for federal action. One of the most ambitious plans, according to the *Post* story, is New York City's, part of which needs state approval before it can be implemented.

The preemption strategy adopted by Dingell and Boucher is similar to one the Bush administration has used in a variety of contexts to prevent states from establishing stricter health, safety or environmental standards and to prevent citizens from seeking damages after injury or death from harmful products or activities.

Dingell has long been a champion of the auto industry. He railed against environmental legislation in the 1970s fearing the loss of jobs in the industry and the increased cost to vehicle makers. According to Clean Air Watch, Boucher receives significant contributions from coal companies in his district and has been promoting the coal-to-liquid fuels technology this congressional session.

Democratic leaders have reacted strongly to the draft bill. A June 8 BNA story outlined

the likely intra-party battles to come in committee and on the House floor. Henry Waxman (D-CA) and eleven other Democrats sent a letter to Dingell and Boucher expressing concern about their proposal. Waxman intends to offer a substitute amendment when the bill is marked up at a scheduled committee session June 13. Edward Markey (D-MA), chair of the House Select Committee on Energy Independence and Global Warming, also intends to offer legislation that would increase the corporate average fuel economy standards auto manufacturers must meet, according to BNA.

House Speaker Nancy Pelosi (D-CA) also opposes the Dingell-Boucher proposal because it would halt California's implementation of its vehicle emissions program. Pelosi established the controversial committee Markey now chairs because she wanted a committee fully devoted to resolving these difficult global warming issues. Her move was regarded by some as an insult to Dingell, whose committee retains jurisdiction over the issue. Democrats would be wise to put aside the infighting and focus on the larger context, as the *New York Times* editorial reminds us:

When Americans elected a Democratic Congress last November, they were voting to end politics as usual and special interest legislation. On the vital issues of energy independence and global warming they are not only in danger of getting more of the same but also, unless Nancy Pelosi and other Democratic leaders step forward, winding up in worse shape than they were under the Republicans.

White House Meets with Industry on Smog Standard

The White House Office of Information and Regulatory Affairs (OIRA) is reviewing the U.S. Environmental Protection Agency's (EPA) revision to the national ozone standard. A number of scientists have urged EPA to adopt a more stringent standard for ozone, also known as smog. Unusually, Vice President Dick Cheney's office has involved itself in the review of the standard. OIRA has also been consulting with industry representatives as it prepares to make edits to the standard and make recommendations to EPA.

On May 24, EPA sent to OIRA the review of the National Ambient Air Quality Standards (NAAQS) for ozone. EPA's NAAQS program regulates a variety of air pollutants found to be harmful to public health. NAAQS is the seminal regulatory program enforcing the Clean Air Act. The Act requires EPA to periodically revise all NAAQS standards, including the ozone standard, to reflect changes in the scientific understanding of air pollutants and the technological feasibility of regulating them.

Executive Order 12866, Regulatory Planning and Review, which governs parts of the federal rulemaking process, requires agencies submit to OIRA all rules either the agency or OIRA deems "significant." In addition to being deemed significant, the ozone standard revision is considered "economically significant," meaning it is anticipated to have an annual effect on the economy of $100 million or more. Economically significant rules are subject to the most rigorous OIRA reviews.

Environmentalists and public health experts are carefully watching the review of the ozone standard. Frank O'Donnell, president of the nonprofit advocacy group Clean Air Watch, says, "Smog is a very dangerous public health threat." Clean Air Watch and other groups believe the current primary standard of 0.08 ppm is inadequate to protect public health. O'Donnell says, "Science has shown that current standards are nowhere near good enough to protect kids with asthma or other Americans."

A number of scientific bodies have recommended a tighter standard. An EPA staff paper finalized in January states a recommendation for a standard "somewhat below" the current standard and as stringent as 0.060 ppm. In March, EPA's Clean Air Scientific Advisory Committee (CASAC) recommended EPA adopt a standard no greater than 0.070 ppm. Later in March, EPA's Children's Health Protection Advisory Committee sent a letter to EPA Administrator Stephen Johnson urging EPA to adopt a standard of 0.060 ppm. In April, a group of 111 scientists and medical professionals sent a letter to Johnson urging a more stringent standard. The individuals did not recommend a specific level but did cite CASAC's not higher than 0.070 ppm recommendation, according to BNA news service (subscription).

The scientific bodies and the individual professionals are unanimous in recommending the revised standard contain an additional decimal place. They contend the current standard, which is specified to the hundredth decimal place, has allowed state enforcement programs to round the standard to 0.085ppm, effectively lowering its stringency.

The draft revised standard is not currently available to the public. However, OIRA has conducted two closed-door meetings to discuss the standard, according to its website. Attendees of the first meeting, held June 4, included OIRA Administrator Susan Dudley and staff members of OIRA, the White House Office of Management and Budget (OMB), the White House Council on Environmental Quality and the Office of the Vice President (OVP). Non-governmental attendees included representatives from the Chemical Industry Institute, the Auto Alliance, and AF&PA, a wood products trade association. No EPA official attended the meeting.

Of particular note at this first meeting with industry representatives was the presence of a representative of the Vice President's office. The OVP is not usually involved in OIRA review of rules. In 2002, the Bush administration issued an executive order which removed the Vice President from the review responsibilities given to the office by earlier executive orders. The presence of a representative from the Vice President's office, as well as Dudley, indicates the priority the administration gives to this rule.

Attendees of the second meeting, held June 8, included staff members of OIRA and OMB and a representative of EPA's Office of Air and Radiation. Non-governmental attendees included representatives from Edison Electric Institute and the American Chemistry Council.

Critics are concerned about industry's access to the White House review process. O'Donnell says industry representatives come to these meetings with "a clear agenda of trying to prevent tougher standards from taking place." As of publication of this article, OIRA had not returned phone calls from OMB Watch seeking comment on the issue.

EPA is under a court mandate to publish a Notice of Proposed Rulemaking by June 20. At that time, the notice and comment period for the draft revised standard will begin. A final action is expected in the early part of 2008.

Long-delayed EPA Risk Assessment of Endocrine Disruptors Exhibits Flaws

In its ninth year of work on the issue, the U.S. Environmental Protection Agency (EPA) is about to begin the risk assessment process for an important but little-known group of chemicals called endocrine disruptors. However, scientists are concerned early indications of the assessment's construction will produce scientifically suspect results.

Risk assessments are an important early step in the regulatory process. Risk assessments often inform federal regulators of the certainty of a public hazard and serve as a factual basis for a regulatory response.

EPA's Endocrine Disruptor Screening Program (EDSP) is in the process of constructing a complex risk assessment to determine the effects of certain substances on the human endocrine system. As in the case of the EDSP, agencies often perform risk assessments to determine the hazard level of substances for which a great deal of data is not available and which have not yet been subjected to federal regulation.

Little is known of the exact effects of endocrine disruptors. An endocrine disruptor is any substance which alters the function of the endocrine system. The endocrine system regulates certain mood, growth and development functions including hormonal and thyroid functions. Scientists are still uncertain as to the types of substances which may be endocrine disruptors and the levels of exposure that may jeopardize public health. Scientists suspect endocrine disruptors to be commonly found in a number of consumer products including pesticides, cosmetics and finished plastics.

Concern over the impact of products on the human endocrine system caught the attention of Congress in 1996. That year, Congress passed the Food Quality Protection Act, which required EPA to screen the effects of pesticides on the human endocrine system. The law also instructs EPA to take action "as is necessary to ensure the protection of public health" if finding a substance to affect the endocrine system (21 USC 346a(p)).

Subsequently, in 1998, EPA established the EDSP. However, the agency is still in the process of finalizing its risk assessment. The agency has yet to study the effects of any

pesticide on the human endocrine system.

The risk assessment will be a two-tier process. The first tier will use a variety of scientific experiments to determine whether substances interact with endocrine systems in any way. The second tier will attempt to determine exact effects at varying doses. EPA is still in the process of developing the experiments for use in the tier one stage.

Congress has indicated its growing impatience with EPA's lack of progress on implementing the requirements of the act. In a February House Appropriations subcommittee hearing, Rep. Jim Moran (D-VA) questioned EPA Administrator Stephen Johnson on the issue. Johnson's flippant response was, "We have been doing the research, but there's this pesky thing called science."

However, scientists are assailing this risk assessment as scientifically weak. A *Dallas Morning News* article summarizes the growing concern of the scientific community. For example, scientists are expressing concern EPA has not properly constructed the dose-response assessment, which compares dosage level to health effect. Unlike other contaminants, endocrine disruptors may cause different or more serious adverse effects at trace levels than at greater levels.

Scientists are also concerned about the influence of industry in construction of the risk assessment. Scientists worry EPA may allow chemical companies to choose the breed of rat on which they will test chemicals. Certain rats have exhibited high tolerances to the effects of endocrine disruptors.

Critics are also concerned with potential cuts to the budget of EPA's work on endocrine disruptors. President Bush's budget submission to Congress proposed a $1.6 million — or 22 percent — cut to EDSP. Democrats in both the House and Senate have indicated they would restore this and other proposed cuts to EPA's budget; however, those appropriations bills remain in committee.

On June 11, EPA released a draft list of 73 pesticides slated to undergo the first round of first tier testing. The public may comment on the list upon its publication in the *Federal Register*. EPA hopes to begin the risk assessment process for endocrine disruptors later this year.

Appropriations Season Kicks Off

Congress shifted into full appropriations mode the week of June 4 as both the House and Senate began subcommittee markups of the twelve individual appropriations bills. As the White House and congressional Democrats continue to trade barbs about potential vetoes of spending bills above President Bush's request, the House is scheduled to consider its first four appropriations bills on the floor this week — all of which exceed the president's requested spending levels. Democrats are hoping to pass all appropriations

bills before October 1, the start of the new fiscal year, a feat not accomplished since 1994 — the last year Democrats controlled both chambers of Congress.

