» The Watcher » July 12, 2004 Vol.5, No.14

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New Poll Finds Overwhelming Majorities Favor Government Regulation for Health and Safety

A new Harris poll conducted for Advocates for Highway and Auto Safety reveals that nine out of ten Americans believe that governmental regulation to protect health and safety is important.

The finding accords with similar findings since 1996.

According to the study's authors, "the weight of public opinion is overwhelmingly on the side of having federal responsibility for . . . safety and public health. The intensity of support is also high." Of those who rated the government's role as important, almost 64% (or 58% of all respondents) considered the government's role as very important.

"Over the years, roughly six in 10 Americans have viewed government regulatory responsibility over highway and auto safety and other matters affecting the health and safety of the people as not just important, but 'very important,' essentially indicating that they view it as an indispensable *necessity*," the report continued.

More specifically, the poll found widespread support of governmental regulation to make auto safety standards

tougher and more uniform. Among the findings:

- Making all vehicles, including sport utility vehicles, more stable and less prone to roll over is favored by 84% of the American public, including 8 out of 10 SUV owners.
- An overwhelming majority -- 9 out of 10 surveyed -- wants the government to set auto safety standards.
- More than 90% of adults surveyed said they would be willing to spend $200 to $300 more for safety improvements in new cars.
- Another majority, 83%, wants the government to "require a major upgrading of roof safety standards" to prevent the roof of a car from crushing inward during a rollover.

These findings come at a critical time, as the Senate and House are conferring on the Safe, Accountable, Flexible, and Efficient Transportation Equity Act (SAFETEA), a transportation bill for which the Senate version, but not the House version, would require safety improvements addressing many of the concerns identified by the poll.

Appropriations in November?

The House has been steadily moving forward with appropriations bills, in spite of the tight cap on appropriations spending for 2004; but in the Senate only one bill -- Defense -- has passed, and only one other bill -- Homeland Security -- has even gotten through a full Senate committee. None has made it to the Senate floor.

Little time remains in this pre-election congressional session -- only 14 days in July and only 19 days in September. The new fiscal year of 2005 begins October 1, 2004. What seems to be the problem?

- Last week Senate Appropriations Chairman Ted Stevens (R-AK) cancelled nine subcommittee markups. According to a *Congressional Quarterly* report, the purpose was to keep the markups from being available for public scrutiny over the summer break. Given the tight budget cap necessitating cuts or, at most, level funding of a number of programs and services, advocates would be able to highlight and garner public support against cuts in widely supported programs. Politically unpopular cuts, like inadequate funding of healthcare for veterans while fighting continues in Iraq and Afghanistan, could become political issues.
- Before proceeding with appropriations, Senate Majority Leader Bill Frist (R-TN) is determined to get agreements with Democrats limiting the time for floor debate of appropriations bills. The time limits would protect these from the addition of numerous amendments, including those with political overtones.
- Senate leadership may, all along, have been anticipating wrapping all the appropriations bills into an omnibus bill, rather than debating each bill (and allowing the cuts to be more publicly known).
- Meanwhile, with so many important matters facing Congress this week, lawmakers are set to squander considerable time debating and voting on the completely symbolic proposed constitutional ban on gay marriage, which nearly everyone agrees cannot pass. The sole purpose is to build some members' political currency with constituents over the July/August break.

There had been talk of the Senate wrapping the remaining ten appropriations bills into an omnibus bill and attaching it to the Homeland Security appropriations bill for passage before the July/August break. Now it seems less likely that Homeland Security will move before the summer break, in spite of some mutterings about the failure to pass Homeland Security, given the recent warnings about terrorist threats this summer. Homeland Security will remain a possible vehicle to carry the omnibus bill come September.

What does all this boil down to? It's an election year, so election posturing takes precedence over getting the substantive work of funding the government done. In the same vein, the majority has continued to use strong-arm tactics, as during the extended debate about amending the Patriot Act last week, which have even further divided Congress. This makes it difficult for Congress to work cooperatively on much of anything.

Finally, lawmakers have a number of amendments they would like to see attached to some bill and there is a very short time with few opportunities to do so. These include amendments to block the Department of Labor overtime rules, increase the minimum wage (Sen. Kennedy tried but failed to attach an amendment to the class action bill raising the minimum wage from $5.15 to $7.00), reduce greenhouse gasses, legalize the re-importation of drugs from outside the US, and extend the ban on assault weapons. Congress also still must pass an increase in the statutory debt limit. The majority would prefer to do so as an amendment buried in another bill, rather than make an issue of it. (Republican leaders tried to get the debt limit increase into the Defense

appropriations bills, but failed).

Probably only the Defense appropriation, which is almost ready to be sent for the President's signature, will become law before the July/August break. It may also be the only one of the 13 appropriations bills to be considered alone. It now seems that the real appropriations work will be delayed until after Congress returns -- or maybe even until after the elections, with continuing resolutions instead funding government through a "lame duck" session of Congress.

Estate Tax Update

The status of the estate tax repeal has not changed, but action is likely before this congressional session ends.

The $1.3 trillion tax cut package passed in June 2001 bill included a one-year repeal of the estate tax effective in 2010, with gradually increasing exemption levels and decreasing tax percentage rates until then. In 2011, the estate tax will revert back to the law that was in effect in 2001.

Permanent repeal of the estate tax is something of a conservative fixation, making it likely that efforts will be made to accelerate the repeal, to extend the repeal, to make the repeal permanent, or possibly to "reform" the estate tax by making the exemption levels so high and the tax rate so low as to render it repealed in all but name. However, the failure of Congress to pass a budget resolution; the tight budget situation and the cost of repeal; and the expiration in 2004 of the so-called "middle-class" tax cuts, all mitigate against the possibility of estate tax repeal anytime soon.

It is unclear how the deadlock over the estate tax will be broken -- especially in the near future. There appears to be broad congressional support for extending the so-called "middle-class" tax cuts that are due to expire in 2004, in spite of the rising deficits. However, even those tax cuts may require offsets since the proposed PayGo rules that would have exempted tax cuts from the offset requirement have been defeated so far. The failure of Congress to pass a budget resolution means that there are no reconciled funds available for any tax cuts during 2004, including repeal of the estate tax.

Future plans are uncertain, but there likely will be one more vote in the Senate on a measure to repeal or reform (in a manner not yet determined) the estate tax, essentially to send a message to voters before the election. For more information and updates see the Americans for a Fair Estate Tax coalition website.

United for a Fair Economy has launched a campaign to have business owners sign on to a statement in support of the estate tax. UFE would welcome efforts to increase the number of signers.

Tax Cut Extensions Possible

We reported earlier that Senate Finance Committee Chairman Charles Grassley (R-IA) wanted to delay until September consideration of extending the "middle-class" tax cuts -- marriage penalty, expansion of the 10% income tax bracket, and the $1000 child tax credit -- that will expire on December 31. However, the Bureau of National Affairs (BNA) reported July 12 that House and Senate leaders plan to consider the cuts late this week.

Grassley reasoned that the same Senators, who so strongly fought against a budget resolution requiring offsets on entitlements, but not on tax cuts, may insist that the costs of extending any tax cuts should be offset to avoid worsening the deficit. However, after both parties' conventions are over in September, and as the December 31 deadline gets closer, that insistence might fade.

The House has already passed bills making permanent the three middle-class tax cuts and extending the Alternative Minimum Tax (AMT) breaks for one more year. Those bills have no offset provisions. President Bush, of course, strongly supports extension of all the tax cuts and prefers earlier passage.

BNA also reported this morning that House and Senate Majority leaders are trying to write a conference report on the House-passed child tax credit refund bill (H.R. 1308), and use it as the vehicle for extension of at least those three expiring tax cuts. It is not known whether the AMT (or other tax cuts) will be part of that package, especially since fixing the AMT is very expensive compared to the cost of extensions of the other tax cuts. With apparent reluctance, Grassley has agreed to earlier consideration, although high support for the extension of the three tax cuts in the Senate is mixed with concerns about increasing the deficit.

OMB Watch Uncovers Flaws in OMB's Data Quality Report

The Office of Management and Budget (OMB) recently published a report to Congress that analyzes and summarizes federal agencies' first year of operations experience using the new information quality guidelines mandated under the Information Quality Act (IQA). The guidelines are supposed to ensure the quality, objectivity, utility, and integrity of information disseminated by federal agencies. The report provides OMB's perspective on the first year under the law and the IQA reports submitted to OMB from individual agencies. Unfortunately, OMB Watch's analysis found that OMB's insights are biased and its facts inaccurate.

OMB's report is seriously flawed: data is inaccurate, information is misleading, and overall the report is highly biased. For example:

- OMB claims that agencies only received 35 information quality challenges in Fiscal Year 2003. Yet, even using questionable methodology employed by OMB, the number is 98, nearly triple the number in the report.
- OMB states that "most" IQA challenges that were denied were appealed and that the appeals process "appears to have fostered corrections." Yet only 28 percent of denied challenges were appealed -- clearly not "most." And of these appeals, only 5 resulted in partial or full corrections -- and 4 of these were for what is called non-influential information.
- OMB accurately states that a wide range of stakeholders have filed information quality challenges, dismissing fears that these challenges would be dominated by industry. But OMB fails to disclose that 72 percent of the challenges -- nearly three-quarters -- were from industry.
- OMB claims that the IQA has not slowed down agency rulemakings or dissemination activities. Yet OMB has no data to draw such conclusions. OMB did not collect information from the agencies about impact on rulemakings or dissemination. Instead, OMB relies on conjecture or highly flawed logic to make its point (See links to both the full analysis and the OMB report below).

The template OMB created for the first year reports from agencies does not collect the type of information that would allow for a thorough assessment of the new law. For example, OMB does not ask agencies to send information on the amount of resources each devotes to IQA activities or the impact the IQA has on other agency activities such as rulemakings and dissemination of information. Congress must have such information in order to evaluate the implementation of the law accurately.

The OMB report to Congress has so many problems, it probably would not meet the standards established under OMB's own information quality guidelines. There are problems with reproducibility, transparency of the methodology, accuracy of the data, and general reliability -- all key factors under the information quality guidelines.

Regardless of the merits of OMB's report to Congress, it is clear that this law has had a significant impact on government operations, and surprising that Congress has never had a hearing -- not even during development. In light of the OMB report, congressional oversight is now needed, including a General Accounting Office assessment of the law's implementation, and hearings on whether the law needs to be modified.

OMB Watch's full analysis of OMB's report
OMB's DQA Year-1 report to Congress

Scientists Speak Out Against the Bush Administration

Last week the Union of Concerned Scientists (UCS) released updated evidence that the Bush administration continues to manipulate and control science for political reasons. UCS has now collected the signatures of more than 4,000 scientists supporting a statement urging the Bush administration to discontinue these troubling practices, and to restore scientific integrity in federal policymaking. The prestigious list of scientists taking this unprecedented stand includes 48 Nobel laureates, 62 national medal of science recipients, and 127 members of the National Academy of Sciences.

UCS released a report in February detailing numerous cases of manipulation, distortion, and suppression of scientific information within government agencies. The White House dismissed the concerns raised in the report

and has continued operating as before. UCS blames this denial for the significant increase of interest in the scientific community.

The new cases involve issues ranging from mountaintop removal strip mining to endangered species. The evidence also exposes significant political interference with independent scientific advisory panels, most notably at the National Institutes of Health (NIH), under the Department of Health and Human Services.

UCS outlines measures that could mitigate the problems and begin to correct the situation, including:

- Whistleblower protection of government scientists;
- Restoring independent scientific advice to Congress, possibly within GAO;
- Greater oversight powers for the Office of Science and Technology Policy;
- Stricter enforcement of the Federal Advisory Committee Act (FACA) with increased transparency for selection and activities of advisory committees; and
- Full access to government scientific analysis that isn't legitimately classified for national security reasons.

Patriot Act Intact but Under Fire in Congress

In a vote reflecting disagreement among Republican leaders and several conservative members of Congress over the USA Patriot Act, the House of Representatives defeated by the thinnest possible margin an effort to reign in the government's power to require libraries and booksellers to reveal the books people are reading.

Libraries and booksellers, including the American Library Association and American Booksellers Foundation for Free Expression, have gathered over 100,000 signatures in a campaign to support the Freedom to Read Protection Act, yet the House deadlocked on the bill.

The limits on the Patriot Act appeared to pass, but House leaders extended the voting deadline and convinced enough members to switch their votes to deadlock the chamber into a 210-210 tie, enough to kill the measure. The White House had earlier threatened a veto. It was not easy for Republican leaders to defeat the measure and prevent changes to the Patriot Act, which has been severely criticized ever since its hasty passage in the hazy weeks after 9/11.

Groups Object to Indian Affairs FOIA Exemptions

Several groups and individuals voiced objections to a Senate Bureau of Indian Affairs reform bill, in a letter delivered to Senators Ben Nighthorse Campbell (R-CO) and Daniel K. Inouye (D-HI) July 8.

The groups oppose Section 7 of S. 297, the Federal Acknowledgment Process Reform Act of 2003, which would exempt from the Freedom of Information Act (FOIA) certain actions by the Interior Department's Assistant Secretary for Indian Affairs. The exemption would specifically allow Interior to hide its actions on any Indian group's petitions for acknowledgment, until the petition has been "fully documented" and the assistant secretary publishes a notice of its receipt in the Federal Register. This exemption would not apply to U.S. law enforcement formal or informal requests, or subpoenas.

The bill asserts that Section 7 aims "to increase the transparency, consistency, and integrity of the [tribal] acknowledgment process." The letter argues that this approach is fundamentally flawed and actually "makes the acknowledgment process more obscure." Instead, the groups believe that using online dockets to display the information, as mandated by E-FOIA, would generate greater efficiency and cost-savings.

The signatories on the letter include journalists and federal and state organizations.

Poll Shows Growing Public Support for First Amendment

Public support for the First Amendment has rebounded to pre-9/11 levels, according to this year's results of an annual poll by the First Amendment Center.

Two findings from the survey, released in conjunction with the nation's Fourth-of-July celebrations, are noteworthy for advocates of open government. The poll shows nearly two-thirds of Americans disagree with the statement that the First amendment goes too far in protecting freedoms. Last year Americans were evenly split on the statement. Second, a growing number of Americans say they want more and better information about the United State's efforts to combat terrorism: 50 percent in 2004, up from 40 percent a year earlier.

The survey is available from the First Amendment Center.

Ad Council pushes public to "exercise freedom" after 9/11

The Advertising Council last week released several public service announcements designed to remind Americans to support and defend freedom as part of the response to the attacks of September 11. These new ads encourage Americans to exercise their freedom by voting, volunteering and otherwise engaging in civic life.