On June 4, House Appropriations Committee Chairman David Obey (D-WI) announced the breakdown of the total discretionary budget to each of the twelve appropriations subcommittees. These numbers, called 302(b) allocations, give each subcommittee chairman an overall target for the discretionary programs under his or her jurisdiction.

Despite repeated premature veto threats from Office of Management and Budget Director Rob Portman, Obey and the House committee approved subcommittee allocations above the president's request in eight out of the 12 bills. (See breakout of the House's 302(b) allocations) The House levels in the remaining four bills (Defense, Financial Services and General Government, Legislative Branch, and State-Foreign Operations) were only a combined $5 billion below the president's request.

The administration may have backed itself into a corner by vowing to veto any appropriations bill that exceeded the president's request so early on in the process. On June 6, the House Appropriations committee approved the Military Construction-Veterans Affairs bill by a unanimous 56-0 vote, including all 29 committee Republicans. The bill is currently $4 billion above the president's request, and should he hold true to his earlier commitments, Portman will recommend that President Bush veto the bill. Since some appropriations bills have been vastly underfunded over the last several years and many of the programs within the bills are popular with both parties (like the Veterans Health programs funded in the House Military Construction-VA bill), it is likely the president will be boxed in on more than just this appropriations bill.

But that has not stopped some House Republicans from attempting to bolster the president's new-found "commitment" to fiscal responsibility. The Republican Study Committee (RSC), a conservative group of House Republicans, sent the president a letter vowing to support any veto of appropriations bills that are higher than the president's request. The RSC hopes to garner enough signers on the letter to show sufficient support to sustain a presidential veto of any FY 2008 appropriations bill. While the official list of signers to the letter has not been released, press reports indicate the RSC has convinced 135 out of a necessary 146 legislators to sign the letter.

After completing a busy workload the week of June 4 within the appropriations committee, the House is scheduled to consider four appropriations bills on the floor this week, starting with the Homeland Security bill today (June 12). At $37.4 billion — $2.1 billion above the president's request — the Homeland Security bill may also end up being a showdown between the president and Congress. Also on the docket this week are the Energy and Water, Military Construction and Veterans Affairs, and Interior and Environment appropriations bills. In addition, the full House Appropriations committee currently has five additional bills ready for consideration (Financial Services, Labor-HHS, Legislative Branch, State-Foreign Ops, and Transportation-HUD).

The Senate is just beginning its appropriations committee work, leading off with the Military Construction-VA and Homeland Security bills. The subcommittee mark-ups for both of those bills are being held today (June 12), and the full committee will consider the bills on June 14.

Congress Still Struggling to Settle Earmark Disclosure Procedures

Five months after the House adopted institutional earmark reform rules (H. Res. 6) and the Senate passed statutory requirements governing earmark disclosure (S. 1), confusion reigns in both chambers on how earmark disclosure rules will work and who will administer them. Key members of the Senate and House Appropriations Committees have unilaterally altered the rules in the intervening months, and even with appropriations season upon us, it appears the disclosure rules and their application remain in flux.

S. 1, the Senate's lobbying and ethics reform bill that passed January 18, requires that members seeking earmarks provide a written statement to the chairman and ranking member of the committee of jurisdiction including:

the Member's name; the name and address of the intended recipient of the earmark ... identification of the [beneficiaries]; the purpose of such earmark or benefit; and a certification that the Member or spouse has no financial interest in them [with] the name of the requesting Member is made available to the general public on the Internet for at least 48 hours before its consideration.

But because the Senate has not yet enacted S. 1, the earmark disclosure requirements are not yet binding. Because of this, Senate Appropriations subcommittee chairs began improvising on their own. On Feb. 21, the Interior and Environment subcommittee sent Senators a detailed procedure for proposing earmark requests with a March 30 deadline. On Feb. 28, the chairman and ranking Republican on the Energy and Water Development subcommittee released a different procedure that asked for earmark requests that detail the beneficial role of the spending. Several subcommittees sent out earmark solicitation forms omitting the requirements of the new ethics bill. The form from the Health, Education, Labor, and Pensions subcommittee asked only that the request be made by April 13.

Perhaps because of the proliferation of subcommittee approaches, Senate Appropriations Committee chair Robert Byrd (D-WV) announced in mid-April that the full committee would apply the standards established in S. 1 even though the bill has not yet been enacted. Critics, led by Sen. Jim DeMint (R-SC), complained that the Senate shouldn't have to rely on Sen. Byrd ☼ to enforce S. 1: "There's no reason at all we shouldn't adopt [the earmark provisions of S. 1] as a Senate rule." Outside critics even suggested that adopting those provisions as a Senate rule would run afoul of an earlier

pledge by Byrd to place a moratorium on *all* earmarks until a reformed process is firmly established.

Meanwhile, House Appropriations Committee chair David Obey (D-WI) has floated several earmarks procedures, all of which appear to flout the guidelines established by H. Res. 6, the House lobbying and ethics rule changes passed January 4 (which are identical to those in S. 1, minus the Internet publication requirements). After Obey set a March 13 deadline for the submission of earmark requests to his committee, the twelve House Appropriations subcommittee chairs nevertheless imposed a diversity of application procedures of their own. After Appropriations ranking member Jerry Lewis (R-CA) and others cited "confusion stemming from new House ethics rules," Obey extended his mid-March deadline to April 27.

In the six weeks since then, Obey has struggled to settle on a legislative process for the 36,000 earmark requests his committee has received. In late May, Obey announced he would ignore the January reforms adopted by the House requiring that earmarks and their sponsors be identified in spending bills when they are introduced. Instead, he said he would delay the inclusion of earmarks into spending bills until they are in conference, when they can no longer be removed from the bill by amendment.

This announcement was met with harsh national and home state criticism in the press and calls from watchdog groups, including OMB Watch, for reform.

In spite of guidelines passed by both houses of Congress and increasingly intense media scrutiny of the issue, the situation continues to evolve. As recently as June 11, Obey took a completely different tack, according to the *New York Times*:

'Before the August recess,' [Obey] said, his office intends to list 'every earmark that the committee expects to try to include in a final conference product' with the Senate. Any lawmaker can question or challenge any request and, he said, the earmark's sponsor will be asked to respond. 'They'll be hanging out there for 30 days' of public scrutiny and comment while Congress is on its summer break.

Whether this approach will stick — and comply with the House rules governing earmarks — remains to be seen.

Senate Committee Considers Bill to Criminalize Deceptive Election Practices

The Senate Judiciary Committee held a hearing June 7 on a bill that would criminalize deceptive election practices. The Deceptive Practices and Voter Intimidation Act of 2007 (S. 453) is cosponsored by Sens. Barack Obama (D-IL) and Charles Schumer (D-NY). It would make it illegal to purposefully misinform or confuse voters about an upcoming election. The House Judiciary Committee already approved a companion bill (H.R. 1281)

in March. The bill, should it become law, would give nonprofit organizations that monitor elections new tools to combat voter suppression and intimidation.

Witnesses testify to deceptive practices in Maryland during 2006 election

Sen. Ben Cardin (D-MD) — a strong supporter of the legislation — testified about his own experience with dishonest campaign tactics. During his 2006 campaign for Senate against then Lt. Governor Michael Steele (R), deceptive fliers were distributed in predominantly African American communities in Prince George's County, MD, on election day. The fliers displayed a "Democratic Sample Ballot" with the names of the two Republican candidates — incumbent Governor Robert Ehrlich and candidate Steele, implying that Democrats were endorsing Steele. At the hearing, Cardin said these kinds of deceptive campaign tactics "undermine and corrode our very democracy and threaten the very integrity of our electoral process."

Maryland Attorney General Doug Gansler (D) also testified before the Committee and spoke of witnessing long lines of Prince George's County citizens, mostly African Americans, waiting at polling places to vote on election day. Gansler called for an end to these types of "senseless obstacles" to voting and noted that the legislation currently being considered builds upon the 1965 Voting Rights Act, which was aimed at protecting voters from intimidation.

During the 2006 election, there were numerous reports of similar attempts to disenfranchise and confuse voters. Election Protection, a nonprofit that monitors elections, received more than 26,000 calls during October and November from voters in 31 states reporting electoral problems they had encountered.

Legislation would enable nonprofits to file complaints with Attorney General

The Deceptive Practices and Voter Intimidation Act of 2007 amends federal criminal law to make it illegal for any person to intentionally misinform another in regards to:

1. the time, place, or manner of conducting any federal election; or
2. the qualifications for or restrictions on voter eligibility for any such election.

The pending bill, moreover, makes the intent of stopping another person from voting a key aspect of the offense.

The legislation would impose penalties of up to $100,000 and five years in prison for knowingly conveying false information about an election. The legislation enables groups and individuals to file criminal complaints reporting fraudulent election practices or communications with the U.S. Attorney General. The bill would also give individuals the right to file suit in order to stop deceptive practices as they occurred.

Currently, the U.S. Department of Justice is not obliged by law to investigate claims of voter suppression and intimidation. Under the new law, the Justice Department would be required to prepare reports for Congress after each election documenting 1) occurrences of voter deception and suppression, and 2) the efforts the department plans to undertake in order to prevent similar crimes in the future.

Other testimony

Also testifying before the Judiciary Committee in support of bill were: Obama; Sens. Patrick Leahy (D-VT) and Schumer; Jack Johnson, County Executive, Prince George's County, MD; Hillary Shelton, Director of the Washington Bureau of the NAACP; John Trasviña, President of the Mexican American Legal Defense and Education Fund; and Richard Briffault, a law professor at Columbia University. Briffault argued that the bill does not limit free speech as protected under the First Amendment.

Testifying in opposition to the bill was William B. Canfield, a partner specializing in federal elections law at the Washington, DC, law firm of Williams and Jensen. Canfield testified that he was opposed to the bill because of its "overly wide scope" and because, in Canfield's opinion, "the Department of Justice has all the authority it needs to root out such wrong-doing."

The Commissioner of the U.S. Commission on Civil Rights, Peter Kirsanow, also spoke at the hearing, urging the members to add three deceptive practices to the bill not currently included: fraudulent registration, multiple registration, and compromised absentee ballots.

House committee passed companion bill in March

In March, the House's version of the bill passed the Judiciary Committee. The act was co-sponsored by Reps. Rahm Emanuel (D-IL) and Judiciary Chairman John Conyers (D-MI), along with 60 other House members. Rep. Jerrold Nadler ☼ (D-NY), chair of the Subcommittee on the Constitution, Civil Rights and Civil Liberties, hailed the Committee's endorsement of the bill, saying the legislation "is absolutely necessary to protect voters — especially voters in minority communities, and voters with limited English language proficiency — from the dirty tricks brought to light in our hearing." An earlier version of the bill was first introduced in 2005 but did not make it past the Judiciary Committee.

Charities Respond to Treasury's Overbroad Allegations of Terrorist Ties

On June 8, charities wrote to the Secretary of the Department of Treasury, Henry Paulson, to express their concern about continuing statements from Treasury that allege charities are a significant source of terrorist financing. The letter was sparked by a report

from the Treasury Inspector General for Tax Administration (TIGTA) published in late May that claimed charities are a "significant source of alleged terrorist activities." The charities' letter calls upon Treasury to retract this claim, saying, "Treasury needs to recognize that charities are part of the solution and not part of the problem."

Treasury Lacks Hard Evidence

The letter notes that instead of providing data to substantiate its claim that charities are a significant source of terrorist activities, Treasury cites news reports about front organizations, primarily non-U.S. groups or the role of terrorist networks in natural disaster relief areas. The letter argues that Treasury has never provided information that proves a considerable portion of charitable funds are diverted to terrorist organizations. In fact, its own data shows that overall, charities only account for 8.75 percent of the individuals, companies and organizations on Treasury's Specially Designated Nationals (SDN) list. There are 43 charities on that list, and only six of these are based in the United States, making U.S. charities 1.25 percent of the designations. This hardly justifies Treasury's broad claims about the role of charities in supporting terrorism, according to the charities that sent the letter.

Anti-Terrorism Measures Taken by the Charitable Sector Have Been Treated Dismissively

The letter argues that Treasury does not respect the positive role charities play in the world, saying, "Daily more than 1 million 501(c)(3) organizations provide charitable services within their communities and throughout the world. Many of these activities act as a counter balance to terrorist influences." It also notes several steps the nonprofit sector has taken to guard against diversion of funds to terrorism, including the 2005 publication of *Principles of International Charity*. Unfortunately, Treasury still relies heavily upon its own guidelines and has ignored the sector's requests that they be withdrawn.

Watch Lists Are Riddled With Errors

Treasury's over-reliance on inaccurate watch lists, such as the SDN list, raises major concerns about the TIGTA recommendation that the Internal Revenue Service (IRS) use the even larger Terrorist Screening Center (TSC) watch list. Referencing yet another inaccurate watch list is not the most effective use of resources, according to the charity letter. Moreover, grantmakers have spent thousands of dollars checking the SDN list with little benefit for doing so.

The letter was signed by the following organizations:

- American Civil Liberties Union
- Fellowship of Reconciliation
- Fund for Nonviolence

- Global Fund for Women
- Grantmakers Without Borders
- Islamic Society of North America
- Kinder USA
- Life for Relief and Development
- Moriah Fund
- Muslim Advocates
- Muslim Public Affairs Council
- National Council of Nonprofit Associations
- OMB Watch

IRS Reports on 2006 Political Activities Enforcement Program, Releases Guidance

On June 8, the Internal Revenue Service (IRS) released a report on the initial results of its 2006 program enforcing the ban on partisan electioneering by charities and religious organizations. The same day, it also released Revenue Ruling 2007-41, which provides guidance nonprofits can rely on in planning permissible voter education and mobilization activity. The results of the enforcement program to date show a continued low level of violations.

Overall, the IRS received 237 complaints for the 2006 election season. Of these, 137 were dismissed after the initial review, and the remaining 100 were investigated. 44 percent of these are religious organizations. The IRS has completed 40 investigations, and none merited revocation of exempt status. Written advisories were issued in 26 cases, and 14 were dismissed after further investigation. The types of activities selected for investigation indicate that many cases occur in gray areas of the law, such as allowing candidates to speak at organizational functions or distributing printed materials. This makes the new guidance a welcome development, but clearer rules are still needed.

The report said the IRS now tracks organizations that received written advisories as a result of activities in 2004 to see if there are further violations, using quarterly Internet searches to review publicly available documents and news reports.. So far, there have been "no instances of repeat political intervention." Another new development is the Political Contributions Sub-Project. It compares state data on campaign finance contributions with the IRS lists of 501(c)(3) organizations. It found 269 cases of possible direct campaign contributions by charities, which are not permitted to make campaign contributions. In the 92 cases investigated, 65 organizations received written advisories, and no violations were found in 21 cases (the match appeared to be due to errors in state databases).

The guidance in the new Revenue Ruling uses 21 examples to illustrate permissible and impermissible activities of voter education, registration and participation efforts, activities of individuals, candidate appearances, issue advocacy, renting facilities,

mailing lists and other business activities, and web sites. While it leaves many gray areas undefined, it makes two important points:

- "Section 501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office."
- Issue advocacy communication "is particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election."

For a summary of the Revenue Ruling, click here.

New Complaints to the IRS about Political Intervention

In late May, news surfaced of an Internal Revenue Service (IRS) inquiry into a Wichita, KS, church, Spirit One Christian Center. Another new complaint, against Bill Keller Ministries, also was made public. Both cases involve statements about candidates that are alleged to indicate opposition to their election.

On April 20, 2007, the IRS sent an "inquiry" letter to Spirit One Christian Center in Wichita, stating that "a reasonable belief exists that your organization has engaged in political activities, which activities could jeopardize your tax-exempt status as a church." Pastor Mark Holick was asked to answer 31 questions about political activities at the church. The questionable activities include:

- messages on the church's marquee critical of Governor Kathleen Sebelius (D) and Attorney General Paul Morrison's (D) positions on abortion during the campaigns;
- voter guides distributed in front of a Wichita church;
- Holick's involvement with Kansans for Life; and
- an appearance by former Kansas Attorney General Phill Kline (R) at the church.

In October 2006, Citizens for Responsibility and Ethics in Washington (CREW) asked the IRS to investigate churches for possible involvement in Kline's re-election campaign.

According to the church's website, the IRS alleges that the church also used their website to try and stop Sen. Hillary Clinton's (D-NY) campaign for president.

The IRS letter to Holick is posted on the church's website. "Our concerns are based on information in messages posted on the sign in front of your building shortly before the November election in 2006, your website (www.spiritonecc.org), and in an e-mail sent by your organization. This information indicates that you may have intervened in the political campaigns for the offices of Governor and State Attorney General of Kansas and in the upcoming Presidential election."

According to the Wichita Eagle, the IRS wanted information about four statements posted on the church marquee, including how long they were posted, when they were put up and what the cost was. The four statements posted outside the church attempted to connect Sebelius, who was up for reelection, and Morrison to George Tiller, a doctor who provides late-term abortions:

- "Morrison accepts blood money from abortionist Tiller. How many babies??"
- "Canfield supports life and traditional family, Barnett does not."
- "Paul Morrison early release of felons. Reginald Carr multiple murders."
- "Abortionist Tiller has given $300,000 to Sebelius. Price of 1,000 babies!"

Holick has been outspoken in his objections to the IRS questions, holding a news conference and posting all materials on the church's website, saying it is a free speech issue.

Meanwhile, Americans United for Separation of Church and State (AU) asked the IRS to investigate a St. Petersburg, FL, ministry that advised people not to vote for presidential candidate Mitt Romney. The group in question is Bill Keller Ministries and its associated website Liveprayer.com. Keller has a call-in show, during which on May 11 he warned listeners, "If you vote for Mitt Romney, you are voting for Satan!" Keller's message added that Romney's nomination will "ultimately lead millions of souls to the eternal flames of hell." However, Keller claims he made a spiritual statement, not a political one.

The Liveprayer.com Daily Devotional from May 11 also has very strong, harsh remarks about the Mormon faith. In the AU press release, Rev. Barry W. Lynn, executive director of Americans United, said that taken together, this activity is a "blatant example of religiously based partisan politicking."

The IRS could review the case and take it up with Bill Keller Ministries, though it is up to the organization to make information about the case public.

The Department of Homeland Security's Dangerous Pattern

On June 5, Rep. Bennie Thompson ☼ (D-MS), chairman of the House Homeland Security Committee, wrote an op-ed in *The Hill* criticizing the Department of Homeland Security (DHS) for the hasty development of ineffective programs. Thompson cites DHS's failed efforts to implement an integrated information-sharing network, but, as he notes, this is merely one of many examples of misplaced priorities and ineffective leadership at DHS. The Department's attempt to build a robust chemical security program could serve as another example.

Thompson accuses DHS of rushing to put in place the information sharing network "without sufficient input from those who would be using it," with the result being a system that does not have the trust of states and other participants and "that fails to

meet the needs of its users, [and] duplicates other efforts." Many of the shortcomings of the DHS information sharing network were highlighted in a previous *Watcher* article "DHS Does Not Share Well with Others."

DHS's efforts to design and implement a chemical security program could easily also fall under Thompson's "haste makes waste" pattern. DHS has taken the authority given by Congress to implement a chemical security program and watered it down to the point that it holds little hope of actually increasing the public's protection from accidents or attacks on chemical plants.

The regulations are weak in three respects. First, DHS maintains the right to preempt stronger state chemical security regulations. This could be severely detrimental to the effort of states to protect their citizens against chemical facility accidents or attacks. Second, the program is highly secretive. What facilities are covered by the regulations, what facilities are failing to comply with the regulations and what sorts of specific improvements are being made by facilities can all be kept secret from the public. Third, DHS rejected the proposal to require companies to report on safer chemicals, procedures or technologies that could be implemented to reduce a facility's risk. Not requiring companies to even consider making such changes reduces the possibility that they will actually be made. These weaknesses were included in DHS's regulations despite numerous comments pointing out the problems these provisions would cause in creating an effective protection program.