The spots stress that most Americans care about social problems but do little or nothing to address them. One spot shows person-on-the-street interviews in which individuals identify problems they consider important, such as education, racism and women's rights. When asked what they personally are doing about these, the individuals are stumped. The ad ends with the message, "Keep freedom strong. Exercise it." (To view this and other ads in the campaign, go to www.explorefreedomusa.org/hear/index.html. This ad is entitled, "Ummm.")

The Ad Council is making these ads freely available for nonprofits and others to highlight on websites. The spots are designed to air through the Internet as well as on television, in newspapers, and on the radio.

The new series of advertisements push Americans to find out more at a new website, www.explorefreedomusa.org. The ads are part of the Ad Council's Campaign for Freedom, created in response to the events of September 11, by a leading advertising agency working with college students at Virginia Commonwealth University. The Council convened academics, entertainment executives and public interest advocates to help inform its strategy. Previous ads are available at www.rememberfreedom.org.

Legality of Campaign Coordination with Nonprofits Questioned

Two presidential campaigns are facing challenges about their ties to nonprofit groups. The Bush campaign's appeals to churchgoers to recruit from their congregations, and the Ralph Nader campaign's office rental agreement with a 501(c)(3) group founded by him, both raise the possibility that charitable or religious resources are being used for partisan purposes. Both are the subject of a complaint filed at the Federal Election Commission (FEC) that alleges illegal coordination between the campaigns and two nonprofits in Oregon working to get Nader on the state ballot.

FEC Complaint Against Bush, Nader Campaigns, and Two Nonprofits

On June 30 Citizens for Responsibility and Ethics in Washington (CREW), a nonprofit that "focuses on government officials, who sacrifice the common good to special interests" through litigation, filed an FEC complaint alleging illegal coordination between two Oregon nonprofits, the state's Republican Party, the Bush campaign and the Nader campaign. CREW also alleges the nonprofits, Citizens for a Sound Economy and the Oregon Family Council, made prohibited corporate contributions to the Nader campaign.

The primary issue is whether the parties violated FEC regulations defining prohibited coordination between campaigns and outside groups. CSE and OFC operated a phone bank urging conservatives to sign petitions to put Ralph Nader on the presidential ballot in Oregon, saying "If Ralph Nader gets on the ballot he would pull thousands of liberal votes that would otherwise go to Kerry and perhaps cause President Bush to win the election." CREW says the effort was coordinated with the state Republican Party and Bush-Cheney campaign and

used their resources.

CSE's press release responding to the charge said there was no illegal contribution because the group did not expressly advocate election or defeat of a federal candidate. CSE is a 501(c)(4) organization that can be involved in partisan electioneering, but support for federal candidates must be paid for from a separate segregated fund. Their statement did not address whether the funds used came from such a fund. The complaint says the Oregon Family Council is also a 501(c)(4) organization.

More recently the Detroit Free Press reported that the state Republican Party is collecting signatures to put Nader on the Michigan ballot.

Recruiting Church Members

The Bush-Cheney re-election campaign is targeting religious voters by asking church members to recruit volunteers from the ranks of their congregations and post campaign information in church facilities. A recent action plan sent to volunteers lists 22 "duties" to be carried out over the summer. For example, by July 31 volunteers are asked to "send your Church Directory to your State Bush-Cheney '04 Headquarters or give to a Bush-Cheney Field Rep.," and "Talk to your Pastor about holding Citizenship Sunday for Voter Registration Drives." By August 15, they are to "talk to your Church's seniors and 20-30 something group about Bush-Cheney '04 and recruit 5 or more people in your church to volunteer for the campaign."

The *Washington Post* obtained a copy of the packet and reported that it does not contain any information warning volunteers not to endanger their church's tax-exempt status by involving it in partisan activities. (Religious organizations, like all groups exempt under Section 501(c)(3) of the tax code, are prohibited from supporting or opposing candidates, but are allowed to engage in nonpartisan voter education and mobilization activity.) The IRS said it would not comment on the issue, since limited facts are available. However, last month the IRS wrote a letter to national political parties warning against involving 501(c)(3) organizations in campaigns after the Bush campaign sent emails asking volunteers to identify "Friendly Congregations" for the campaign.

The Bush campaign's efforts have been criticized by the conservative Southern Baptist Convention, which objected to using religious groups for political purposes, and the liberal Americans United for Separation of Church and State, which called it a misuse and abuse of churches for partisan ends.

Nader Campaign Office Rental Deal Subject of FEC Complaint

CREW has also filed complaints at the FEC and Internal Revenue Service (IRS) against the Nader campaign, saying the campaign is receiving discounted office space and telephone service from a 501(c)(3) organization, Citizen Works, which Nader had founded in 2001. In June, the *Washington Post* reported that FEC records show rental payments from the campaign to Citizen Works. A common receptionist works for both groups, as well as other sub-tenants. Citizen Works' president, Theresa Amato, is Nader's campaign manager. If the rent is found to be below market rate, or if other services are provided at a discount, Citizen Works will have made an illegal in-kind contribution to the Nader campaign and endangered its tax-exempt status. To date no action has been taken by the FEC or IRS.

More Evidence of Misconduct by Head Start Bureau Chief

On June 30, the National Head Start Association issued a statement calling for the immediate resignation of Windy Hill, the U.S. Head Start Bureau Chief. Hill is the subject of an Inspector General investigation into misconduct during her tenure as head of a Texas Head Start agency prior to coming to Washington. The investigation began after NHSA released details of Hill's misconduct in April, alleging thousands of dollars in unauthorized pay, vacation time and undocumented expenses. Hill has announced her resignation effective in November, but NHSA released new details of misconduct and said the resignation should be effective immediately.

Last year Hill sent letters to Head Start grantees that contained confusing and inaccurate information about grantees' right to lobby on Head Start issues. The letter threatened sanctions against programs and parents who engaged in lobbying activity. After NHSA filed a lawsuit, HHS was forced to send a corrected letter to all Head Start programs.

In addition to its previous allegations, NHSA's new announcement said Hill hired the suspended Texas accountant that reviewed her programs as a HHS reviewer of Head Start programs. The group also alleged that Hill began her job at HHS while on "leave of absence" from the Texas program, without disclosing that fact to her board or in the Public Financial Disclosure Report required by ethics laws.

Court Says State Must Accept Voter Registrations From Nonprofit Project

A Georgia education group involved in a multi-state effort to register voters won a preliminary injunction in early July barring the Georgia Secretary of State from rejecting voter registration cards mailed in bundles. The case, Charles H. Wesley Education Foundation, Inc. v. Cathy Cox, et al., was a test of whether state officials can impose rules on voter registration drives that are inconsistent with the National Voter Registration Act (NVRA).

The public charity was participating in a voter registration drive with the National Coalition on Black Civic Participation, Alpha Phi Alpha fraternity and the National Pan-Hellenic Council. Cathy Cox, Georgia's Secretary of State, rejected 64 voter registration applications mailed by the project because they did not comply with Georgia procedures. This process requires each card to be individually mailed to protect privacy and requires voter registration projects to register in Georgia on a county-by-county basis.

U.S. District Court Judge William C. O'Kelley issued the preliminary injunction against the state, holding, "Because the applications were received in accordance with the mandates of the NVRA, the State of Georgia was not free to reject them." The court will be ruling on a permanent injunction after further proceedings.

For more information on nonprofits helping voters to register and vote, see www.npaction.org/helpUSvote.

IRS Suspends Tax-Exempt Status of Group on Terrorist List

The Internal Revenue Service (IRS) released Announcement 2004-56 on June 24, suspending the tax-exempt status of the Rabbi Meir Kahane Memorial Fund (the fund), which is a part of the Kahane movement. The action was based Section 501(p), a new section of the tax code created in 2003 as part of the Military Family Tax Relief Act.

Section 501(p) suspends tax-exempt status for any group designated as a terrorist group under the Immigration and Nationality Act or by Executive Order. Donations to such a group are not tax-deductible. The law denies any appeal or challenge to the suspension, but allows the Executive Branch to restore exempt-status in the case of erroneous designation. However, there is no process for review or reinstatement in the law.

Kahane-related groups were designated by the State Department as terrorist organizations in December of 2000. Kahane groups, including the fund, work to legalize the views of the Israeli politician, Rabbi Meir Kahane, who believed that Israel is the motherland of the Jews and all hostile Arabs must be removed. Kahane was assassinated in 1990. The group posted its response on its website

In September 2003 OMB Watch published a report, Patriot Games: The Patriot Act and its Impact on Nonprofits, which raises concerns about the broad powers to shut down organizations and the lack of due process involved.

Senate Finance Committee to Hold Roundtable on Nonprofit Issues

The Senate Finance Committee recently announced it will hold a roundtable discussion Thursday, July 22, on issues concerning exempt organizations. The two main purposes of the roundtable are to follow-up on the committee's hearing on charities, and to further review the staff's discussion draft regarding proposed reforms to exempt organizations.

On June 22, the committee held a hearing on charitable governance reform. Witnesses addressed a wide range of issues on governance, accountability and enforcement of tax laws. On that same day, the committee's staff released its draft discussion paper with proposals for reform in governance, conflicts of interest, grant-making, federal-state coordination, reporting and disclosure, boards of director responsibilities, best practices and funding for enforcement.

Now the Senate Finance Committee is extending the opportunity to comment to nonprofit organizations nation-wide. The committee chairman recognizes the expertise in the tax-exempt field and would like the field's

viewpoints to be heard. If you are interested in providing the committee with comments, please take time to review the staff's draft discussion paper on proposed reforms to exempt organizations. You can also read OMB Watch's summary of the draft.

Submit your comments to the Finance Committee by the close of business on Friday, July 16. Written submissions can be sent by email to the Finance Committee at charities@finance-rep.senate.gov. Those who submit comments may also request to attend.

It is extremely important that the Senate Finance Committee hear the viewpoints of state and local nonprofits. Read Senate Finance Committee Holds Hearing on Nonprofits for more background information on the hearing. If you have additional questions, please call (202) 234-8494 and ask for Kay Guinane or Abbey Tyrna.

AmeriCorps Programs Violate Separation of Church and State

On July 6, a federal court judge ruled that AmeriCorps must stop funding programs that place volunteers in Catholic schools.

The American Jewish Congress (AJC) brought suit against the Corporation for National and Community Service (CNCS), the federal agency that runs AmeriCorps, for unconstitutionally crossing the line between church and state. AJC claims that because AmeriCorps volunteers are sponsored with federal dollars through "educational awards," that they should not be placed in religious institutions such as Catholic schools. Some AmeriCorps programs send volunteers to work in religious schools where they teach religion to students throughout the school day, lead their students in prayer multiple times a day, and attend mass with their students.

The University of Notre Dame intervened on behalf of CNCS. Notre Dame and CNCS argued that AmeriCorps was not violating the Establishment Clause of the First Amendment (the part of the First Amendment that calls for the separation of church and state) because volunteers would essentially "clock out" during times of religious instruction. Defending the process CNCS stated that the time volunteers spend engaging in religious activity is not recorded on timesheets that are submitted to justify the educational award.

However, Judge Gladys Kessler of the U.S. District Court of District of Columbia ruled that time sheets used to prove that volunteers were not getting paid for their time while being involved in religious activity were "totally inadequate." Kessler writes, "Moreover, even if the court assumes the Corporation [for National and Community Service] accurately estimates the time AmeriCorps participants spends on religious versus non-religious activities, it is impossible to distinguish between the two roles that AmeriCorps participants supposedly play. The line between the two has become completely blurred."

The case could definitely have broader implications on President Bush's faith-based initiative. Although Bush's initiative has not been able to pass through Congress, it has been implemented administratively through Executive Order. Federal grant-making agencies have created new rules that make it easier for government to contract with religious organizations for social services. While religious organizations that receive federal funds are encouraged to maintain their religious identity and character, they are barred from using federal money for religious activity. New agency rules state that religious activity must be carried out during a separate time or location from those activities that are supported with federal funds. Could the line between the two also become completely blurred?

Read Kessler's full opinion.

SBA Proposes, Withdraws Proposal to Change Definition of 'Small Business'

Last week the Small Business Administration retracted its proposal to alter a powerful federal designation that affects the work of almost every federal agency. Only "small businesses," designated as such by SBA, are eligible for SBA loans and roughly a fifth of federal procurement contracts. But SBA's "size standards" also grant to small business privileges to challenge agency regulations both in rulemaking and rule enforcement periods. Defenders of agency effectiveness have more at stake in the debate over the definition of small business than is immediately apparent.

SBA is charged with providing loans and other advantages to small businesses within each industry. But deciding

which businesses are small can be complicated. Because a "small" oil company is much larger than a "small" barbershop, SBA must establish the definition of a small business within each separate industry. For over 600 industries, the number of employees a business has determines its size classification. Revenue- (or receipt-) based size standards are employed for almost 500 other industries. SBA limits itself to 30 possible receipt-based size caps (ranging from $750,000 to as high as $48.5 million), five employee-based size standards (ranging from 100 to 1500 employees), and two standards based on other measures. Apparently, limiting to 37 the total set of options for choosing a receipt or employee cap in each industry simplifies things: SBA need not tinker with the exact number of employees that differentiates a small business from a large one, but it need only make adjustments when an industry has changed significantly.

Presumably, SBA uses receipt-based standards in the belief that receipts are a better reflection of market share than employee counts in some industries. However, in an attempt to abandon years of using the more traditional receipt-based standards, the proposed rule would have applied an employee-based size standard to all industries, eliminated revenue-based standards entirely, and reduced the number of size standard levels from 37 to 10. According to the SBA, roughly 34,000 businesses would have lost "small business" status, while approximately 35,000 would have gained it.

In its March 19 proposal, SBA claimed that the current structure is too complicated, despite its having "worked well" for many years, and that businesses seeking government contracts have too hard a time figuring out what size standard applies to them. Particularly, businesses that operate in multiple industries might encounter both receipt- and employee-based size standards in order to apply for one contract.

After commenters displayed a "significant level of interest" in the proposed change, SBA extended the comment period from May 18 to July 2 and received over 3,700 comments, most in opposition to the proposal. While many commenters agreed that simplification is a good idea, some, like the Contract Services Association, denied that any problem exists at all, arguing that finding the applicable size standard is simply a matter of reading a table. Senator John Kerry suggested in his public comments that businesses are intimidated or confused not by SBA size standards but by "burdensome paperwork and reporting requirements . . . and an unlevel playing field in the competition between small businesses and firms that are other than small."