As a result of these shortcomings, public interest and environmental groups have encouraged the chairs of the key committees — Reps. Thompson and Sheila Jackson-Lee (D-TX) — to force DHS to devote the necessary time and effort to implement an effective and robust chemical security program. Any delay in DHS's action leaves millions of Americans at constant risk of a dangerous chemical accident or attack.

Kyl Unveiled as FOIA Foiler

Shortly after supporters of the Openness Promotes Effectiveness in Our National (OPEN) Government Act began aggressive online and telephone campaigns to discover the senator who had placed an anonymous hold on the bill, Sen. Jon Kyl ☼ (R-AZ) acknowledged that he was blocking the legislation. Kyl explained that the move was at the behest of the Department of Justice (DOJ), which he explained had "uncharacteristically strong objections to the bill."

Apparently, DOJ believes some of the provisions in the bill are too strong. But Sen. Patrick Leahy's (D-VT) office claims that such concerns have been addressed already, including the removal of a section that would have prevented the government from withholding information if an agency took too long to respond to a FOIA request.

DOJ also reportedly believes that President Bush's 2005 Executive Order on FOIA (E.O.

13392) is working well in improving agency implementation of the act and should be given more time before a legislative fix is attempted. Public interest groups have been less impressed with the results of the E.O. after a review of the agency FOIA plans revealed that "many of the improvement areas were either not addressed or rated as poorly addressed."

Kyl's public acknowledgment of his hold on the legislation has not changed the fact that the bill remains stuck because of the hold. Until the differences can be resolved, Kyl has stated that he will continue to block the bill. During the Judiciary Committee's April vote on the bill, Kyl voiced concerns but agreed to work with Leahy to address the issues. However, Leahy's office reports that it has received no contact from Kyl about the bill ever since.

If the hold is not removed, the only way the bill will reach the Senate floor is under regular order, meaning that considerable floor time would need to be reserved for debate of the bill. Under Senate rules, nearly any type of amendment could be added to the bill, making it a potential legislative Christmas tree, which could kill the overall bill. Since the bill is considered non-controversial, moving it through unanimous consent, which takes no Senate time, is the logical path — except for the Kyl hold.

Restored EPA Budget Holds Hope for Libraries and Labs

On June 7, the House Appropriations Committee approved a $27.6 billion Interior-Environment spending bill that increases the U.S. Environmental Protection Agency's (EPA) FY 2008 budget to $8.1 billion, a $361 million increase over current spending. It is also $887 million more than President Bush's budget request, which will likely trigger a veto threat.

The appropriations bill currently allocates $788 million for core scientific research. This may be welcome news for EPA's network of libraries and laboratories, which have suffered from downsizing attempts in anticipation of significant 2008 budget cuts. The budget restoration may allow EPA to abandon its controversial plans for closings and consolidations.

In both cases, EPA cited the proposed cuts as necessitating restructuring efforts and has initiated plans to close multiple libraries and labs. The agency moved quickly in closing libraries in Chicago, Washington, DC, Dallas and Kansas City and limiting public access in four others. Congress voiced strong objections to the agency's actions, including a letter from powerful Democrats to halt all additional EPA library closings. In response, EPA agreed to not close any of its remaining 22 libraries, but took no action on the five regional libraries it had already closed.

However, the EPA labs, for which plans to cut staff and consolidate offices were leaked after the congressional hearings on EPA libraries, currently have no such protection.

Stephen Johnson, EPA's administrator, has promised that no agency labs will be closed during his tenure, although a June 2006 memorandum indicates differently.

The exact amount of the research funding that would go to EPA libraries and labs cannot be determined from the broad breakdown provided in the bill. Such decisions will be left to the agency, should the appropriations bill make it through Congress and be signed by the president. However, the prospect of additional funding may be sufficient to derail restructuring efforts for labs and libraries that were predicated on severe funding reductions.

The House Interior and Environment bill is expected to be voted on the week of June 11.

NASA Inspector General Faces Tough Questioning from Congress

On June 7, the Senate and House held a joint hearing to investigate the conduct of the National Aeronautics and Space Administration's (NASA) Inspector General, Robert Cobb. The hearing was conducted by the House Science and Technology Subcommittee on Investigations and Oversight and the Senate Commerce, Science, and Transportation Subcommittee on Space, Aeronautics and Related Matters. Questions raised during the hearing concerned issues including the inspector general's alleged manipulation and interference with investigations, creation of a hostile environment for whistleblowers, and the destruction of records.

Debra Herzog, previously Cobb's Deputy Assistant of Investigations, detailed how Cobb allegedly tried to halt or interfere with federal investigations of NASA premises, including the questioning of a search warrant. Cobb was also accused of severe negligence for trying to protect the reputation of the OIG and NASA by failing to investigate the computer theft of NASA rocket engine designs. The estimated damage from the hacking is $1.9 billion and should have been reported to the U.S. State Department immediately. Cobb was also accused of unethically consulting with NASA administrators regarding what matters should be investigated.

Sen. Claire McCaskill ☼ (D-MO) expressed dismay about an inspector general interfering with a federal investigation. Such investigations are to be performed without delay to insure that no incriminating documents are destroyed. Rep. Bart Gordon (D-TN), chairman of the House Science and Technology Committee, expressed concern that Cobb seems to give priority to pleasing NASA's top officials as opposed to providing an independent audit and investigation into NASA's activities.

There were various allegations that Cobb created a hostile environment for whistleblowers, adding to an unacceptable work environment. Also of concern was the disclosure to NASA management of the names of those who cooperated in investigations into his behavior. A report by the President's Council on Integrity and Efficiency (PCIE),

listing the names of NASA employees who complained about Cobb, was somehow disclosed to NASA managers. Sen. Charles Grassley ☼ (R-IA) stated in his testimony before the joint committee, "This effectively painted a target on the backs of NASA employees who provided information to PCIE investigators and to Congress."

Cobb has also developed an inappropriately close relation with the current general counsel at NASA, Michael Wholey, stated Rep. Brad Miller ☼ (D-NC), chairman of the House Subcommittee on Oversight and Investigations. Wholey went so far as to destroy a video record of a meeting between the NASA administrator Dr. Michael Griffin, Cobb and the OIG staff, according to Miller. The video supposedly documented an inappropriate encounter in which the administrator instructed the OIG staff as to what they should be doing. "This represents the only time — certainly in the history of the Science and Technology Committee and perhaps the entire Congress — that an agency general counsel has admitted destroying agency records to keep anyone from viewing them," stated Miller.

Gordon and Miller, along with Sen. Bill Nelson (D-FL), Grassley and McCaskill, called upon Cobb to resign. Cobb told the hearing room that his department's work was of the highest quality and that he was still worthy of his position. "I proudly stand behind the work of the NASA OIG," stated Cobb.

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In This Issue

Portman Out, Nussle Tapped to Head OMB

On June 19, Office of Management and Budget (OMB) Director Rob Portman announced his resignation, effective in August. President Bush has chosen former House Budget Committee chairman Jim Nussle to be the next OMB director — a candidate whose reputation and policy record suggest the White House is prepared to clash with Democrats in Congress, particularly over the FY 2008 budget.

Portman said he made the decision to leave OMB because he wanted to spend more time with his wife and children. White House Chief of Staff Josh Bolten said he had hoped Portman would stay for the rest of Bush's term but had compelling personal reasons to

leave.

As Budget Committee chairman, Nussle presided over the massive 2001, 2003 and 2005 tax cut bills and failed to usher through a budget resolution three out of the six years he chaired the committee. Nussle also supported radical budget process changes that would have, if enacted, cut public investments and opened the door to more irresponsible tax cuts. Nussle left Congress in 2006 to make an unsuccessful bid for governor of Iowa.

While in Congress, Nussle was known for his combative style, earning him the nickname "Knuckles." He was part of a group of Republican representatives — the "Gang of Seven" — who tried to embarrass Democrats during the House banking scandal in the early 1990s. A particularly memorable sequence occurred when Nussle put a paper bag over his head on the House floor to caricature the House leadership's refusal to disclose which Democrats had overdrafts in the banking scandal.

Timing of the Move

Given the strong relationships Portman enjoys with members of Congress on both sides of the aisle and his months-long advocacy in Congress on behalf of the president's $2.9 trillion budget, the timing of the change at OMB appears less than ideal. The changing of the guard, which came as a surprise to almost everyone outside the White House, will occur during the heat of the FY 2008 appropriations season, as the first of 12 spending bills are just starting to make their way through Congress.

The Bush administration has threatened to veto any bill that exceeds the president's discretionary spending requests, with one threat — against the recently-passed $36.3 billion Homeland Security bill — issued on the grounds that "it includes an irresponsible and excessive level of spending." The administration had requested $34.2 billion. The $2.1 billion difference represents 0.2 percent of total discretionary spending.

While the change at OMB could exacerbate tensions in the relationship between the president and Congress, there maybe more to the move for Portman than spending more time with his family. Portman, who is regarded as one of the most talented and respected members of the GOP, may well be looking toward a return to electoral politics. He served for six terms as a Congressman from Cincinnati and plans to return to Ohio in August. President Bush is particularly unpopular in Ohio, which has seen thousands of jobs in its eroding manufacturing base cut or shipped overseas. Portman may be leaving quickly to break ties with the Bush administration in order to try to save a chance at running for office in Ohio. With the next statewide race not until 2010, his departure now could help his cause.

Process and Politics

Further complicating matters is not just the timing but also the process and politics surrounding the confirmation of Nussle. The Senate Budget and Homeland Security and Governmental Affairs Committees have joint jurisdiction over the OMB director confirmation process. If both committees take action on the nomination (whether

favorably or not) within 30 days of each other, the nomination moves to the floor for consideration by the full Senate.