The strongest criticisms came from businesses expected to lose "small business" status and their advocates. The American Bar Association argued that it is unfair to ruin thousands of businesses that were formed and structured in good faith as small businesses solely to meet government contracting needs. Many have suggested such businesses should be grandfathered into status. Senator Kerry also wrote, arguing that the proposal might result in substantial job loss during tough economic times.

But while Kerry has argued for providing more access to loans and government procurement contracts for small business, his arguments did not accommodate other public interest concerns about aspects of the definition of small business. Those interested in curbing the influence of business on federal agencies see the small business tag as a backdoor method of slowing the regulatory process.

Because of three important federal statutes, rulemaking is more burdensome when the proposed rule has a significant economic impact on small business. When the economic impact is significant, agencies must justify the rejection of less economically affecting alternatives. OSHA and EPA are further required to consult with a panel of small business representatives.

Agencies face even more significant obstacles when enforcing rules against small business. After an agency has issued a citation for violating a rule, small business owners may petition agencies to reduce or waive penalties on the basis of their economic impact to the business (as long as the violations are neither criminal nor "pose serious health, safety, or environmental threats") or may file a grievance in court against an agency if it feels "adversely affected or aggrieved" by a ruling. The court, in turn, may suspend regulations and force revisions that are conducive to small business interests or establish that certain regulations cannot be enforced against any small entity. Small businesses may also bring a civil action for attorney's fees whenever a citation is found to be unreasonable or excessive.

These wide protections already cover some very large businesses. In fact, 97 percent of all American businesses fit into the SBA definition of "small business." Well over half the industries in the country are covered by either the 500 employee-based size standard or a $6 million receipt-based standard. A contractor making up to $17 million a year, a chemical company with as many as 1,000 employees, and a petroleum refinery with no higher than 1,500 employees are all considered "small business" by SBA.

In addition, "small businesses" may be responsible for significant harm to the public interest. As noted by a recent AFL-CIO fact sheet, establishments with fewer than 100 employees -- all of which are considered "small businesses" -- maintain higher rates of fatal occupational injury than do businesses with 100 or more employees.

Making matters worse, the proposed change in SBA's definition could very well have resulted in more and larger businesses gaining small business status. While only 1,000 businesses would have immediately gained the "small business" classification according to SBA estimates, many more could have used the employee-based standards to gain the designation by outsourcing employees. Outsourced and subcontracted employees are not counted toward employee-based size standards. Thus, the SBA proposal could have encouraged the practice of outsourcing or subcontracting for businesses seeking to win or maintain "small business" status.

Outsourcing has become an increasingly important -- and controversial -- business practice over the last few years. In a recent cover story, *Time Magazine* listed 11 percent of American jobs at risk of outsourcing, including telephone call center employees, computer operators, data enterers, business and financial support, paralegals and legal assistants, diagnostic support service staff, accounting, bookkeeping, and payroll staff. Some NAICS industry sector categories that are currently covered by receipt-based standards and may be particularly vulnerable to outsourcing are Data Processing Services; Financial Investments; Funds, Trusts, and Other Financial Vehicles; Professional, Scientific and Technical Services; Administrative and Support; and Waste Management and Remediation Services. Noteworthy industry subsectors include Offices of Lawyers, Marketing Research and Public Opinion Polling, Translation and Interpretation Services, Document Preparation Services, and Travel Agencies.

It is unclear how much larger the incentive would have been for businesses to outsource in order to maintain or achieve small status. But the industries most affected by outsourcing are the ones currently using receipt-based size standards. So whether "small business" protections provide greater incentive for businesses to outsource, businesses, which already outsource would have been more likely to gain small business status. As SBA continues to consider moving away from receipt-based standards, the backdoor widens, and obstacles to agency functioning are increased.

On a broader note, it is questionable that SBA would propose to eliminate receipt-based standards and decrease the number of size standard levels in the first place. One of SBA's original missions was to protect competition and market access for smaller businesses. Receipts have traditionally been a critical tool in determining the market share or market dominance of businesses, presumably in industries where there is little correlation between employees and market share. Multiple size standard levels have been in keeping with the intent of the Small Business Act, which states, "the Administrator shall ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various institutions." As Kerry puts it: "The variety of goods and services being provided to the government has increased not declined." Moreover, the diversity of American industry has grown not shrunk.

It is no longer clear how much effect government loans and contracts might have on the competition in a particular industry. But, in the current state of affairs, where the vast majority of businesses in the nation are considered small -- indeed, entire industries are considered "small" -- and industry hostility to public welfare regulation has been echoed in the highest levels of this administration, it should come as no surprise that SBA proposed to increase rather than decrease the number of high-income businesses considered "small."

SBA Lobbies States for Small Business Role in Regulation

The Small Business Administration (SBA) has been actively lobbying the states to enact legislation that would increase the role of small business in state regulatory processes, promoting in particular a model bill that would force state agencies to review the costs to small business of proposed public safeguards and, ultimately, all existing state regulations.

Since January 2003, personnel from SBA's Office of Advocacy has testified at least eight times to state legislatures urging passage of the model bill or other legislation that would give small business a seat at the regulatory table (without providing any similar opportunity for citizen or public interest involvement). It has also ensured wide circulation of the model bill by releasing it through the American Legislative Exchange Council, a network for conservative state legislators.

It is not clear what legal authority allows the federal SBA to lobby state legislatures.

The SBA crafted its model state bill on the federal Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act, which force federal agencies to analyze proposed rules for their costs to small businesses, consider alternatives that would cost less for small businesses, and explain their reasons for rejecting such alternatives.

States adopting such legislation will now be forced to address the same issues that small business considerations raise in the federal rulemaking process. The very definition of what constitutes a small business, for example, can be so easily manipulated that it could stretch far beyond the sentimental image of the mom-and-pop storefront to include all but the tiniest fraction of total industry. Moreover, the public welfare problems tackled by regulations do not necessarily accommodate the special needs of small businesses. Asthmatics troubled by air pollution will find it difficult to breathe polluted air whether a small or large business is responsible for the emission, just as an employee crippled by unsafe working conditions is crippled all the same whether the business itself is large or small.

Enforcement Report: A round up of news items related to agency enforcement activity & gaps

As reported in the recent Citizens for Sensible Safeguards report *Special Interest Takeover*, one of the many threats to our regulatory system is the lack of enforcement of existing regulation. In recent years, the budgets for agency enforcement efforts have been slashed and personnel have been cut. The EPA's Office of Enforcement and Compliance Assurance, for example, has seen a reduction in staff of 12 percent, bringing its staff numbers to the lowest levels since the formation of the agency. The resulting lack of enforcement of existing safeguards threatens the public health, safety, and environment. The following is a roundup of recent examples of inadequate enforcement of public safeguards.

USDA Ignores Canadian Beef Regulations

As has been widely reported in the media, last fall the USDA allowed 7.3 million pounds of Canadian processed beef into the United States in violation of a trade ban enacted after some Canadian cows were found to have been infected with "mad cow" disease. When the USDA allowed the Canadian beef to enter the United States, it disregarded two food safety standards: one "that brain and spinal tissue of US-bound Canadian beef be removed before shipping to the United States, and another stipulating that the beef must be processed in facilities that are used only for the slaughter of animals eligible for export to the United States," according to the BNA. In issuing permits for Canadian beef, the USDA risked contaminating US beef supplies, putting American consumers at risk. Now the agriculture department's Inspector General, Phyllis K. Wong, will investigate the USDA's actions at the request of Senators Thomas Daschle (D-SD), Tom Harkin (D-IA), and Mark Dayton (D-MN).

EPA's Lack of Enforcement Leads to Increased Refinery Emissions

According to a report released by the EPA's Office of Inspector General(IG), the EPA's Office of Enforcement and Compliance Assurance (OECA) "has not established and communicated clear goals, systematically monitored refinery program progress, reported actual outcomes, or tracked progress toward achievement of" the goals of its settlement agreements with petroleum refineries that pollute.

Petroleum refineries became a national priority for the OECA in 1996, when it was discovered that refineries "had the highest inspection-to-enforcement ratio of the 29 industry sectors ranked by EPA," the report said. According to the report,

> The 145 operating petroleum refineries in the United States span 9 of EPA's 10 regions and 33 States. Petroleum refineries account for significant releases of pollution into the environment. In 2001, refineries released over 35,000 tons of toxic air pollutants, with 75 percent released to the air, 24 percent to the water, and 1 percent to the land. These pollutants seriously affect human health and the environment, and they include pollutants known or suspected to cause cancer or other serious human health effects.

The current compliance strategy for refineries was developed and implemented by EPA in conjunction with the U. S. Department of Justice. The integrated strategy, with tactics ranging from compliance assistance to inspection and enforcement, has been implemented over the last 8 years and has evolved to meet specific compliance problems. As of this March, the IG reported, refineries have agreed "to invest more than $1.9 billion in pollution control technologies, pay civil penalties of $36.8 million, and implement supplemental environmental projects valued at approximately $25 million." EPA projects a significant reduction of pollutants as a result of the compliance program.

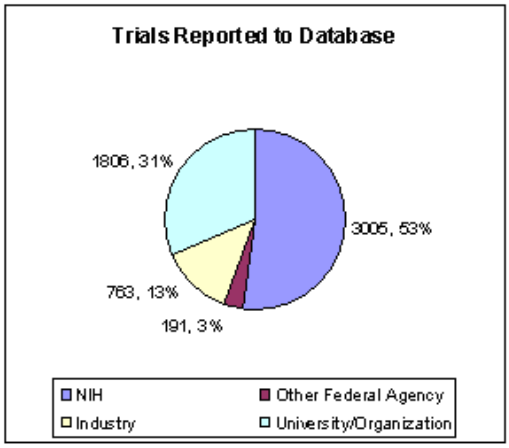
However, according to the report, OECA has not been able to provide "useful and reliable information necessary to effectively implement, manage, evaluate, and continuously improve program results." In 2000, OECA began

to pursue voluntary "global" settlements with petroleum refinery companies. This method allowed companies to avoid investigation and litigation by entering into a consent decree in which the company would work with the OECA to reduce emissions. However, as reported in the IG analysis, OECA is not sufficiently monitoring the companies' performance and improvement. Furthermore, EPA was slow to respond to consent decree documents submitted by companies, and the resulting delays have pushed back implementation of emission reduction projects.

EPA is required to release a response to the report within 90 days. In comments on the draft of the report, EPA said it believes that the IG report downplayed the complexity of refinery regulation and was unbalanced in its criticism of OECA, though EPA did agree that some of the recommendations should be implemented.

FDA Ignores Law on Drug Trial Information

Concerned that they do not fully understand the safety of many pharmaceuticals, patient advocacy groups and the American Medical Association have recently called for drug manufacturers to disclose clinical trials to a government database. What many of these professionals did not know was that the release of such information was already mandated by a little-enforced 1997 law, the FDA Modernization Act of 1997. According to the *Washington Post*, the FDA acknowledges that it has not enforced the law, arguing that the statute did not explicitly give the agency enforcement authority. One sign of the incompleteness of the database (which can be found online at ClinicalTrials.gov) is that only 13 percent of the registered trials on the website were reported by the pharmaceutical industry, even though over 80 percent of trials are funded by for-profit companies.



1742 Connecticut Avenue, N.W., Washington, D.C. 20009
202-234-8494 (phone)
202-234-8584 (fax)
ombwatch@ombwatch.org

» The Watcher » July 26, 2004 Vol.5, No.15

In This Issue

CBO Reports Charities Would Lose 6-12% on Estate Tax Repeal

The Congressional Budget Office has released two new reports on the impact of the estate tax on charitable giving. The reports confirm that there is a significant negative impact on charitable giving that would result from the elimination of the estate tax.

The first report, "The Estate Tax and Charitable Giving" examines families' contribution to charities to determine the impact of changes to estate tax law and the impact of full repeal. The bottom line result is that the study estimates that raising the exemption level to $2 million or $3.5 million would reduce charitable giving by less than 3 percent, and that **permanent estate tax elimination would reduce total charitable giving by between 6 and 12 percent**

While the percent numbers may seem small, it is important to note that this is a decline relative to *all* charitable giving -- which was about $201 billion in 2003. **So according to the CBO, eliminating the estate tax would mean a loss in total charitable giving of between $12 and $24 billion per year.** Note that this estimate is larger than previous estimates, which were in the $10 billion range (see Bakija and Gale, 2003).

The second paper, "Charitable Bequests and the Repeal of the Estate Tax" is a technical empirical study of the impact of the estate tax on giving, and follows research by David Joulfaian in 2000, and by Jon Bakija and Bill Gale last year. This CBO paper uses both the Joulfaian and the Bakija and Gale methodologies on more recent data. **It confirms the results in the previous work and finds that a "variety of estimates" of the decline in *bequest* giving are in the range of 20 to 30 percent.** To put this in context, Joulfaian had estimated a 12 percent drop, while Bakija and Gale had estimated a 37 percent drop. Robert McClellan, the author of the report, shows that the differences in results are primarily due to various differences in methodology rather than differences in the data sample chosen for analysis.

These new studies again confirm that the estate tax does provide an important incentive to give to charity, and that eliminating it would mean significant lost revenue and service cuts for the nation's nonprofit organizations.

For more information on the CBO results, see:

- The Estate Tax and Charitable Giving by Robert McClelland and Pamela Greene, Congressional Budget Office (2004)
- Charitable Bequests and the Repeal of the Estate Tax by Robert McClelland, Congressional Budget Office (2004)

For more on the charitable impact of estate tax repeal see:

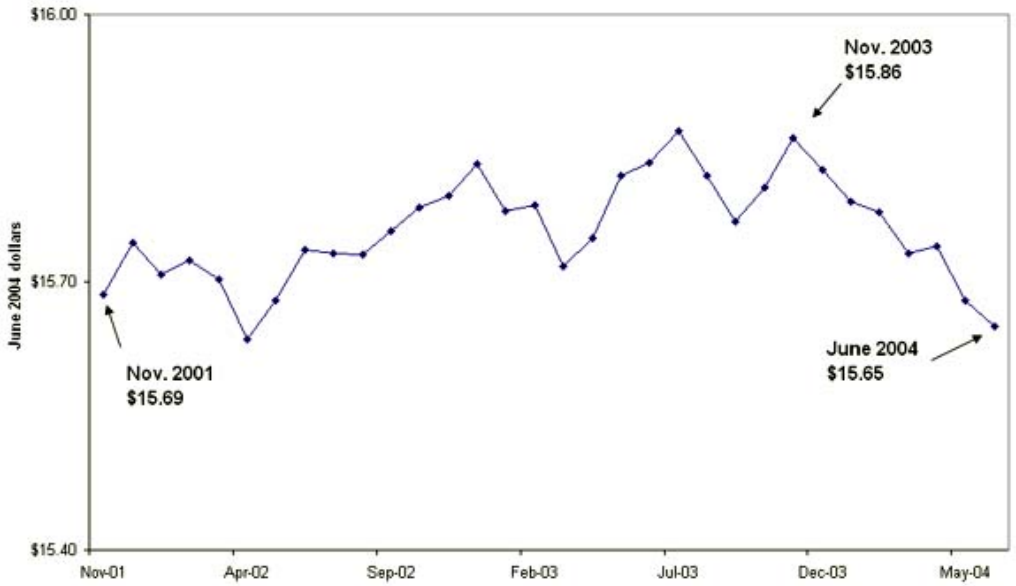
- Effects of Estate Tax Reform on Charitable Giving by Jon Bakija and William Gale, Tax Policy Center (2003)
- Estate Taxes and Charitable Bequests by the Wealthy by David Joulfaian, National tax Journal (2000)
- The Estate Tax and Charitable Giving by Gary Bass and John Irons, OMB Watch (2003)
- The Estate Tax and Charitable Giving: State-by-State Analysis by John Irons OMB Watch (2003)

Economy and Jobs Watch: Wages Fail to Keep Pace with Inflation

While many observers believe that the economy is in the process of recovering from weak growth and a dismal labor market, there is still considerable evidence that the recovery is not serving everyone.

Recent data shows that real average hourly wages for production and non-supervisory workers (about 80 percent of the population) have declined over the past several months -- reversing all of the gains since the end of the recession. (See graph below.)

Figure 1: Real hourly wages since recession ended, November 2001-June 2004



Source: Economic Policy Institute, Economic Snapshot, July 16, 2004

The Economic Policy Institute attributes this decline to three factors: 1) a continuing weak labor market with unemployment stuck at 5.6%, 2) the new jobs created by the current economy appear to be lower quality jobs, and 3) a recent up-tick in inflation.

In addition, the share of gross domestic product (GDP) going to labor compensation is near 40-year lows. All this comes at a time when corporate profits are at record highs as a share of GDP.

For more information, see

- Inflation-adjusted wages fall again in June Economic Policy Institute
- Hourly Pay in U.S. Not Keeping Pace With Price Rises New York Times July 18, 2004
- Corporate Profits at Record Highs, While Labor Compensation at 38-year Lows OMB Watch

Tax Cuts: See You in September ...

A bipartisan agreement to extend the so-called "middle-class" tax cuts for an additional two years bit the dust last week. Efforts to extend the cuts will now be delayed until Congress returns in September.

The "middle-class" (see related article) tax cuts under discussion are tax reductions for married couples, the new 10 percent tax bracket, and the expansion of the child tax credit. These tax cuts were included in the 2001 tax cut package, but to reduce the costs (on paper at least) they were scheduled to phase out at the end of this year. (If you are confused about the phase-in and phase-out schedule from the 2001 and 2003 tax cuts, Citizens for Tax Justice has produced a handy "cheat-sheet".)

Senate Finance Chairman Grassley (R-IA) had intended to wait until September to attempt extension of these cuts, on the grounds that there would be more urgency (since the cuts expire December 31) that might override concerns about the cost of the cuts. However, after pressure from the White House to pass the tax bill before the Democratic National Convention, House and Senate leaders managed by Tuesday to reach a bipartisan agreement to extend the three tax cuts for an additional two years and fix the Alternative Minimum Tax (AMT) problem for an additional year, at a cost of $80 billion. The agreement included no offsets to pay for the cost, possibly resulting in a "no" vote by Senators Chafee (R-RI) and Snowe (R-ME), but was considered certain to pass and garner at least a handful of Democratic votes. It also would have included an increase in the child tax credit refund for low-income families, which was omitted from the 2001 legislation.

The agreement was touted as a victory for President Bush. Even though Bush had called for a five-year extension, the two-year extension would end during an election year, 2006, and was not seen as much of concession. The five-year extension would cost about $120 billion.

Suddenly, on Thursday, the White House announced in no uncertain terms its opposition to the two-year extension. Apparently, the Administration would rather have a "no" vote on a five-year extension, allowing the blame to fall on Democrats, than a "yes" vote on a two-year extension. As a consequence, the deal collapsed and any extension will be delayed until September.

Should 'Middle-Class' Tax Cuts be Extended, Offset or Not?

The political reality, especially in an election year, makes extension of the so-called "middle-class" tax cuts very likely. Hardly anyone is arguing against extending these cuts, as long as they are paid for. However, there are very good arguments why, even If the cost of the extension is offset, extension of these tax cuts is not supportable.

What's the problem with "middle-class" tax cuts that are offset?

- "Middle-class" is in quotes for a reason. While these tax cuts do provide modest benefits for middle-class families, and may include the refundable child tax credit that benefits low-income families, they benefit wealthier families far more. As a double whammy, rising deficits and caps on spending resulting from tax cuts that mostly benefit the wealthy reduce revenue for public services that primarily middle- and low-income families depend upon, such as education, healthcare and mass transit. Under the Bush presidency, tax rates have nearly flattened, with the wealthiest one percent of the population now paying 32.8 percent of their income in taxes, and most of the rest paying 29.4 percent, according to an analysis by Citizens for Tax Justice. That tosses the principle of progress taxation out the window. No offsets that could roll back some of the tax cuts to the very wealthy have been suggested.
- The tax cuts will not pay for themselves, in spite of arguments that they produce economic growth. We are borrowing money (adding to the national debt) to pay for the tax cuts. At some point, deficits and a burgeoning national debt will begin to hurt the economy and the borrowed money must be paid back. Who will pay then? According to a report by the Tax Policy Center, middle and low-income families will pay the price for the tax cuts.
- While one- or two-year extensions appear to cost less, in reality they make the tax cuts permanent in all but name. Massive retirement of the baby-boomers will continue increasing the cost of medical care, already growing much faster than inflation. Social Security will no longer take in enough revenue to pay out benefits. Even if no more tax cuts are passed, if the tax cuts that are phased out continue to be extended, we will be even less able to deal with future needs.
- Ultimately, the fiscal hole which the tax cuts -- middle class or not -- are rapidly deepening poses an even greater threat. In a recent speech, Brookings Institution Fellow Henry Aaron asserted that "[o]ver the long haul, the nation faces budget challenges so great that they threaten the stability of our nation's democratic political institutions."

The huge cost of the Bush tax cuts of 2001 and 2003 has created a structural problem -- there is not enough revenue to meet the country's needs. The 2004 appropriations process, with its budget cap too tight to adequately fund even high priorities, is just the beginning. As the adage "you don't miss the water 'till the well runs dry" observes, we may not recognize the importance of government spending to our everyday lives until those services are even more radically cut. And that is what our future holds without some tax "increases."

Appropriations: A Broken Process

Not only was Congress unable to pass a budget resolution this year --passage of appropriations is also in jeopardy.

As predicted, the only appropriation bill completed by Congress for FY 2005 (which begins on October 1, 2004) is the $417.5 billion Defense bill approved on Thursday, July 22.

Partisan politics, an unworkably tight budget cap, and only 18 legislative workdays make even passing an omnibus bill combining the other 12 appropriations before October 1 a huge challenge. If it doesn't happen, there will be continuing resolutions to keep government running, and possibly a lame-duck session after the November elections. A yearlong continuing resolution might even be considered, funding government at last year's levels.

The whole budget process for FY 2005 represents a huge failure by Congress to do what is arguably its most important annual job.

OMB Fails to Meet Another Deadline

The Office of Management and Budget is required to produce a "Mid-Session Review" by July 15 of each year. However, the mid-session budget review has still not been issued.

Reports are that OMB's Mid-Session Review will show a "shrinking" deficit for fiscal year 2004 -- from a projected $521 billion (as estimated in Bush's fiscal year 2005 budget) to $420 billion. Just in case the budget review comes out during the next couple of weeks -- possibly just before the Republican National Convention -- here are some caveats about the projections taken from a column by Stan Collender as published in NationalJournal.com .

- Projections, which are always questionable at best, can be used to make a convincing case for a variety of outcomes.
- A $420 billion deficit is a new all-time high when adjusted for inflation -- hardly a cause for congratulation.
- A $420 billion deficit is higher than that claimed in Bush's 2004 budget, submitted on February 3, 2003, which projected a deficit of $307 billion.
- Even more strikingly, the deficit predicted in Bush's 2003 budget was only $14 billion -- making a $420 billion deficit much, much higher than predicted.

Keep an eye out for the Mid-session Review, and watch out for the rhetoric. It can be found on OMB's website sometime in the next few weeks.

California Nonprofits Caught in Revenue Squeeze

The California Association of Nonprofits (CAN) recently completed a study of the impact on nonprofits of funding cutbacks in California. In the report "Holes in the Safety-net: Study of Funding Cutbacks and Safety-net Nonprofits in California," CAN found that a wide range of nonprofits in the state are squeezed between revenue reductions and increased demand for services.

In their survey, over 40 percent of organizations responded that revenues were down over the previous year, compared with 32 percent that reported increases. Of those that saw decreases, funds were reduced by 22.5 percent on average.

The reductions led most commonly to hiring and salary freezes, and layoffs. In addition, service delivery was also hampered: half of respondents have reduced or eliminated aspects of programs, and 46 percent had slowed program innovation.

In addition to revenue reductions, nonprofits reported an increase in the number of people who need their services. There were increases in the number of people needing shelter, greater demand for food air, increases in elderly unable to afford medications, and increases in many other areas.

Nonprofits are struggling to cope with the squeeze. The report finds that 70 percent of nonprofits are increasing fund-raising efforts to raise funds from individuals and foundations. These efforts undoubtedly place additional strains on the philanthropic and local communities.

The report contains several recommendations in the areas of improving nonprofit operations and structure, improving capacity (including advocacy capacity), and addressing public policy and values. In the later category, the report recommends that "as a community we must develop policies and strategies that attack the structural deficits that underlie the serious safety-net issues facing our state," and that "government must not abandon its safety-net role."

The experience in California is unlikely to be unique; many other nonprofits throughout the country continue to struggle for the very same reasons as in California.

The full report is posted on the CAN website at:

- Holes in the Safety-net: Executive Summary
- Holes in the Safety-net: Report body

Justice Department Supports Dismissal of Second Data Quality Lawsuit

The Justice Department (DOJ) issued a memorandum June 25 recommending the dismissal of a lawsuit filed by the Chamber of Commerce and the Salt Institute under the Data Quality Act (DQA). The March 31 lawsuit against the National Heart, Lung and Blood Institute (NHLBI) within the National Institutes of Health (NIH) challenged agency statements about sodium consumption.

The DOJ memo states that the plaintiffs lack standing to challenge the sodium study that underlies the agency statements because it is not sufficiently demonstrated that they incur any injury because of the agency's statements. Additionally, DOJ asserts that the court does not have subject matter jurisdiction, and even if it did, there is no statutory basis for federal court review, as the DQA contains no provisions allowing private parties to enforce the statutory terms in court.

This memorandum comes days after a Minnesota federal district court ruled that the DQA does not permit petitioners to seek judicial review. The court ruled the DQA itself does not create any private right of action.

The Chamber and Salt Institute filed a brief July 16 refuting the DOJ's recommendations. Although the DOJ memorandum does not cite the Minnesota case, the industry brief does argue that this case should not set precedent. They argue that a key Supreme Court test was not followed and there was no substantial information to justify the ruling.

While the Minnesota federal court case was the first data quality case to come before the court, it did not set a strong precedent. The Chamber of Commerce and Salt Institute lawsuit is one of four additional lawsuits that have yet to be resolved. DOJ's memorandum sends a strong message that the DQA does not allow for judicial review and the outcome of this case will help determine whether future parties will submit suits under the DQA.

EPA Announces E-rulemaking Online Forum, Public Meetings

The Environmental Protection Agency (EPA) has announced a countrywide series of public forums for August on an eRulemaking Initiative. The four forums will be held in Boston, Chicago, San Francisco and Washington, D.C. In addition to EPA's public meetings, Harvard University is partnering with the eRulemaking Initiative to host an online dialogue during August. Details about the online dialogue will be released soon.

The eRulemaking Initiative is an effort to develop online tools that will allow agencies to more effectively utilize Internet technology in their regulatory process. The increased use of technology holds significant promise for increasing the transparency and accountability of government agencies. The eRulemaking Initiative could provide improved access to government information related to regulatory programs along with new search and information management tools.

The EPA hopes to use the forums to gather feedback on the usability and features of the electronic system currently available to the public at the Regulations.gov website. The forums will also provide an opportunity to provide input on the planned government-wide electronic federal docket management system. The forums are open to any and all stakeholders. The announcement is published in the Federal Register.

New Report Explores Chemical Dangers from Power Plants

A new report by the Working Group on Community Right-to-Know estimates that 3.5 million Americans living near some 225 non-nuclear power plants are at risk from leaks or releases of gaseous ammonia or chlorine. It calls for these plants to switch to safer alternatives to ensure the safety of surrounding communities.

The Working Group analyzed information submitted to the Environmental Protection Agency (EPA) from individual facilities. Facilities are required to assess the dangers they pose to the surrounding communities.

In addition to the 3.5 million people at risk, the report found that two two-dozen power plants account for two-thirds of the people in danger. Also that California, Texas, Florida, Illinois, Minnesota, Pennsylvania, Missouri, Rhode Island, Virginia, and New Jersey each have more than 100,000 people living in power plants' vulnerability

zones

Congress has considered, and continues to consider, legislation that would require facilities that store large quantities of dangerous chemicals, including power plants, to reduce the danger from chemicals by reducing storage and switching to safer alternatives when possible. This type of policy would move past the Risk Management Program, which currently simply collects information from these facilities. This report utilized the risk management plans (RMPs) filed by facilities. Unfortunately, Congress has been unable to decide on a course of action on this issue. Industry has significantly contributed to this inaction by continually lobbying against new safety requirements and using the threat of terrorism as an excuse to try and dismantle to RMP program.

The report, Unnecessary Dangers: Emergency Chemical Release Hazards at Power Plants, demonstrates the power and usefulness of information to help make communities safer. It is available at www.crtk.org.

DHS Extends Comment Period through August 16 for Environmental Directive

The Department of Homeland Security (DHS) reopened its comment period for its draft directive containing policy and procedures for implementing the National Environmental Policy Act, after several public interest groups requested an extension. The new deadline for comments is August 16.