In the two most recent OMB director nominations (for Bolten and Portman), the confirmation process took five weeks. Both Bolten and Portman were non-controversial nominees. This cannot be said about Nussle. Reaction on Capitol Hill to word of his nomination was swift and strong among some key budget process committee chairs:

- **House Appropriations Chair David Obey** (D-WI) told the *New York Times*: "Nussle is ideological as hell...[the nomination is] an act of absolute confrontation."

- **Senate Budget Chair Kent Conrad** (D-ND) commented in the *Washington Post*: He's "an intense partisan more given to confrontation than cooperation — he's coming here with baggage" and could have problems with his confirmation.

- **Another Democratic senator** said the announcement was made at the Democrats' regular Tuesday policy lunch and told *Roll Call*: "There was an audible reaction" and called Nussle a "bare-knuckled brawler ... I don't think he's got very high standing with anybody in the Congress who's worked with him."

- However, **House Budget Chair John Spratt** (D-SC) said in a statement: "Our relationship was one of comity and cooperation ... Even though Jim and I disagreed on policies, the disagreements never were personal. Indeed, Jim was a fair and honorable chairman."

Since Nussle is more controversial and time is limited before the upcoming month-long August recess (when Portman plans to leave), it may be difficult for the Senate to pass a final verdict on Nussle before the fall. On the other hand, the Senate may act quickly, but use Nussle's confirmation battle to serve as a proxy fight between Bush and Congress on fiscal issues. Whatever the outcome, Nussle's nomination is likely to heighten tensions over the federal budget process between the White House and Congress, who are already locked in a heated struggle over federal budget priorities and government spending.

House Battle over Earmarks Procedure Resolved

A fiercely partisan impasse in the House was resolved on June 14 when Appropriations Chair David Obey (D-WI) and Minority Leader John Boehner (R-OH) reached a comprehensive procedural agreement following months of confusion and vituperation over the chamber's earmarks disclosure and approval process. The agreement outlines rules for consideration of earmarks for the House to follow for each of the 12 FY 2008 appropriations bills and appears to be operating smoothly thus far: on June 21, the House Appropriations Committee approved the lists of earmarks for two spending bills

by voice votes.

In late May, Obey announced he would ignore the January reforms adopted by the House requiring that earmarks and their sponsors be identified in spending bills when they are introduced. Instead, he said he would delay inserting earmarks into spending bills until conference, when they can no longer be removed from the bills by amendment. Obey argued he needed several months to vet and sign off personally on over 32,000 earmarks requests, after which point full review on the House floor of the earmarks he approved would be impractical and unnecessary.

Obey's decision and reasoning set off a furious reaction among House Republicans and advocacy groups who argued such a procedure effectively insulated earmarks from any meaningful legislative review, a reversal of practice in the 109th and earlier GOP-dominated Houses and quite contrary to Democratic pledges to bring transparency to the House. National media outlets covered the issue, the *New York Times* alone writing three stories on it in the space of a week.

After two weeks in which Obey was subject to increasingly intense criticism and changed his position a couple of times — consenting to publish earmarks during the August recess but not allow them to be amended or removed — he and Boehner entered discussions on procedures that would quell the tempest. Within 48 hours, after the House GOP leadership prematurely announced a deal at a press conference, the Democratic leadership confirmed the following agreement:

- **Homeland Security and Military Construction-VA**: No earmarks will be included in these bills until conference, but challenges to earmarks added to bills *during* conference negotiations will be permitted.

- **Energy-Water**: No earmarks will be included in this bill, but the House will act separately on a package of earmarks to be added to the bill prior to conference.

- **Financial Services**: The bill, already adopted by the Appropriations Committee without earmarks on June 11, was remanded to the committee and marked-up with earmarks added on June 21.

- **Interior-Environment**: The bill, adopted by the Appropriations Committee without earmarks on June 11, will be accompanied by a supplemental report detailing specific earmarks.

- **The remaining seven bills**: Earmarks will be included in these bills when they reach the House floor and, therefore, subject to amendment.

On June 18, the House formally approved these new earmarks procedures, permitting points of order on any appropriations conference reports containing earmarks added during conference. After only twenty minutes of debate following such a point of order,

the House will vote on whether to consider the conference report in an up-or-down vote. The rule only applies to spending, not tax earmarks; it also requires earmark sponsors to certify that they have no financial interest in a project.

Three days later on June 21, the Appropriations Committee took up the Financial Services bill with earmarks included and the Interior-Environment supplemental report consisting of earmarks for that bill, adopting both by non-contentious voice votes. The two bills are scheduled for floor votes the week of June 25. The earmarks provisions in these bills comprise small fractions of the total spending approved. The $21 billion Financial Services bill now includes $33.7 million in earmarks; the Interior-Environment supplemental report earmarked $119 million of its overall $27 billion in spending. It should be noted this is not additional spending, but merely specific instructions about how to spend money already included in the bills.

The harsh rhetoric in the House earlier this month seems long-forgotten. The practical fallout from the earmarks battle may be that House Democrats have scaled back their ambitious goal of passing 11 of the 12 FY 2008 spending bills by the July Fourth recess. But the bitterness of the debate both in and outside of Congress also serves as a reminder of the powerful resonance that remains with transparency and accountability issues linked to the several scandals that plagued the House starting in early 2006 with Jack Abramoff, through the Duke Cunningham episode, and continue to the present with the recent indictment of Rep. William Jefferson ☼ (D-LA).

President Promises Slew of Vetoes

As Congress looks forward to the July 4 recess, it continues to fulfill a primary responsibility — passing legislation that funds the activities of the federal government. Five of 12 FY 2008 spending bills have passed the House and await Senate approval. But President Bush has signaled he intends to veto bills that could push spending above the $933 billion cap specified in his budget request earlier this year.

Shortly after House-Senate budget resolution conferees began negotiating the spending blueprint for FY 2008, OMB Director Rob Portman warned Congress that he would recommend the president veto spending bills that exceed the president's budget request.

On May 16, Portman issued a press release stating:

> I will recommend the President veto any appropriations bill that exceeds his request until Congress demonstrates a sustainable path that keeps discretionary spending within the President's topline of $933 billion and ensures that the Department of Defense has the resources necessary to accomplish its mission.

This statement is consistent with the administration's historical insistence that annual discretionary spending be kept below the president's discretionary spending cap. But this

year, President Bush faces a Democratic Congress willing to challenge his spending priorities.

The White House has been careful in choosing which spending bills to sign, given the numerical imperatives the president faces if he wants to hold Congress to his $933 billion topline. For example, Portman never issued a veto threat for the Military Construction-VA ("MilCon") appropriations bill prior to certain House approval. It was not necessary for Portman to issue this threat in order to make good on his May statement, because the $4 billion by which it exceeds the president's request does not *per se* render a $933 billion topline mathematically impossible for Congress to achieve.

How does the president's approval of MilCon comport with his insistence that spending bills remain on a "sustainable path"? The House and Senate's 302(b) allocations indicate they will approve four appropriations bills that are less than that the president's request. The total amount that these four bills are below the president's budget is $5.1 billion. This $5.1 billion budgetary wiggle room enables the president to sign a MilCon bill that is only *$4 billion* more than the president's request.

Any additional appropriations bill that exceeds the president's request by more than $1.1 billion would render the "path to the topline" unattainable, and will, according to Portman's statements, necessarily elicit a veto. Therefore, OMB's latest veto threats on the Homeland Security and Energy-Water spending bills should be taken at face value.

Congress and the president seem headed toward full-scale confrontation over purported fiscal principles. There is a $21 billion difference between his and Congress's budgets. The president's budget request is a 7 percent increase over last year's enacted spending; Congress's budget is a 9 percent increase.

The president's appropriations requests may not be seen as the standard of fiscal responsibility. Since he took office over six years ago, President Bush has signed every spending bill that came to his desk, even as the national debt exploded by $3 trillion.

If the president vetoes an appropriations bill, it is not clear how Congress will react. Will all the vetoes be sustained? Will Congress be forced to pass spending bills below its preferred levels to avoid blame for a government shutdown? Resolution to these questions is months way, but the president's stated position is clear: $933 billion and not a penny more.

EPA Announces Proposed Smog Standard

The U.S. Environmental Protection Agency (EPA) has announced proposed changes to the national standard for ground-level ozone, also known as smog. Scientific consensus supports a limit substantially lower than the current standard. EPA's proposal has drawn criticism for being too weak to fully protect the public from the adverse health effects of

ozone. A lack of transparency in the rulemaking process has left the public in the dark as to whether EPA, the White House or industry lobbyists may be to blame.

EPA's National Ambient Air Quality Standard (NAAQS) program regulates a variety of air pollutants found to be harmful to public health. NAAQS is the seminal regulatory program enforcing the Clean Air Act. The Act requires EPA to periodically revise all NAAQS standards, including the ozone standard, to reflect changes in the scientific understanding of air pollutants and the technological feasibility of regulating them.

EPA was under a court mandate to propose a revised standard by June 20. On the morning of June 21, EPA announced a proposed range of exposure. The proposed range is 0.070 to 0.075 ppm. The current standard is 0.08 ppm.

Although any standard within the proposed range would be tighter than the current standard, it would not be stringent enough to adequately protect public health, according to a growing body of scientific evidence. An EPA staff paper finalized in January states a recommendation for a standard "somewhat below" the current standard and as stringent as 0.060 ppm. In March, EPA's Clean Air Scientific Advisory Committee (CASAC) recommended EPA adopt a standard no greater than 0.070 ppm. Later in March, EPA's Children's Health Protection Advisory Committee sent a letter to EPA Administrator Stephen Johnson urging EPA to adopt a standard of 0.060 ppm. In April, 111 independent scientists and medical professionals sent a letter to Johnson endorsing CASAC's recommendation.

EPA Administrator Stephen Johnson called an exposure limit of 0.08 ppm inadequate and recognizes the need for a more stringent regulation. However, Johnson will not endorse a standard within the range proposed by CASAC, EPA's premier scientific panel on air quality issues.

EPA assessed exposure benchmarks of 0.060, 0.070 and 0.080 ppm. According to the preamble to the proposed rule, Johnson believes the data for health effects at the 0.060 ppm level are "too limited." While Johnson does not question the science behind data at the 0.070 ppm benchmark, EPA provides no rationale for considering a range in which 0.070 ppm is the low end as opposed to the high end.