The proposal seeks to hide Environmental Impact Statements (EIS), partially or wholely, from public disclosure for security reasons, according to DHS. For more information on DHS's directive, read OMB Watch's article "DHS Seeks Exemptions From Public Disclosure Requirements", which makes the case that withholding information has little to do with security. For information about the extension notice, draft directive, and public comments already submitted, see DHS's website.

Transportation Bill Pre-empts State Sunshine Laws

A provision in the transportation spending bill, H.R. 3550 and S. 1072, could pre-empt state and local sunshine laws and pre-empt public access to problems on the roads, highways, sea, and air.

The administration requested that the amendment in Section 3029 of the spending bill be added and it appears unlikely to be removed. The section allows information designated as "sensitive security information" to be shielded from disclosure. The language is not scheduled for debate when House and Senate negotiators meet to hammer out differences in the House and Senate versions of the bill. Thus, the likelihood that the provision will be removed appears low.

This legislation, like many of the efforts to expand secrecy since and before 9/11, assumes that secrecy makes us safer while the free flow of information endangers our safety. And yet, when Congress or the executive branch gives government officials the authority to keep secrets, they should carefully craft these laws and regulations with two principles in mind. First, any exceptions to open government should be made only when government can make a public case that such disclosure will harm national security.

Second, government should ensure that information not threatening to national security be left unrestricted and available to the public. Creating broadly defined zones of secrecy under imposing titles such as "sensitive security information" or "Sensitive Homeland Security Information" only hinders the government's ability to keep necessary secrets and prevent unnecessary ones. Strong safeguards for our secrets and the free flow of information protect the government from improper accusations of corruption or abuse and protect the public's trust.

Momentum Grows to Limit 'Classified' Information

Amidst growing criticism that the White Hose and Central Intelligence Agency (CIA) attempted to classify information that would prove more embarrassing than threatening national security, senior Republicans and Democrats in Congress are moving to reform the classification system.

Senators Ron Wyden (D-Oregon) and Trent Lott (R-MS) introduced legislation, S. 2672, which would create an Independent Security Classification Board to oversee agencies' use of the "classified" stamp. Modest in scope, the proposal would allow a three-member board to pass judgment on agencies' decisions to classify documents. The board could decide the agency improperly classified information that should otherwise be available to the public. The president could overrule the board's decision, but would have to make a public statement in doing so.

The practical effect of such a board may be to create an environment in which agencies think more carefully when invoking their ability to classify information. Currently there are few good safeguards to prevent agencies from abusing their power to stamp information as secret. The bureaucracy that oversees the classification system for the federal government, the Information Security Oversight Office, reported the federal government used the "classified" stamp 25 percent more times in Fiscal Year 2003 than in the previous year.

The proverbial straw that broke the camel's back was the Central Intelligence Agency's initial proposal to black out as much as half of the Senate Intelligence Committee's report on pre-war intelligence about Iraq. Although in the end roughly 15 percent of the text was kept secret, the CIA's efforts to squash parts of the report left a bad taste in some Republican mouths. Lott, hardly a champion of the public's right to know, even said publicly that the CIA's efforts were "an insult."

The executive order outlining procedures for stamping information as "classified" explicitly forbids agencies from using the stamp to hide embarrassing or illegal activity.

Several high-profile reports over the last year created controversy when the executive branch sought to black out, or redact, key sections when the reports were released to the public. Last year, the administration redacted 28 pages of Congress' 9/11 joint inquiry that reportedly identifies links between al Qaeda and the Saudi government. And before issuing its final report last week, the 9/11 Commission struggled with the White House for months over access to documents.

There are, however, several limitations to the legislation. The legislation gives the president authority to define the scope of the board's authority. The president would also have the power to overrule the board rulings. In addition, much of the board's materials would themselves be classified and exempt from public disclosure under the Freedom of Information Act.

The legislation also does not address other recommendations of the last bipartisan commission to examine government secrecy and classification. The unanimous 1997 report (posted here by Steve Aftergood) of the Commission on Protecting and Reducing Government Secrecy recommended that a national classification center be established to evaluate and oversee the classification system among federal agencies. The Commission was led by Senator Daniel Patrick Moynihan and enjoyed participation of a bipartisan panel including Senator Jesse Helms. Further, the Commission envisioned an appeals board with greater independence and authority to require declassification.

The prospects for Congress to pass much-need, long-sought reform of the classifications system are murky at best. Members of the 9/11 Commission are pressuring Congress to act quickly on their recommendations, and spending bills waiting congressional action in September.

Similar legislation (H.R. 4855) was introduced in the House by Representatives Robert "Bud" Cramer (D-AL) and Leonard Boswell (D-IA), although that legislation currently has not attracted Republican co-sponsors.

Data Quality Whistleblower Fired

A Fish and Wildlife Service (FWS) biologist has been fired after filing a data quality challenge that accused the agency of using flawed science in approving development projects in Florida panther habitat.

The biologist, Andrew Eller, received a letter dismissing him after 30 days, for reasons of engaging in "unprofessional" exchanges with the public and completing projects late. Eller claims that the dismissal amounts to retaliation for his work to protect the panther habitat from development, including his data quality challenge. Under the Endangered Species Act developers and government agencies must consult with FWS before initiating work that would affect panther habitat.

Eller filed a data quality request along with the Public Employees for Environmental Responsibility (PEER) challenging the data FWS used in defining panther habitat. They charged that the agency used daytime-use habitat rankings to define the overall habitat and that such data would be incorrect because the panther is most active at night. The challenge asserted that using the more accurate nighttime data could vastly change the extent of panther habitat. Additionally, the petitioners charge that incorrect survival rates and telemetry data are used. An outside expert panel reported similar flaws in a report last year.

A spokesman for the agency asserts that Eller's dismissal is based solely on his performance -- he was suspended three times in the past. Eller says he has been "at odds with management for two years now on panther science," and admitted that one suspension was warranted -- he used inappropriate language with a consultant. However, he claims that any overdue projects were due to understaffing of his office.

Additional Resources:
Data Quality Petition
FWS Petition Response
Sun-Sentinel article

House Lobby Disclosure and Reforms Proposed

Rep. Martin Meehan (D-MA) announced July 14 that he is filing legislation to strengthen lobbying disclosure requirements and reform the way the House of Representatives operates. Supported by Common Cause, Democracy 21 and Public Citizen, Meehan said the legislation is needed because "â€¦never before have special interest lobbyists claimed so great an influence over the policy process." The bill does not have a number yet.

Proposals to create greater transparency in relationships between lobbyists and members of the House include:

- **Searchable Database**- A searchable, downloadable database of lobbying disclosure reports would be created to make publicly disclosed information easier to access and more useful. Electronic filing of federal lobbying disclosure reports would be mandatory in order to make the database viable and keep it current.
- **More Frequent Reports**- Lobbying disclosure reports would be filed quarterly rather than semi-annually, as they now are.
- **Disclose Grassroots Lobbying**- Reports would have to include the identity of grassroots lobbyists and list their expenditures and the issues they lobby on. Lobbying to members or shareholders would not be considered grassroots lobbying.
- **Disclose Coalition Members**- Coalitions that lobby would have to disclose their members. Groups that spend less than $1,000 to participate would not have to be disclosed.
- **Links to FEC Database**- Cross-linking between the lobby disclosure reports and the Federal Election Commission's database with campaign contributions and expenditures would be required.

The bill proposed to give the minority party in the House more input, including the right to propose amendments on floor votes and have notice of conference committee meetings. A 30 minute maximum time limit for floor votes would be imposed to avoid arm twisting, and late night votes could only be held if approved by a two-thirds majority of the House. The House Administration Committee would be comprised of an equal number of members from both major parties, and the minority party would have a majority on the Government Reform Committee.

Stronger ethics standards would be imposed, including increasing the one year prohibition on former Members of Congress lobbying on issues that came up in their committees while they served in the House to three years.

Meehan's office has posted a PowerPoint presentation explaining the proposals on his website.

Senate Finance Committee Holds Charities Roundtable

On July 22 the Senate Finance Committee held a closed door roundtable discussion with leaders and experts on the charitable sector to discuss a bipartisan staff proposal for reforms.

Committee Chair Charles Grassley (R-IA) told the group he expects some legislation on reform to go forward this fall, while other proposals need more refinement. Grassley's remarks indicated that he recognizes "the need to balance reforms with the burden it places." The roundtable was attended by authors of white papers submitted to the committee. A list of participants and links to the white papers are posted on the committee website. BNA quoted one participant as saying the session was helpful in reviewing a broad range of issues.

OSHA Delays Worker Safety Action, Reopens PPE Rule for Comment

The Occupational Safety and Health Administration has reopened for comment a rule requiring employers to pay for personal protective equipment, "such as fall arrest systems, safety shoes, and protective gloves," that workers must currently purchase themselves, or do without (69 Fed. Reg. 41,851 (2004)). Although the rule, first proposed during the Clinton administration in March 1999 (64 Fed. Reg. 15,401), was open for public comments until June 1999, OSHA has let it languish on its long-term agenda for most of the past four years, and has yet to announce any anticipated date for finalizing the rule.

Labor groups decry the move to reopen comments five years after the initial period ended as playing politics with safety, further delaying action while giving the appearance that OSHA is working on it. They note it also coincides with a recent OSHA summit on safety and health issues of Hispanic workers. The rule is particularly important to the Hispanic population, and the Congressional Hispanic Caucus has repeatedly petitioned OSHA to move on it. CHC has stated, "Tens of thousands of workers are bearing the cost of safety in the workplace, or worse, paying the price because they are unable to bear the cost."

OSHA officials claimed in The Hill that the rule has actually been in a final stage since before President Bush took office, but the agency's own semiannual regulatory agendas show otherwise.

NIOSH To Move Deeper into the Bowels of Government

Five former NIOSH and MSHA administrators sent a letter to Department of Health and Human Services Secretary Tommy Thompson last week to protest the Center for Disease Control's plan to move the National Institute for Occupational Safety deeper into the bureaucracy of the CDC.

The CDC's new reorganization plan includes the decision to cluster NIOSH with several environmental health agencies into the Coordinating Center for Environmental Health, Injury Prevention, and Occupational Health, one of four coordinating centers that will report directly to the CDC administrator.

The former administrators were joined by a wide range of individuals and organizations, including the United Auto Workers, American Association of Occupational Health Nurses, American Industrial Hygiene Association, AFL-CIO, and the NIOSH Board of Scientific Counselors, who charged that the move will curtail NIOSH's autonomy, undermine its influence on regulation, and perhaps impact its budget. Furthermore, concern was raised that the move fails to meet the intent of Congress as set out in the Occupational Safety and Health Act. "Clustering NIOSH with a number of environmental health programs would undo the intent of Congress and place it essentially where it was thirty-four years ago," the board members of NIOSH's Board of Scientific Counselors stated in a letter to CDC Director Julie Gerberding.

NIOSH was established by the Occupational Safety and Health Act of 1970 as a separate institute that reported directly to the Secretary of Health, Education and Welfare with the mission "to conduct research, experiments, and demonstrations, develop plans, establish criteria, promulgate regulations, authorize programs, and publish results and industrywide studies." President Gerald Ford later moved NIOSH under the CDC, even though occupational health and safety has very little to do with the CDC's primary goals of disease control and prevention. Moving NIOSH deeper into the CDC would only further de-emphasize the agency's importance, visibility and autonomy.

Read Some Letters Opposing the Reorganization of NIOSH:

- American Association of Occupational Health Nurses Letter
- American Society of Safety Engineers Letter
- AFL-CIO Letter

NHTSA Changes Strategy from Safety Features to Crash Prevention

The National Highway Transportation Administration has announced
that it will drop its emphasis on making vehicles safer in crashes in favor of a new focus on "crash prevention."

"I'd like to begin to focus on the event before the crash," NHTSA administrator Jeffrey Runge told the Society of Automotive Engineers in Washington last May. "We may have plateaued out in terms of crashworthiness."

Whereas NHTSA regulatory initiatives for the last 34 years have sought to boost crash protection devices, such as seatbelts and airbags, which mitigate the harm from crashes, the new safety devices to be tested and implemented by NHTSA seek to avoid a crash altogether. These devices use new "smart technology" currently touted by car manufacturers and available in high-end vehicles to avoid, among other things, rollovers, drifting in lanes, and drowsy drivers. One such measure being considered is electronic stability control, which adjusts a vehicle's braking and steering in an emergency, reducing the chance of rollover.

Though safety advocates approve of any new attempts to increase the safety of vehicles, many have expressed concern that NHTSA is abandoning its historic mission of protecting passengers in a crash. They also dispute NHTSA's claim that there are no further advances to be made in crash protection. According to NHTSA officials, a new proposed rule on side-curtain air bags may be the last major crash-protection regulation. The shift in NHTSA's policy is already evident in its research and development projects, which focus increasingly on crash avoidance technology.

Mad Cow Disease Regulation Fails to Protect U.S. Food Supply

Although food safety officials testified to a House subcommittee
that two new regulations will enhance existing rules to make an effective firewall against mad cow disease, a new report reveals that the rules mainly protect the meat industry and are not strong enough to prevent contamination of the food supply.

According to the report by the Center for Progressive Regulation, the centerpiece of the mad cow regulation is a so-called "zero tolerance policy" for the introduction into the food chain of certain cattle parts that are at highest risk of spreading bovine spongiform encephalopathy (BSE). However, the report reveals that the zero tolerance policy actually allows the meat industry to opt out of a stringent hazard prevention approach and instead adopt less stringent industry-designed standards.

Report Reveals Weaknesses in Food Safety Policy

Prior to the outbreak, the federal government regulated the contamination of the domestic meat supply through (1) a ban on imports from countries that had suffered BSE outbreaks, (2) a surveillance program that tested a small number of downer cattle, and (3) partial restrictions on feeding animal protein to cattle. With the discovery of a BSE cow in Washington state last December, the USDA and FDA have stepped up existing regulation and also initiated two new pieces of regulation designed to act as a firewall against the contamination of the human

food supply. However, according to a report released on July 22 by the Center for Progressive Regulation, the new regulations act to quell public fears and protect the meat industry rather than actually prevent high-risk substances from entering the food supply.

The primary example of loopholes in the new regulation regards preventing specified risk materials (SRMs) from entering the food supply. SRMs, which include brain, ganglia, and spinal cord tissue, are the animal parts most likely to contain the mad cow disease "prion" (a protein particle that lacks nucleic acid). According to Secretary of Agriculture Ann Veneman, preventing SRMs from entering the food supply is the best way to prevent the threat of BSE to humans. As she stated in a July 14 government reform subcommittee hearing, "When you remove the Specified Risk Materials from the food supply, as the chairman of the International Committee said to me, that is the most important thing that you do to protect public health."

The new USDA regulation claims a zero tolerance policy on SRMs. However, as the CPR report uncovers, the regulation allows industry to choose one of two methods for meeting the requirements. Either companies can apply the existing standards of the Hazard Analysis and Critical Control Point (HACCP) system, a preventive approach to food borne hazards currently used to control the spread of contaminants such as salmonella and E. coli, or industry can use what is called a prerequisite program. This program option, favored by industry, allows companies to come up with their own standards for preventing SRMs from entering the food supply. The prerequisites program requires no oversight or approval from the USDA or FDA and provides no punitive measures for violations. Prerequisite programs are generally used for basic sanitation or other contaminations that are seen to be low risk.

Companies are not required to release their prerequisite plans for SRMs, but the food safety department at the University of Nebraska has released standard operating procedures for the control of specified risk materials that best approximate the level of scrutiny required of a prerequisite program. According to the plan, "grossly identifiable spinal cord material spread by the splitting process will be trimmed from the carcass with a knife." The guidelines also require that the meat be inspected by "visual observation" once per day. With such imprecise guidelines, it seems likely that SRMs will continue to pass into Americans' food supply. Furthermore, these policies clearly do not meet the zero tolerance level mandated by the regulation.

The industry position is that there is no need to use the more stringent HACCP strategy because the chance that the meat will contain the mad cow disease prion is relatively low. However, the regulation seeks to eliminate the presence of the SRMs, and not that of the mad cow prion. Therefore, the industry methods are wholly inadequate for dealing with the regulation and render the firewall flimsy at best.

Another regulation bans the feeding of mammalian proteins to ruminants, including bovines. However, the regulation allows for the feeding of chicken litter to cows. Since the chickens are fed cow proteins, it is possible that the chicken litter is contaminated with cow protein, which is then fed back to the cows in the form of chicken litter. Ruminant-to-ruminant feeding is the only known way that BSE spreads from cow to cow.

USDA Defends Surveillance Plan

Although these two significant problems weaken the mad cow regulation, the USDA was called upon by a House government reform subcommittee to defend only its surveillance program. The USDA's plan, which took effect in June, will concentrate testing on high-risk cattle. The vast majority of the 265,000 cattle that will be tested over the next twelve to eighteen months will come from cattle most likely to have BSE, including nonambulatory "downer" cattle and cattle showing signs of a disorder of the central nervous system. Because BSE rarely occurs in cattle less than thirty months of age, the test will only be administered to cattle over thirty months old. The USDA believes that by targeting high-risk cattle, it can increase its chances of finding potential cases of BSE and therefore better calculate the prevalence of BSE in the bovine population.

The USDA asserted that by targeting high-risk cattle for testing, it would be able to find one case of made cow disease in ten million. Rep. Henry Waxman (D-CA) and food safety experts charged that the claim was based on faulty assumptions. The current surveillance program is largely voluntary; therefore, the population sampled will not be arbitrary. Furthermore, though less likely to occur, cases of BSE have been found in young and healthy-looking cattle.

The surveillance program is not intended to be a public health safeguard. Rather, the surveillance program is designed to indicate the prevalence of BSE in the domestic bovine population. Although it does not protect against the spread of BSE, the testing is still crucial because accurate knowledge of the prevalence of BSE can establish the effectiveness of current safeguards. Fearing the market repercussions of a positive result, many farmers lack incentive to test their cattle. By allowing industry avoid testing cattle, the USDA sacrifices accuracy in order to protect industry interests.

Though most of the program is voluntary, BSE testing is mandatory for all nonambulatory cattle going to slaughter. However, since new regulations prohibit such "downer" cattle from entering the food supply, many of these never reach the slaughterhouse, and therefore are not required to be tested. That gap in the testing requirement leaves a large number of high-risk cattle out of the tested group. Instead, farmers often bury these cattle on their property.

Though the hearing focused on the accuracy of the surveillance techniques, testimony by the USDA inspector general revealed the weaknesses of the system prior to the 2004 tightening of regulations by the USDA. Cattle ranchers and meat packers were often unclear on which animals to test and what organization is responsible for testing. In the case of the Washington state cow, discrepancies existed as to which cow was actually the BSE positive cow and whether or not the cow was ambulatory at the time it reached the slaughterhouse. The issue is important because only nonambulatory cattle are required to be tested at the slaughterhouse. As Rep. Waxman pointed out, the recent discovery of a BSE-infected cow in the United States appears to have been due to luck rather than improved regulation.

The risk of mad cow disease here is still very low. However, the USDA's and the FDA's approach, while appearing to provide strong protection, instead has gaping loopholes that may protect industry, but not public health.

Court Rejects Agency Reasons for Trucker Hours Rule, Calls Arguments 'Troubling'

In a stinging rebuke, an appeals court rejected a change to regulations limiting the daily and weekly number of hours that truckers can work without rest breaks. Although the court based its decision on the agency's failure to consider a statutorily mandated factor, it also identified weaknesses in several arguments commonly raised to block regulation, repeatedly calling the arguments "troubling."

The suit was brought by Public Citizen, which calls truck driving "one of America's most hazardous occupations." Public Citizen notes that almost 700 truckers die in crashes every year, and those crashes put all other drivers at risk.

About the Rule

The rejected rule, which was issued in April 2003 by the Federal Motor Carrier Safety Administration, differed significantly from the version in the agency's Notice of Proposed Rulemaking (NPR) three years earlier:

- The final rule increased the maximum total daily driving from ten to eleven hours and dropped the NPR's requirement of a mandatory two-hour break during the day.
- The NPR, citing research about circadian rhythm cycles, would have required a 24-hour daily cycle. The explanation in the final rule admitted the 24-hour cycle would be "ideal from a scientific viewpoint" but stressed that an "inflexible" across-the-board requirement would unduly disrupt the trucking industry. The final rule mandated a 24-hour cycle only for drivers who took the maximum off-duty time (ten hours) and worked the maximum number of driving hours (fourteen). Those who maximized driving hours and *minimized* off-duty hours (ten hours), by contrast, were allowed to work on a *21*-hour cycle.
- The NPR would have mandated a "weekend" of 32 to 56 hours, including two night-time periods, in order to prevent drivers from working five consecutive night shifts and to allow drivers to compensate for sleep deficits during "circadian-optimal times." The final rule mandated only a 34-hour "restart" phase, that would allow drivers to drive another seven- or eight-day work week after one 34-hour off-duty block. The restart provision would have actually increased the number of hours truckers could drive each week above the cap from the old existing rules. As the court noted, the old rules had set absolute caps of 60 hours for a seven-day week, or 70 hours for eight, whereas trucking companies could game the new rules and force truckers to work 77 hours in a seven-day period.
- The NPR would have reduced the "sleeper-berth exception" of the old rules. Under existing rules, drivers could break their required eight hours of consecutive rest into two separate periods totaling eight hours if they spent the rest period in the trucks' sleeper berths. The NPR would have closed this loop-hole for solo drivers but retained it, in modified form, for team drivers. The final rule rejected the NPR's closure of the sleeper-berth exception, calling the NPR's approach "inflexible" because the use of sleeper berths is "firmly entrenched in the practice, culture, and equipment of the trucking industry." FMCSA also argued that there was no evidence that the sleeper-berth exception posed a "safety hazard" and rejected existing studies as

"inconclusive."

- The NPR would have required electronic on-board recorders to monitor compliance with the rule. The agency rejected EOBRs in the final rule, citing insufficient evidence of the costs and benefits of EOBRs.

About the Decision

The court found that one reason was sufficient to vacate the rule: "The FMCSA points to nothing in the agency's extensive deliberations establishing that it considered the statutorily mandated factor of drivers' health in the slightest." The court nonetheless took the unusual step of outlining, "for a sense of completeness," a number of other problems in the rulemaking that it repeatedly called "troubling."

Failing to Consider Drivers' Health

Testing the hours of service rule for a rational connection between the rule and the factual basis for it, the court rejected the rule as arbitrary and capricious because "the agency failed to consider the impact of the rules on the health of drivers, a factor the agency must consider under" its statutory mandate. Although 49 U.S.C. § 31506 (d) requires FMCSA to "*consider* the costs and benefits" of rule changes, the law demands more of FMCSA for health and safety issues:

> (a) Minimum safety standards. . . . At a minimum, the [hours of service] regulations shall ensure that --
>
> > (1) commercial [trucks] are maintained, equipped, loaded, and operated safely;
> > (2) the responsibilities imposed on [truckers] do not impair their ability to operate the vehicles safely;
> > (3) the physical condition of [truckers] is adequate to enable them to operate the vehicles safely; and
> > (4) the operation of commercial [trucks] does not have a deleterious effect on the physical condition of the [drivers].

Id. § 31136. The court rebuked the agency for failing to demonstrate any point in the rulemaking record in which "it considered the statutorily mandated factor of drivers' health in the slightest." Rejecting the agency's sole evidence of considering drivers' health -- a point at which it had considered the effect of driver health on vehicle safety -- the court admonished the agency that the law that driver health and vehicle safety may occasionally overlap but are nonetheless separate considerations. "It is one thing to consider whether an overworked driver is likely to drive less safely and therefore cause accidents," explained the court. "Whether overwork and sleep deprivation have deleterious effects on the physical health of the driver is quite another."

Other 'Troubling' Factors

The court also identified four specific parts of the rulemaking that it found particularly "troubling": (1) the decision to increase driving time from ten to eleven hours, (2) the maintenance of the sleeper-berth exception, (3) the rejection of EOBRs, and (4) the replacement of the NPR's "weekend" period with a 34-hour "restart." Several of these decisions simply defied the factual basis of the evidence in the record. Some of them embodied larger problems that have recurred throughout recent anti-regulatory rhetoric beyond the hours-of-service case itself.

Cost-Benefit Analysis and Economics

The agency's economistic rationales repeatedly come under attack in the court's opinion. FMCSA cited its cost-benefit analysis as a justification for the decision to increase driving time from ten to eleven hours, arguing that the simultaneous increase in mandatory daily off-duty time (from eight to ten hours) worked with the increase in maximum daily driving time (from ten to eleven hours) to result in net benefits. The economics, however, failed to consider the very human limitations on the practical value of those calculations:

> [T]his analysis assumes, dubiously, that time spent driving is equally fatiguing as time spent resting -- that is, that a driver who drives for ten hours has the same risk of crashing as a driver who has been resting for ten hours, then begins to drive. . . . In other words, the model disregarded the effects of "time on task" because, the agency said, it did not have sufficient data on the magnitude of such effects.

By assuming away the fatiguing effects of time on the job, despite its own admission that the risk of crashing increases "geometrically" after the eighth hour on duty, the agency rigged its economics to justify an industry-

favored alternative.

When it zeroed out the effects of driving time because of insufficient data, FMCSA replicated a favorite habit of leading proponents of cost-benefit analysis in regulatory decisions: treating unquantified effects as though they had zero value. These zeroed effects tend, incidentally, to be effects that could result in conclusions other than those in industry interests. Another prominent example of such zeroing is an oft-cited study by Robert Hahn, co-director of the AEI-Brookings Joint Center for Regulatory Studies, that zeroed out all unquantified benefits of regulations in order to argue that half of all major rules passed in a 15-year period failed net benefits testing. Hahn's practice of zeroing out these benefits (even some quantified, monetized benefits, for which Hahn decided simply to substitute a zero) was recently revealed by a law professor who discovered other unsupported assumptions in major anti-regulatory economics studies.

FMCSA also attempted to evade entirely its obligation to consider the use of EOBRs. The court noted that the agency had failed even to test the use of the on-board recorders, despite the agency's acknowledgment that noncompliance with the current system of paper logs is "widespread," because the costs and benefits of EOBRs are unknown. The rigging here is even more obvious, because FMCSA could have tested EOBR use and based its estimates on that study. Further, common sense demands the conclusion that EOBR use could have significant benefits: as the court reasoned, EOBR use will induce compliance with the hours of service regulations, and compliance will have substantial health and safety benefits.

Uncertainty

"Uncertainty" is an important term in anti-regulatory thought. In scientific terms, it can refer to the probability of an event (statistical uncertainty) or to an event with an unknown probability (true uncertainty). In either sense, uncertainty is a technical aspect of any scientific information. In everyday discourse, uncertainty is the opposite of certainty; we use the term to refer to lingering questions about which we lack sufficient facts to state an answer with firm conviction. In anti-regulatory rhetoric, the single word is often used to toggle back and forth between both the scientific and the quotidian meanings, the effect being to make even overwhelming scientific consensus appear unresolved.

The court in this case rejected FMCSA's attempt to use uncertainty as a reason for failing to regulate. FMCSA assumed away the fatiguing effects of "time on task" in its cost-benefit model in order to justify increasing the maximum daily driving time, arguing that the studies showing incredible increases in crash risk after the eighth hour of driving do not provide sufficient evidence for attributing fatigue to the time spent driving. The court argued that this use of uncertainty was problematic:

> Quite apart from the circularity of the agency's explanation, moreover, the model's assumption that time-on-task effects are nil is implausible. Again, the agency admits that studies show that crash risk increases, in the agency's words, "geometrically" . . . after the eighth hour on duty, and the agency does not deny that this geometric risk increase results at least in substantial part from time-on-task effects. **The mere fact that the magnitude of time-on-task effects is *uncertain* is no justification for *disregarding* the effect entirely.** . . . In light of this dubious assumption, the agency's cost-benefit analysis is questionable . . . .

(Emphasis added.) In its rejection of the agency's claim that uncertainty prevented it from even roughly estimating the benefits that would accrue from increased compliance with hours-of-service regulation because of EOBRs, the court added, "Regulators by nature work under conditions of serious uncertainty, and regulation would be at an end if uncertainty alone were an excuse to ignore a congressional command . . . ."

The effect of the court's decision is to erase the rule and send the agency back to the drawing board.

For Further Reading:

- Notice of Proposed Rulemaking: 65 Fed. Reg. 25,540 (2000)
- Final Rule: 68 Fed. Reg. 22,456 (2003)
- Decision in *Public Citizen v. Federal Motor Carrier Safety Administration*, No. 03-1165 (D.C. Cir. July 16, 2004) (also on Westlaw at 2004 WL 1585847)

1742 Connecticut Avenue, N.W., Washington, D.C. 20009
202-234-8494 (phone)
202-234-8584 (fax)
ombwatch@ombwatch.org

In This Issue

National Debt Limit Countdown

On August 2, Treasury Secretary John Snow urged Congress to raise the federal debt limit without delay, and warned that the limit will be reached by late September or early October.