EPA's proposal will follow the scientific recommendation that the standard be specified to the thousandth decimal place. The current standard, 0.08 ppm, has effectively been manipulated to be 0.084 ppm due to rounding. EPA's final rule will close that loophole.

In addition to the proposed range, EPA announced it would accept comments on an even broader range from 0.060 ppm to the current standard. EPA is required to accept all public comments regardless of scope. No aspect of the legal framework governing the rulemaking process requires EPA to make this added distinction. The language is likely a political move which incorporates the views, albeit rhetorically, of public interest groups

advocating for a stricter standard and industry groups calling for no change.

EPA has come under fire from environmentalists for even entertaining the thought of maintaining the current standard when, by its own admission, the standard is inadequate. Frank O'Donnell, president of the nonprofit advocacy group Clean Air Watch, calls it "an outrageous idea, driven by politics instead of science."

The White House has also been implicated in manipulating the proposed standard. During the regulatory review process, the White House Office of Information and Regulatory Affairs (OIRA) held three closed-door meetings with non-governmental interest groups. Two of these meetings included lobbyists representing the auto manufacturing, chemical and other industries. In the third meeting, public interest organizations including the American Lung Association expressed their views. Because the proposed standard is less protective than the scientific community has recommended, the White House is perceived to have given the views of industry undue priority.

One meeting also included a representative from the Office of Vice President Dick Cheney. In 2002, President Bush officially ended the role of the vice president in the rulemaking process. Since then, a representative from the office has been present in only five of 482 regulatory review meetings.

The exact influence of industry interests or the vice president's office is unknown because of a lack of transparency in the rulemaking process. The public is not readily afforded the opportunity to view EPA's pre-review proposal. While EPA staff scientists and two advisory committees suggested markedly tighter standards, it is unclear what agency officials ultimately decided to submit for White House review.

A lack of transparency in the records of regulatory review meetings further obscures public understanding of the decision-making process. OIRA maintains on its website a log of all meetings that identifies which rule was discussed and who attended. However, although Executive Order 12866, Regulatory Planning and Review, requires OIRA to disclose "the subject matter discussed" during these meetings, that information is rarely revealed.

EPA will accept comments on the proposed standard for 90 days after publication in the *Federal Register*. EPA's draft of the final standard will be subject to another review by OIRA. EPA is under court order to publish the final standard by March 2008.

House Legislation Would Force Regulatory Review

The House has approved legislation that would expand the ability of the Small Business Administration (SBA) to aid small businesses in complying with federal and state regulations. However, the bill would also allow SBA to target regulations that the small

business community finds objectionable.

The SBA Entrepreneurial Development Programs Act of 2007 (H.R. 2359), would give new responsibilities to existing regional Small Business Development Centers (SBDCs) to provide small businesses with regulatory compliance advice. SBDCs would provide free training and educational services and free "in-depth counseling" to small business owners and operators. The bill would also expand Internet sharing of regulatory compliance assistance information.

The bill would also require the administrator of SBA to prepare an annual report of federal regulations and recommend regulations to be reviewed. The regulations addressed would be those the administrator determines to be the "most burdensome to small business concerns."

In preparing the list, the SBA administrator would consult with the SBA Office of Advocacy, which typically serves as a liaison between the small business community and the White House or federal agencies. SBA would then transmit the list to the president and the House and Senate small business committees.

Once the list is established, the Office of Advocacy would then identify listed regulations eligible for review under the existing legal framework for rulemaking. The Office of Advocacy would notify federal agencies and the White House Office of Management and Budget of these rules and request the appropriate agency perform a review.

Specifically, the bill focuses on rules for which agencies have not performed a regulatory flexibility analysis or for which the analysis has proved inaccurate. Under the Regulatory Flexibility Act of 1980, while developing rules agencies must perform a regulatory flexibility analysis, which assesses the impact a rule will have on small entities.

The objective of the bill is to reduce or eliminate the burden imposed on small businesses by those regulations SBA identifies. The bill would also raise the profile of those regulations and subject them to greater scrutiny by the White House and lawmakers.

However, the bill's focus on the regulatory flexibility analysis could become problematic. An agency's decision to move forward with a regulation is based on how that regulation will affect society as a whole. While a rule may impose a cost on businesses, it may also hold great benefit for public health, the environment, national security or the economy. The bill would require agencies to review a regulation only from the perspective of businesses.

The provision is also duplicative. The Regulatory Flexibility Act provided that regulations affecting small entities be reviewed every ten years. The bill would expand the burden of agencies by forcing agency officials to review the impacts of regulations at the behest of SBA and possibly on an annual basis.

On June 20, the House voted 405-18 in favor of the bill. The Senate Small Business and Entrepreneurship Committee is scheduled to mark up a similar bill on June 26. Currently, the Senate version does not contain this regulatory review provision.

House Bills Address Mining Health and Safety Shortfalls

Two House bills introduced June 19 address health and safety issues left out of the MINER Act passed in 2006 after coal miners died in three separate accidents in Kentucky and West Virginia. The bills also include provisions that will allow the Mine Safety and Health Administration (MSHA), often criticized for slow implementation of mining laws, to better address new and existing protections.

Rep. George Miller ☼ (D-CA), chairman of the House Education and Labor Committee, and Rep. Nick Rahall ☼ (D-WV), chairman of the Natural Resources Committee, introduced H.R. 2768, the Supplementary Mine Improvement and New Emergency Response (S-MINER) Act and H.R. 2769, the Miner Health Enhancement Act of 2007. In introductory remarks, Miller described the bills as part of an effort "to clean up years of neglect and backsliding" by President George W. Bush's administration and a "complacent" mining industry. The bills come after a series of committee hearings, reports and requests for information from the administration.

The MINER Act of 2006 was passed to address immediate safety concerns after 47 people died in mining accidents that year at the Sago, Aracoma Alma, and Darby mines. Many health and safety provisions discussed after those accidents were not included in the MINER Act. Following the accidents, however, the Kentucky and West Virginia state legislatures passed significant new health and safety measures designed to take advantage of new technology and to improve state enforcement of safety violations. These state actions are considered model proposals for improving mine safety.

The House bills address some of the states' concerns and are intended to supplement the MINER Act and provide a variety of improvements to safeguard miners' health and safety. The bills would also provide services to the families of miners. The S-MINER Act, for example:

- would require mine operators to develop more detailed emergency plans and implement new safety features such as improved communications during emergencies, upgraded standards for conveyor belts, gas and smoke monitoring systems, and sealing abandoned areas of mines;

- would supplement enforcement authority of mine inspectors, establish new penalties on mine operators for violations, provide MSHA with subpoena powers, and create an ombudsman to hear miners' safety complaints and to protect whistleblowers;

- would enhance rescue, recovery and accident investigation authority by requiring prompt notice of serious accidents and "near misses," require improved logistical support for rescue teams, and allow supplemental mine accident investigations by the independent Chemical Safety Board; and

- would revise the 1977 congressionally-mandated standards for respirable coal dust to those long recommended by the National Institute of Occupational Safety and Health (NIOSH).

H.R. 2769 addresses directly other critical health issues Congress mandated in 1977 but never revised or updated. The bill would require MSHA to use the asbestos standard that the Occupational Safety and Health Administration (OSHA) uses for other workers instead of the weaker asbestos standard currently in place for miners. It would also require MSHA to update the list of permissible exposure limits in its air quality standards to the recommended exposure limits set by NIOSH.

In addition, H.R. 2769 would require MSHA to use the hazard communication standard issued in October 2000, which was in place when the Bush administration came into office. According to Miller's statement, the administration amended the hazard communication rule in June 2002 to weaken the timeliness of scientific information on workplace health risks provided to miners.

Also on June 19, Miller and Rahall, along with Reps. Lynn Woolsey (D-CA), Sen. Edward Kennedy ☼ (D-MA), and Sen. Patty Murray ☼ (D-WA), announced a Mine Safety and Health Initiative to help improve health and safety in U.S. coal mines.

H.R. 2768 and H.R. 2769 are part of the initiative. Both bills have been referred to the House Education and Labor Committee. Similar legislation is expected to be introduced in the Senate.

Supreme Court Upholds Right to Run Genuine Issue Ads during Elections

On June 25, the U.S. Supreme Court announced its decision in *Federal Election Commission vs. Wisconsin Right to Life, Inc.*, ruling 5-4 that the federal electioneering communications ban is unconstitutional when applied to genuine issue ads. The case challenged a provision in the Bipartisan Campaign Reform Act of 2002 (BCRA) that bars corporations, including nonprofits, from paying for broadcasts that mention federal candidates 60 days before a general election or 30 days before a primary (known as the blackout period). Though the Court ruled in favor of groups that run issue ads during elections, the debate will likely continue throughout the upcoming presidential election and beyond.

Chief Justice John Roberts wrote the majority opinion, finding that Wisconsin Right to

Life's (WRTL) ads opposing judicial filibusters during the 2004 election season were not the equivalent of express advocacy — supporting or opposing a candidate — but were genuine issue ads. The Court determined that an ad can be regulated and considered express advocacy "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Under this test, WRTL's three ads are plainly not the equivalent of express advocacy." The ads in question were considered genuine issue ads for two reasons: the ads' focus on a legislative issue and the absence of a reference to an "election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office."

The Court determined that the content of an ad should be considered, not the context. This rejects the government's argument that genuine issue ads cannot exist during the blackout period because all discussion of issues at that time would essentially become an electioneering ad. The majority disagreed with the government's reasoning; contextual factors are irrelevant, and the fact that WRTL engaged in express advocacy through other, separate actions does not qualify for censorship of issue advocacy. Roberts wrote, "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor."

Advocates including OMB Watch agree that issue advocacy should be permitted even in the days before an election. Since 501(c)(3) nonprofit organizations cannot support or oppose candidates, they would have been prohibited from conducting any lobbying, or issue advocacy, during the blackout period prior to the Court's decision. Thus, this decision is regarded as a free speech victory for nonprofit organizations.