Others have speculated that gimmicks can be used to keep from reaching the limit until mid- or late November. One way that has been used in the past is not making scheduled payments into the Federal Employee Retirement System pension fund and after the ceiling is raised, repaying the "borrowed" amounts (with interest). This would allow action on the debt limit to be postponed until after the election.

Following is a brief Q & A about the debt limit.

What is the debt limit?
The debt limit or ceiling is the legal amount -- set by statute -- up to which the government can go into debt. Currently it is set at $7.384 trillion. Increasing debt over this limit is illegal.

What causes the national debt to grow?
Every time the government runs a annual deficit, meaning revenue is not sufficient to cover spending, it must borrow money, which increases the national debt. Record deficits have become the norm under this administration, because of a combination of factors: the economic downturn following 9/11, the war on terrorism, the Iraq war, and, perhaps most significant, the huge tax cuts in 2001 and 2003 that dramatically reduced revenue. The Office of Management and Budget recently estimated the deficit for fiscal year 2004 at $445 billion, adding $445 billion more to the national debt.

What happens if the debt limit is surpassed?
It is considered unthinkable that the U.S. Government would default on its debt. The catastrophic results would include chaotic bond markets and soaring interest rates. Thus, the debt ceiling will be raised. The only question is when, since raising the debt limit is a political hornet's nest, especially in an election year.

When was the last time the debt ceiling was raised?
It was last raised in May 2003 by a record $984 billion. Since Bush entered office in January 2001, the debt limit has been increased by more than $1.4 trillion.

For more about the national debt, see the U.S. Treasury's Q & A.

The International Monetary Fund released its annual report on the economic and fiscal condition of the U.S. It found that the administration's goal of cutting the deficit in half by 2009 was not ambitious enough, especially given the increasing pressure an aging population will soon be making on Social Security and Medicare. Rather, the IMF recommended getting the budget in balance by 2009 (without counting the Social Security surpluses). This would require "revenue

enhancements," or tax increases.

If you want to watch the debt grow by the minute, see the National Debt Clock.

Budget Legislation Watch

Some good and bad news from Congress before the August recess.

The good news:

Bipartisan bills were introduced before the August recess in both the House and Senate that would provide $6 billion in badly needed additional state fiscal relief over the coming year. However, the September schedule will probably be too full (and money too tight) to expect that Congress will act on them then. For more, see brief descriptions of S 2671 and HR 4961. Along with states, cities are facing difficult times and cutbacks in essential services. For more on this issue, largely being ignored by the presidential campaigns, see A War Against the Cities, an editorial by Bob Herbert which ran in the NY Times on July 30, 2004.

The bad news:

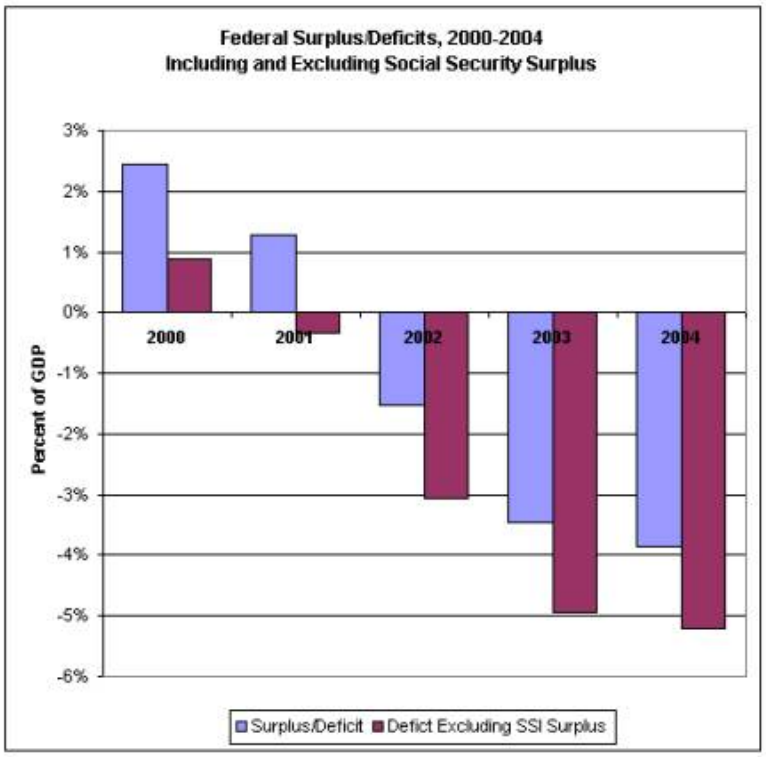
Also just before Congress recessed for August, Sen. Hatch introduced a companion (S. 2752) to Rep. Hensarling's budget process bill. The Hensarling bill includes an extreme "cap" or limit on entitlement spending, tight discretionary caps, and other harmful budget process changes. See a short summary of the Hensarling bill by the Center on Budget and Policy Priorities.

These budget process bills are also unlikely to move soon, despite their importance to so many Americans. Programs including healthcare, nutrition, childcare and child welfare, veterans benefits, and education may be saddled with crippling caps on entitlements and discretionary spending. See *Congressional Record* pages S8737and S8738 for the text of Sen. Hatch's introduction of the bill.

Mid-session Review Presents Misleading View of Nation's Finances

The White House's Office of Management and Budget recently (and belatedly) released its annual budgetary "Mid-Session Review," which attempts to put a positive spin on massive and worsening deficits, as well as the lowest level of revenue in nearly a half century.

Astonishingly the first paragraph in part reads "This Mid-Session Review reports solid progress toward cutting the deficit in half." Having read this statement, one might reasonably conclude that the deficit has begun to decline.



Alas, this is not so. Instead, our nation's economic policy has been fiscally irresponsible, and financially reckless.

The Mid-Session Review shows the federal budget running a $445 billion deficit for fiscal year 2004, up from a $375 billion deficit in 2003. But when the Social Security surplus is appropriately excluded, the current deficit will reach $600 billion, or 5.2 percent of GDP. (See chart below.) While temporary deficits can help the economy recover from a recession or allow us to invest in our future; unless significant policy changes are made, massive deficits are projected to persist.

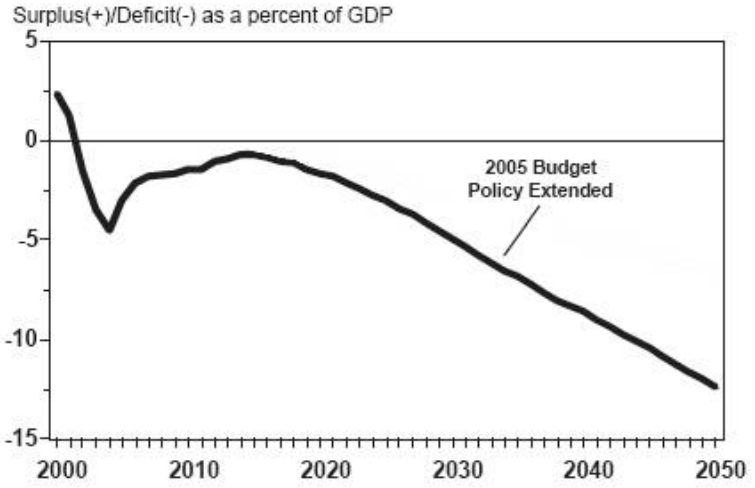
In addition, federal revenue, at just 16.2 percent of gross domestic product is at its lowest level since 1959. It doesn't take a Ph.D. in economics to know that tax changes that lead to historically low revenues just may have something to do with the deficit.

So, things haven't gotten better, but what about the near future?

Over the period from 2004-2009, the White House projects that $1,727 billion will be added to the federal debt. Yet even these projections do not include many of the policy proposals being pushed by the president and considered by Congress, including a permanent fix of the Alternative Minimum Tax and the elimination of the estate tax for multi-millionaires. If enacted, these policies would add hundreds of billions to the deficit projections.

Okay, so the near future doesn't look good, we will grow our way out eventually, right? Well, as one might expect, there is a reason why the president's budget and the Mid-Session Review only publish data for the next 5 years rather than project for a 10-year horizon as was done by previous administrations.

The budgetary situation becomes even worse -- not better -- when looking out over the next 10 years and beyond. The chart below, derived from the president's own budget (Analytical Perspectives, pp. 192-196) demonstrates that the budget situation will deteriorate significantly over the coming decades.



With the retirement of the baby-boom generation, increases in expenditures for Social Security and Medicare will combine with massive deficits and low revenue to put an extreme squeeze on the rest of the budget. The squeeze will ultimately impact many essential governmental areas, including education funding, student loans, services for families and children, funding for parks and historic preservation, highway and transportation funding and many other programs of vital importance to the American public.

So what's to blame for the deficits? Many Americans would be surprised to learn that of all the legislation enacted since the 2001 projections were made, tax changes account for 57 percent of the increased deficit -- more than both the wars in Iraq and Afghanistan, all homeland security spending, and other spending changes *combined*.

By not planning for the future, recent economic policy has been irresponsible, because it shifts trillions of dollars of the tax burden to future generations, and away from those that can best afford to pay.

In addition, we have lost an important opportunity to use a budget surplus to address some of the most pressing and most difficult policy challenges, including the viability of Social Security or Medicare. According to the Tax Policy Institute, the total present value of all the revenue lost by the tax changes over the past three years would be more than enough to shore up Social Security for the next 75 years.

Finally, this kind of tax policy is extremely reckless because it threatens our ability to respond to future crises and challenges -- such as another terrorist attack on the order of 9/11 -- and if it continues, it may very well endanger the financial health and stability of the nation.

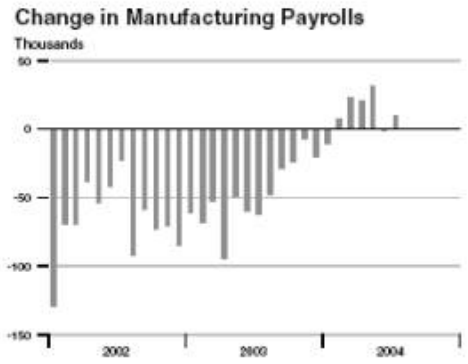
Economy and Jobs Watch: Economy Shows Signs of Weakness under Pressure

Two recent economic reports on jobs and gross domestic product (GDP) indicate that the economy is showing some signs of weakness. The economy will begin to be under increasing pressure from higher oil prices, rising interest rates, and a ballooning deficit. Over the period from 2004 to 2009, the White House projects that $1,727 billion will be added to the federal debt -- and this projection does not include many policy proposals favored by the President and many in Congress which would increase the deficit even more.

Employment

The job market showed an extremely weak and disappointing gain of just 32,000 jobs in July -- well below expectations as well as below the level needed to keep up with the growth of the labor force. The measured unemployment rate however, did decline very slightly by one tenth of a percentage point to 5.5 percent.

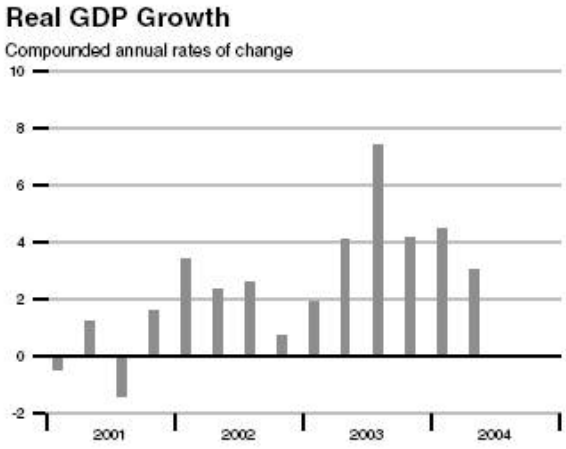
The weak labor market is also having a toll on salaries. According to the Economic Policy Institute, "For those lucky enough to land a new full-time job, the median pay rate fell from $681 per week in their old job to $572 per week in their new job."



Source: St. Louis Federal Reserve, National Economic Trends, 8/6/04

Gross Domestic Product

In addition the nation's economy as measured by the gross domestic product (GDP) grew at a disappointing 3.0 percent annual rate in the second quarter of 2004, the Bureau of Economic Analysis announced. This growth rate is the lowest since the first quarter of last year (see graph below).



Source: St. Louis Federal Reserve, National Economic Trends, 8/6/04

Particular weakness was seen in consumer spending, which had been the strongest part of the economy through the 2001 recession and afterwards and which grew at its slowest pace since early 2001 -- at an annual rate of just 1 percent.

This recent data demonstrates that the economic policies currently in place are not getting the job done, and that neglect of the domestic macroeconomic situation can have real consequences for the job market and the overall economic situation.

As a recent report from Economy.com, an economic consulting and forecasting firm, stated about the Bush economic

policy record, [t]he economic bang for the buck from these policies. . . has been substantially lacking. The report in part concluded, [i]t is not difficult to construct a package of alternative fiscal policies that would have lifted the moribund economy much more quickly and powerfully.

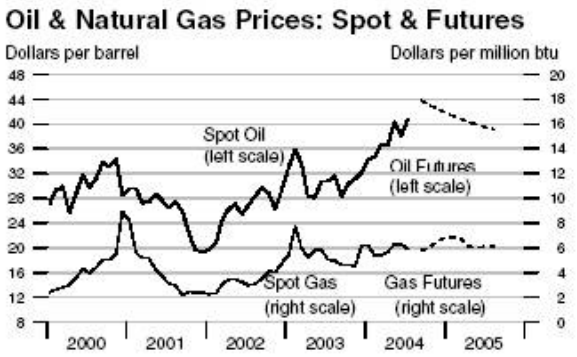
Mounting Pressures

Growing Federal Budget Deficit

According to OMB, the fiscal year 2004 deficit is set to reach $445 billion, and $1,727 billion will be added to the federal debt over the period 2004-2009. If a permanent fix of the Alternative Minimum Tax and additional tax changes such as the elimination of the estate tax for multi-millionaires are enacted, the deficit projections would be even worse.

Oil prices

Oil prices have continued to rise, rising well above the $40 level. This "oil tax" presents a real drain on the domestic economy, and has likely contributed to the recent weakness, especially in consumer spending.



Note: Futures prices as of 08/02/2004.

Source: St. Louis Federal Reserve, National Economic Trends, 8/6/04

Interest rates

While interest rates have risen slightly in recent months, the housing market remains strong. However, this boom is likely to be temporary since the threat of even higher interest rates in the future probably led many people to jump into the market or to speed up their home-buying plans. Further increases in interest rates pose a significant threat to the economy over the next year.

The Federal Reserve was expected to raise rates again at their August 10th meeting of the Federal Open Market Committee, but recent data suggests they may postpone any increase.