The Court's decision does not mean the end of campaign finance reform or BCRA, or even an end to the ban on mentioning a candidate by name in an ad within the blackout period. However, it creates an exemption to the ban. The Court's decision is significant because a standard is set — it must be obvious that an ad supports or opposes a federal candidate for it to be forbidden. Yet the test set down by the Court appears vague: one can argue that an ad is always open to interpretation. Issue ads could come remarkably close to express advocacy ads without passing the test of having "no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

Some, however, are concerned about how corporations and unions will now interpret the decision. As an article in the June 26 *Washington Post* stated, "Critics said the decision will encourage a financial arms race between well-heeled special interest groups." Many groups that are concerned about the role of money in elections see the decision as a sign that future chipping away at BCRA is now inevitable.

As an editorial in the June 26 *New York Times* observed, "Although the court's five most conservative justices voted in the majority and the four more liberal justices were the dissenters, the outcome was not easy to categorize simply along ideological lines. Both sides of the campaign finance debate have always attracted unusual coalitions." Indeed,

OMB Watch joined with liberal and conservative groups to file an amicus brief urging the Court to protect the right of charities to broadcast grassroots educational and lobbying communications even during the blackout period.

There remains an uncertain standard for assessing ads during the blackout period, and concerns of money in politics and the possibility of future litigation still exist. The precise impact of the decision and its extent are unclear, but it importantly protects the First Amendment rights of nonprofit organizations that have a valuable voice in public policy debates.

Americans United Calls on IRS to Investigate Rhode Island Catholic Diocese

The Internal Revenue Service (IRS) has cautioned that it will closely watch the partisan political activities of charities as the 2008 election approaches. This enforcement may address new complaints about alleged political intervention, including a June 13 Americans United for Separation of Church and State (AU) letter to the IRS asking for an investigation into the Roman Catholic Diocese of Providence, RI, for possibly violating its tax-exempt status.

In a May 31 editorial, dubbed "My R.S.V.P. to Rudy Giuliani" in the official diocesan publication, *Rhode Island Catholic*, Bishop Thomas J. Tobin wrote he "would never support a candidate who supports legalized abortion." Tobin's article criticized Giuliani's position on abortion. "Rudy's public proclamations on abortion are pathetic and confusing. Even worse, they're hypocritical."

The IRS's recent Revenue Ruling 2007-41 states that in order for an organization "to remain tax exempt under section 501(c)(3), leaders cannot make partisan comments in official organization publications or at official functions of the organization." A column in a 501(c)(3) newsletter that endorses a candidate violates the prohibition, even if the author is speaking as an individual and/or pays for the space. The AU letter to the IRS pointed this out and noted that federal tax law forbids nonprofits from using organizational resources to support or oppose candidates for public office. "Although Tobin may express his individual views on political candidates, federal tax law prohibits the use of non-profit groups' resources to engage in partisan politics. The IRS has repeatedly warned non-profits not to use organizational resources to intervene in elections."

Barry Lynn, director of AU, was quoted in the AU press release saying, "If the bishop wants to join the political fray, he should do so as an individual without dragging along his tax-exempt diocese. A church is not a political action committee, and it should not act like one." The diocese is a nonprofit organization with a 501(c)(3) tax-exempt status. It has rejected AU's claims as having no merit.

Grantmakers Without Borders Challenges Treasury's Senate Testimony

On June 20, Grantmakers Without Borders (Gw/oB), a philanthropic network of 130 organizations, sent a letter to the leaders of the Senate Homeland Security and Governmental Affairs Committee objecting to the Department of the Treasury's portrayal of the agency's relationship with the charitable sector as an alliance on counter terrorism issues. The letter states, "Ironically, Treasury's anti-terrorism policies often chill the valuable work of international grantmakers, including Gw/oB's member organizations. Thus, philanthropic money that funds, for example, farming projects or support for tsunami victims is too often delayed or discontinued."

On May 10, Chip Poncy, the Director of Treasury's Office of Strategic Policy for Terrorist Financing and Financial Crimes, testified before the committee during a hearing on "Violent Islamist Extremism: Government Efforts to Defeat It." Poncy highlighted Treasury's revised Voluntary Anti-Terrorist Financing Guidelines, which he claimed are "based on extensive consultation between Treasury and the charitable and Muslim communities." While there was consultation on the guidelines, in December 2006, a group of more than 40 U.S. charitable sector organizations called for withdrawal of these guidelines.

Despite Poncy's claims about Treasury's outreach efforts, nonprofit requests for dialogue have gone largely unanswered. As Gw/oB's letter states, "Objections from the charitable sector to the Department of the Treasury's anti-terrorism policies have largely fallen on deaf ears." For example, in March, Treasury's Office of Foreign Assets Control (OFAC) published a Risk Matrix for the Charitable Sector on its website without public announcement or comment. This action ignored a June 2006 request from a group of nonprofits that asked Treasury for a public comment period. Similarly, Treasury has not responded to a November 2006 letter from a group of charities seeking a meeting to discuss ways to release frozen funds of charities Treasury has designated as supporters of terrorism to alternative charitable programs.

During the question and answer portion of his testimony, Poncy highlighted Treasury's "dual purpose" analysis of the charitable sector and terrorist organizations, saying all of the 44 charities it has designated as supporters of terrorism were engaged in both real charitable work and terrorist support. He said this gray area must be addressed "rather than the unfortunate fiction that there are charities that pretend to be, but aren't, and charities that just do charitable work." He also said Treasury considers that if any aspect of an organization is engaged in terrorist support, then it considers the entire charitable organization to be complicit. Poncy acknowledged that this approach "raises operational issues as to whether or not Treasury can look at minimalizing collateral damage." To date, it has made no efforts to contain "collateral damage."

Gw/oB's letter noted that no representatives from the charitable and Muslim

communities were called to testify at the congressional hearing, although this would have provided committee members with a more accurate, complete description of the impact Treasury's counter terrorism procedures have had on charitable programs and the lack of trust and credibility Treasury has within the nonprofit sector on these issues.

IRS Seeks Comments on Proposed Revisions to Annual Filing by Nonprofits

For the first time since 1979, the Internal Revenue Service (IRS) has proposed major revisions to Form 990, the annual information return filed by tax-exempt organizations. The draft form, supplementary schedules and instructions are available on the IRS website. The changes include a new Schedule C for all 501(c) organizations to report information on lobbying efforts and activities that support or oppose candidates for public office. It proposes significant increased reporting on lobbying by charities and religious organizations that do not use the expenditure test to measure their lobbying limit. Public comments can be filed electronically or mailed to the IRS by Sept. 14.

The IRS released the proposed revisions for Form 990 on June 14. IRS officials said the redesigned form is meant to enhance transparency for the IRS and the public, promote compliance with IRS rules and minimize the burden on nonprofits. The proposed core form is 10 pages long, and there are 15 proposed schedules for supplemental information.

Reporting on election related activities

Proposed Schedule C, Political Campaign and Lobbying Activities, should be carefully reviewed by nonprofits. The format could be confusing, since the IRS has proposed one schedule for all tax-exempt organizations, even though the largest segment of the nonprofit sector, 501(c)(3) organizations, operate under more restrictive rules than action/civic organizations, labor unions or trade associations.

Part I-A of Schedule C asks all 501(c) and 527 organizations (political action committees) to describe direct and indirect political campaign activities, including volunteer hours and expenditures. Part I-B asks 501(c)(3) organizations about excise taxes imposed for these activities and whether a correction was made, without stating the prohibition against direct or indirect intervention in candidate elections. The Instructions provide minimal guidance on what is and is not allowed, referring to the IRS' recent Revenue Ruling 2007-41 for further details. The instructions also note that "Political campaign activity does not include any activity intended to encourage participation in the electoral process, such as voter registration or voter education, provided that the activity does not directly or indirectly support or oppose any candidate."

The IRS Rationale and Overview says, "The enhanced political activity questions reflect the Service's concern with the results of its Political Activities Compliance Initiative

(PACI)." It notes that the service will "follow up in appropriate circumstances with a flexible array of compliance tools." This array of tools could include an investigation by IRS staff, written warnings to cease certain activities, excise taxes on the organizations and its managers, or loss of tax-exempt status.

Part I-C asks 501(c)(4),(5) and (6) organizations for expanded information on ties between the organizations and political campaigns by asking for information on "all section 527 organizations to which payments were made." This encompasses political parties, candidate campaigns and political committees at the local, state and federal levels.

Reporting on legislative lobbying activities

Part II-A covers reporting of lobbying expenditures by charities that have opted to use the expenditure test to measure their lobbying limits. There are no significant changes in the first part of this section, since the expenditure test only counts money spent on lobbying toward the limit. However, the proposed form also includes historical reporting of total lobbying expenditures over a four-year period. The Instructions say this is because, "if over a 4-year averaging period the organization's average annual total lobbying or grassroots lobbying expenditures are more than 150% of its dollar limits, the organization will lose its exempt status." Pages four through seven of the Instructions provide a good summary of the definitions and rules.

Part II-B applies to 501(c)(3) organizations that have not filed Form 5768, which allows them to use the expenditure test to measure lobbying limits. All other 501(c) groups also report their lobbying activities here. This section could dramatically increase the recordkeeping and reporting burden on charities, since only about three percent have opted to use the expenditure test. All others default to the vague requirement that no more than a substantial part of the activities shall be attempts to influence legislation. The impact of the proposed increased detail in reporting could deter some charities from taking on lobbying activities or move them to file Form 5768 in order to take advantage of the expenditure test's more limited reporting.

The additional detail about lobbying sought from "no substantial part" 501(c)(3) organizations includes:

- volunteers
- paid staff
- media advertising
- mailings to members, legislators or the public
- publications and broadcasts
- grants to other organizations for lobbying purposes
- rallies, demonstrations, seminars, conventions, speeches, lectures, etc.
- other

The form then asks if these activities "cause the organization not to be described in section 501(c)(3)". However, the Instructions provide limited guidance for answering this question. Pages 11-12 explicitly state that these organizations cannot rely on the definitions that apply to the expenditure test. The failure to state a clear limit on what is "unsubstantial" lobbying activity reflects the larger flaw and lack of clarity in the law.

Vice President Avoids Oversight, Claims Office not Part of Executive Branch

On June 21, the House Committee on Oversight and Government Reform released communications between the National Archives and the Office of the Vice President (OVP) detailing how Vice President Dick Cheney has exempted himself from an executive order about safeguarding classified information. The order requires all executive entities to comply with procedures for safeguarding classified information and to disclose basic information on classification practices. In response to repeated requests to comply with the order, Cheney argued that his office is not an entity within the executive branch. Additionally, the OVP has supposedly suggested eliminating the National Archives' oversight authority for classified information security.

Executive Order 12958, which was reaffirmed and amended by President Bush in 2003, requires the National Archives to issue uniform procedures for the classification, declassification and safeguarding of information. The order gave the Information Security Oversight Office (ISOO) at the National Archives the authority to ensure compliance with the requirements by requesting information on classification and declassification activities. This information is then included in an annual ISOO report for the president.

Between the initial release of E.O. 12958 in 1995 and 2002, the OVP annually submitted information to ISOO and operated in compliance with the order. Since 2002, however, Cheney has failed to submit information on classification and declassification activities to ISOO and has refused to recognize its authority. Despite repeated attempts by the director of ISOO to require compliance, the OVP has maintained that it is not an entity of the executive branch. According to William J. Leonard, Director of ISOO, because of its dual legislative and executive functions, the OVP "does not consider itself an 'entity within the executive branch that comes into the possession of classified information.'"

In a Jan. 9 letter to Attorney General Alberto Gonzales, Leonard states that this is an inappropriate and inconsistent understanding of the executive order. First, it is inconsistent in that annual reports were submitted to ISOO until 2002. Second, the OVP's interpretation violates the plain reading of the text of the order. Third, it would have negative policy implications for the authority of the OVP. "I am concerned that this could impede access to classified information by OVP staff," states Leonard, "in that such access would be considered a disclosure outside the executive branch."

The House Committee on Oversight and Government Reform has learned, however, that the OVP has attempted at different times to revise the order to exempt itself from ISOO's authority or to abolish ISOO entirely. "According to Mr. Leonard, your office urged the inter-agency committee considering revisions to the executive order to abolish the Information Security Oversight Office which he heads," stated Rep. Henry Waxman ☼ (D-CA), chairman of the House Committee on Oversight and Government Reform, in a June 21 letter to Cheney. "Mr. Leonard said that your office also proposed a change to the definitions in the executive order that would exempt the Office of the Vice President from oversight."

White House spokeswoman Dana Perino reaffirmed the OVP's position that it is not subject to the executive order, but also stated that the president does not believe that ISOO should be eliminated and that no one has suggested doing so.

ISOO referred the matter to Gonzales in January, requesting clarification of ISOO's authority and whether or not the OVP is an entity of the executive branch and subject to the requirements of the executive order, but Gonzales has not responded. A Justice Department spokesman states that the matter is currently under review.

Congress Moves to Create a Greenhouse Gas Inventory

In an effort to combat the causes of climate change, proposals to collect and publicly disclose accurate information on releases of greenhouse gases are moving forward in Congress. Two recently introduced bills seek to create an inventory of greenhouse gas emissions, and during the week of June 18, the Senate Interior Appropriations Subcommittee included a provision in its bill that would require the U.S. Environmental Protection Agency (EPA) to create such an inventory. These efforts move in the direction of collecting accurate information on such a broad environmental challenge and, if the EPA's Toxics Release Inventory is any indication, could help to reduce emissions through the mere disclosure of information.

The FY 2008 Interior appropriations bill, which was approved by the Senate Appropriations Committee on June 21, includes a provision that would require EPA to issue a rule on reporting greenhouse gas emissions under the Clean Air Act. The bill provides $2 million to establish a program for reporting greenhouse gas emissions from all industry sectors. "This funding is a first step towards helping to understand and reduce our nation's carbon footprint," stated Sen. Dianne Feinstein ☼ (D-CA), chairwoman of the Interior Appropriations Subcommittee, who issued a press statement along with Sen. Barbara Boxer ☼ (D-CA), chairwoman of the Environment and Public Works Committee, in support of the measure. The House FY 2008 Interior appropriations bill does not include similar language, but it does dedicate $2 million to EPA to begin a rulemaking on reducing carbon emissions.

Congress has also introduced two stand-alone bills to create a greenhouse gas inventory

at EPA. Rep. Eliot Engel ☼ (D-NY) introduced the Greenhouse Gas Accountability Act of 2007 (H.R. 2651) on June 12. "To construct a comprehensive, economy-wide global warming policy, we have to know what we are currently emitting, who is emitting it, and data on where in the economy it makes sense to regulate," said Engel. "A comprehensive registry will give us all the data we need to craft future legislation and intelligently decided [*sic*] how to allocate credits in a cap and trade system."

The Greenhouse Gas Accountability Act would require all publicly traded companies and "significant emitters" of greenhouse gases to report to the EPA and for the agency to make the data available in a publicly searchable format. It also requires publicly traded companies to include data on greenhouse gas emissions in their annual financial reports to the Securities and Exchange Commission.

Sens. Amy Klobuchar (D-MN) and Olympia Snowe (R-ME) introduced the National Greenhouse Gas Registry Act of 2007 (S. 1387) on May 14. Their bill amends the Emergency Planning and Community Right-to-Know Act of 1986 to require the EPA to collect and publicly disclose information on greenhouse gas emissions under the annual Toxics Release Inventory (TRI) program. "If weight watchers can have a calorie counter, we can have a national 'carbon counter' so we can figure out the best way to reduce emissions that is good for business and good for the environment," said Klobuchar. The TRI program has been highly successful in demonstrating that simple disclosure of information on toxic pollution can generate significant voluntary reductions. Since the program launched in 1988, it has tracked an almost 60 percent reduction in release and disposal of the chemicals it covered.

With these three efforts moving forward, it is looking like the 110th Congress may pass greenhouse gas inventory provisions in some form. Both S. 1387 and H.R. 2651 have been sent to committee, but no markup dates have yet been scheduled. The House is expected to vote on the FY 2008 Interior appropriations bill this week; it is unclear when the full Senate may vote on the legislation.

Congress Critical of EPA's Information on 9/11

In recent House and Senate hearings, Congress called to task the U.S. Environmental Protection Agency (EPA) and former EPA Administrator Christine Todd Whitman for misrepresenting the health dangers World Trade Center (WTC) dust posed to the public in the aftermath of the 9/11 attacks. The Senate hearing, chaired by Sen. Hillary Clinton ☼ (D-NY), was held by the Committee on Environment and Public Works' Superfund and Environmental Health Subcommittee on June 20; the House hearing, chaired by Rep. Jerrold Nadler ☼ (D-NY), was held June 25 by the Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties.

The hearings focused on two main areas: (1) EPA's public communications about outside air quality immediately after the towers' collapse; and (2) EPA's programs to sample and

clean inside residential air. In both instances, EPA's information greatly impacted the public's ability to make responsible decisions for their self-protection.

The EPA, Whitman and other government officials continued to affirm that the assurances about air quality in the weeks after the attacks have been confirmed by scientific evidence. At the hearings, however, officials made a vital distinction between the air in and outside the WTC site and asserted that the safety assurances only pertained to asbestos outside of the pile. While this information may have been included in press releases, it was not verbally announced to the public. As Nina Lavin, a resident in the vicinity of the WTC, testified before the Senate, "What remains crystal clear is Christie Todd Whitman ... assuring New York and the nation that 'the good news is the air is safe to breathe.'"

Experts have questioned whether or not EPA had scientific backing to tell the public that the air was safe. Whitman stands by her outdoor air samples showing relatively low concentrations of asbestos, but as Dave Newman of the New York Committee for Occupational Safety and Health pointed out in the House hearing, asbestos was detected in 76 percent of the dust samples and ranged from 110 percent to 449 percent above the legal limit. Asbestos is just one chemical of concern among many carcinogens that were known to exist in the tower debris.

Whitman and others also assured Congress that workers understood the need to wear protective gear. However, the fact that a 2006 Mount Sinai Medical Report found 70 percent of WTC responders had "new or worsened respiratory symptoms as a result of their work on the WTC site, many with severe conditions," may demonstrate that EPA was not effective in spreading that message during the clean up.

EPA's voluntary programs for residential testing and cleaning tell a similar story. New York City's Department of Environmental Protection's notice to building owners included an EPA statement "that the potential presence of ACM [asbestos-containing material] in dust and debris is minimal." Such statements insinuated that a professional cleaning was most likely unnecessary and not urgent. Not surprisingly, only about 4,000 of the 20,000 eligible residents participated in the program.

A New York City Department of Health Study cited in EPA's Inspector General report found that "most residents did not follow the City's recommended cleaning practices." In a recent second program for testing and cleaning residential buildings, EPA convinced residents to believe their air was safe by using test results from the first program that showed asbestos risks as "very small." What was not explained, but was clarified in the hearings, was that eighty percent of these results were found after a professional cleaning.

John Stephenson, director of National Resources and Environment in the Government Accountability Office (GAO), testified before the Senate committee and indicated EPA has not guaranteed the safety of New York's residents: "We think the data is quite

inconclusive. We don't think EPA has done a comprehensive study on a single building, let alone [all of] lower Manhattan." The majority of the Senate and House subcommittee members present at the hearings agreed with Stephenson's assessment.

Though tough questions were asked and honest testimony given, the hearings ultimately became mired in a blame game that obfuscated the most fundamental reality of EPA communications with the public and WTC workers after 9/11: they didn't work. Given the intense interest of lawmakers, legislation to establish more clearly the EPA's responsibilities during a disaster, including information disclosure requirements, may be forthcoming.

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