Ohio Proposes Strengthening Open Records Law

Officials in Ohio will soon introduce a bill to the state legislature that would improve the state's current open records laws, according to the *Plain Dealer*. This comes after a recent survey revealed the state complied with requests for records less than half the time.

The new provisions would require elected officials to receive two hours of public records training and government offices to create records manuals. Judges could also fine those violating the law up to $1,000 a day. While these changes could greatly improve compliance with the laws, some believe it is not enough.

Ohio State Sen. Marc Dann (D-Youngstown) wants a fixed response time for any requests. This would require government offices to respond to requests within a set number of days. The federal Freedom of Information Act requires a response within 20 working days. Another improvement advocated by the Ohio Newspaper Association would mandate that plaintiffs who win lawsuits under open records laws automatically be awarded attorney's fees. This is similar to a law Illinois adopted last year. The promise of recovered costs would encourage more lawyers to take up open records cases pro bono. Currently, judges can decide whether or not to award these fees.

This new bill comes after the Ohio Coalition for Open Government conducted a statewide audit seeking public records. The results showed that requests were granted in a timely manner only half the time. In the rest of the cases, requests were denied, delayed, or additional information was requested that is not required by law. In the Cleveland area, requesters of records faced hassles two-thirds of the time.

Ask Your Representatives to Investigate the Data Quality Act

OMB recently published a report to Congress that analyzes and summarizes the first year under the Information Quality Act (IQA). The IQA, commonly known as the Data Quality Act, requires agencies to produce guidelines to ensure that information they use is of high quality. OMB Watch responded with an analysis, which found OMB's report presented Congress with misleading and incorrect facts. Congress never had a hearing on the law, and in light of the OMB report, it is now time for congressional oversight.

To contact your representatives and find out more information, read OMB Watch's action alert.

Justice Dept. Asks for Destruction of Documents, Later Rescinds

The Department of Justice (DOJ) called for the destruction of all copies of five documents in library circulation, according to a July 20 message from the Superintendent of Documents. After public outcry from libraries and public interest groups, DOJ rescinded its request in a July 30 message.

Although these training materials and other documents were already in the public domain, DOJ asserted that they were not appropriate for external use. One of the listed documents is a public law and law offices commonly use the others in assisting clients to reclaim assets from the government.

After the public backlash, the Superintendent released a second message saying, "In response to the Government Printing Office's further inquiry into this matter, the Department of Justice has requested that I advise depository libraries to disregard the previous instructions to withdraw these publications." DOJ determined that documents already in the public domain were not of a sensitive enough nature to require removal. Neither letter provides a precise definition for the term "sensitive."

Given the atmosphere of secrecy at DOJ these actions alarmed information advocates. Last year, the General Accounting Office (GAO) released a report saying, a significant percentage of Freedom of Information Act (FOIA) officers have reduced the amount of information available to the public because of Attorney General John Ashcroft's infamous October 2001 memo. However, removing documents from libraries is an even more forceful effort at secrecy then denying requests.

The five documents titles are:

- Civil and Criminal Forfeiture Procedure
- Select Criminal Forfeiture Forms
- Select Federal Asset Forfeiture Statutes
- Asset forfeiture and money laundering resource directory
- Civil Asset Forfeiture Reform Act of 2000 (CAFRA), PL no. 106-185, 114 Stat. 202 (2000)

FBI Punishes Whistleblowers

Another former employee of the Federal Bureau of Investigations (FBI) has come forward to blow the whistle on perceived failings and misconduct within the agency. Mike German, a 16 year veteran of the FBI, recently went public with accusations that the agency mismanagement a terrorism investigation. The case is being investigated but it is unclear how far the investigation will go given last month's dismissal of another FBI whistleblower case.

New FBI Whistleblower

German claims that after many years of successfully infiltrating dangerous and criminal organizations, his efforts to investigate an American group reportedly planning to support foreign terrorists was botched by the FBI. The ex-FBI agent also accused the agency of falsifying documents to discredit sources. Finally German says the FBI punished him for raising his concerns to FBI officials by freezing him out and making him an outcast in the agency which led to his leaving the FBI after 16 years of service.

The Justice Department's Inspector General has begun investigating German's case, both his accusations of mismanagement and claims of retaliatory treatment. A F.B.I. spokesperson, claimed that the FBI "thoroughly investigates all allegations of wrongdoing." However, German may have cause for concern considering how the last FBI whistleblower case was handled.

Last FBI Whistleblower

Sibel Edmonds, a former FBI translator, accused the FBI of firing her for complaining major security lapses in the agency's translation service. Specifically, Edmonds claimed that supervisors intentionally slowed her work in an effort to receive budget increases and that inaccurate and shoddy translations were being done. The former translator also reported that an employee with ties to a foreign embassy attempted to shield a foreign official by leaving information out of translations. The FBI has acknowledged that the translator in question, who has since quit and now lives in Belgium, belonged to a Turkish organization being investigated by counter intelligence and that several of her translations missed significant pieces of information.

Edmunds raised these concerns reputedly with FBI officials and was fired. The FBI reported that her contract was terminated completely for the government's convenience, while it took extreme steps to gag her at the same time. In

May, the FBI retroactively classified three letters to Congress concerning Edmunds that had been publicly posted on Congressional websites for sometime. One letter remains on Sen. Charles Grassley's (R-IA) website; Grassley is a member of the Senate Judiciary Committee which oversees the FBI. The Memory Hole, a website that attempts to preserve public access to material, has reposted the other two letters. The FBI also invoked its rarely used state-secrets privilege to block Edmunds from testifying in a civil case brought by the relatives of 9/11 victims.

Last month a federal judge dismissed Edmunds' whistleblower lawsuit without much explanation. The Judge only stated that he was satisfied with claims by Attorney General John Ashcroft and a senior FBI official that the suit could expose state secrets, damage national security, and disrupt diplomatic relations with foreign governments. However, after a classified investigation, the Justice Department's Inspector General found that Edmunds's accusations "were at least a contributing factor in why the FBI terminated her services." The investigation also revealed that the FBI did not aggressively pursue the accusations. The *New York Times* obtained and reported on a July 22 letter from Robert S. Mueller III, Director of the FBI, to Congress that explained these conclusions and informed lawmakers the agency was considering disciplinary actions against some employees.

Data Quality Challenge Helps Bump Species from Consideration for Endangered List

On March 31, 2003 the U.S. Fish and Wildlife Service (FWS) of the Department of the Interior received a data quality petition from Terry Bashore of the U.S. Air Force challenging information concerning FWS' proposed rule to list slickspot peppergrass as an endangered species. The challenge clearly contributed to the FWS' decision to withdraw its proposal to recognize and protect the plant as an endangered species.

Slickspot peppergrass is a flowering plant unique to Idaho. It appears there is no specific purpose or use for the plant, simply that it is a rare flower that is being threatened with extinction by non-native weeds caused by livestock trampling and grazing, road construction and off road vehicles. The grass grows in "slickspots," which are small areas within larger sagebrush habitat. The total area of sagebrush steppe habitat containing occurrences of slickspot peppergrass is about 20,500 acres. Not all of this area is slickspot peppergrass -- just small areas within it. Of that area, 91 percent is federal land managed by the Bureau of Land Management (BLM) and U.S. Air Force (USAF); 3 percent is private land; 6 percent is state land.

In 1999 FWS determined that the rare plant was a candidate for the endangered species list but took no additional action. Western Watersheds Project and the Committee for the High Desert filed a Nov., 2001 lawsuit for the agency's failure to list the plant under the Endangered Species Act and a federal-court settlement required the FWS to make a final decision by July 15, 2003.

On July 15, 2002 (a year earlier) FWS published a proposal to list the plant on the endangered species list. During consideration of the proposed rule FWS provided two public comment periods for a total of four months which ended in Nov., 2002 and held two public hearings . In the proposed rule to list the plant FWS asserted that the rate of disappearance of slickspot peppergrass is "the highest known of any Idaho rare plant species."

Request for Correction

Bashore, Chief Ecologist and Range Liaison at Langley Air Force Base in Virginia, asserted in the data quality challenge that there was a lack of scientific evidence to support the claims, as well as a lack of scientific peer review for the support research. However, Western Watersheds Project reports that Jeff Foss, supervisor of FWS' Snake River Basin Office in Idaho, stated that five peer reviewers supported the "sufficiency and accuracy" of the science and the listing of slickspot peppergrass as endangered.

The Air Force petition also claimed that FWS used inaccurate, confusing and misleading presentation of arguments for listing the species. Additionally, Bashore's challenge raised questions about the taxonomy of the plant species and the sufficiency of the population surveys.

Interestingly, the Air Force is an affected party in this matter because apparently training operations at Mountain Home Air Force Base in Idaho would be severely affected if slickspot peppergrass were listed under the ESA.

The request was filed four moths after the second comment period for the proposed rule closed. It is not clear what new information the Air Force had that it couldn't submit during the two public comment periods or at either of the two public hearings.

Agency Response

On July 10, FWS sent Bashore a response to his challenge, notifying him that the date of resolution for the rule would be extended. Shortly thereafter, on July 18, three days after the court appointed deadline, FWS announced a six-month extension to the final rule and a third public comment period. FWS asserts this was not just in response to the data quality challenge but because "substantial disagreement regarding the sufficiency and interpretation of the available data" existed. However, FWS clearly acknowledges in Frequently Asked Questions About Slickspot Peppergrass" that the additional scientific input from the Air Force prompted the re-review.

Appeal

The Air Force submitted a request for reconsideration on August 1 claiming that the extension of the rule and reopening of the public comment period did not "correct" the FWS Notice to List the species as endangered. Apparently additional subsequent communications occurred between the FWS and the Air Force on the matter of the data quality appeal. However, it is unclear what information was exchanged during these communications.

Agency Response to Appeal

On Sept. 3, FWS notified the Air Force that no direct action would be taken on their appeal and that reopening the comment process was an adequate response to their challenge, as it would enable comments regarding data quality to be considered. The Service also noted that a response would be provided in the final rule. However, there was no final rule.

Instead, on Jan. 22, 2004, FWS announced that it was withdrawing the rule to list slickspot peppergrass as an endangered species. The FWS cited the lack of strong evidence of the plant's decline and that conservation agreements, established during the most recent delay, would sufficiently protect the plant. No explanation was given for why the evidence had been strong enough to initially propose listing the plant as endangered or what exactly had changed besides the obviously biased objections of the Air Force.

This is a case where a questionable policy may have allowed political pressure to endanger the very existence of a species. Environmental groups are concerned that conservation agreements, which do not have nearly the force of law as being listed as an endangered species, will not be adequate to protect the plant. Western Watersheds Project already reports that it expects to litigate over the FWS' decision to not list the species.

Sign up for OpenTheGovernment.org Updates on Secrecy

With new proposals to expand government secrecy emerging weekly, it's hard to keep up with it all. To wit: The transportation spending bill working through Congress could allow officials to hide hazardous waste hauling through communities across the U.S. One piece of legislation would expand the Patriot Act, another would make permanent sections of the Patriot Act set to expire in 2005, yet a third would restore civil liberties protections for libraries and bookstores asked to divulge their patrons' reading habits. The Department of Homeland Security may propose plans to hide unclassified information even as some Republican members of Congress charge federal agencies keep too many secrets. All this and more was covered in the OpenTheGovernment.org Weekly Update.

OpenTheGovernment.org is an unprecedented coalition of journalists, consumer and good government groups, environmentalists and labor. Our goal is to translate public concern about closed government into public voices for open government. Check out the latest news and updates and sign up for alerts about open government at www.OpenTheGovernment.org. It's quick. It's easy. And it will help open the government.

Terror Prevention and Nonprofits: CFC Policy Raises Concerns about Chilling Impact

The Director of the Combined Federal Campaign (CFC) announced July 31 that participating organizations have an affirmative obligation to check government terror watch lists in order to comply with a certification they are required to sign that they do not support terrorism. The statement prompted the American Civil Liberties Union (ACLU) to withdraw from the fund. In a letter to the CFC, ACLU Executive Director Anthony Romero said, "that requirement is not clear from your certification and I am sure that most if not all of the 2,000 participating charities have a different practice and understanding of the CFC requirements." OMB Watch released a statement on August 6 calling on CFC to withdraw the certification requirement.

The certification states that the group "does not knowingly employ individuals or contribute funds to organizations found on the following terrorist related lists promulgated by the U.S. Government, the United Nations, or the European Union." It names three specific lists (see below) and requires the group to notify CFC of any change within 15 days.

The ACLU letter noted that the government's terror watch lists are "notoriously riddled with error and do not provide individuals with a means to correct false information." In April they sued to block use of "no-fly" lists on constitutional grounds, citing the experience of one of their staff attorneys, who is of Middle Eastern descent, and whose name mistakenly appeared on the list.

In February the *Washington Times* reported that a master terror watch list had been created by the government in December to be used by the Transportation Safety Agency as a "no-fly" list. Michael McMahon, a federal employee whose name matched one on the list, was detained for 45 minutes at Dulles International Airport and questioned about alleged ties to the Irish Republican Army. A *Washington Times* search found more than 20 people with the same name in Virginia and Maryland.

Mara Patermaster, the CFC Director told the *New York Times* that, "We expect that the charities will take affirmative action to make sure they are not supporting terrorist activities," assuming appearance of an employee's name on one of the lists means charitable resources are being diverted to terrorism, a highly questionnable assumption.

The negative impact of the new policy is likely to extend beyond the 2,000 charities participating the CFC. Other funders, such as United Way, often require nonprofits to meet CFC requirements. For example, the application for the District of Columbia United Way requires nonprofits to sign the same certification.

Summary of Combined Federal Campaign Regulations 5 CFR Part 950- Solicitation of Federal Civilian and Uniformed Service Personnel for Contributions to Private Voluntary Organizations

The regulations define the Combined Federal Campaign (CFC) program and establish a structure to carry it out. Definitions, a conflict of interest policy and prohibition on discrimination are found in Subpart A. It notes that the CFC is "the only authorized solicitation of employees in the Federal workplace on behalf of charitable organizations." It runs a six-week campaign between September 1 and December 15 each year, with eligible organizations seeking to have donations designated for them.

CFC is part of the Office of Personnel Management.. The regulations authorize the CFC director to take all necessary steps to achieve campaign objectives and to hear all disputes. The director's decisions are final for administrative purposes.

The director establishes Local Federal Coordinating Committees comprised of federal officials that is responsible for overseeing the local campaign, which is carried out by a Principal Combined Fund Organization, made up of charities, federations or a combination of the two.

Federal employees designate charities from national or local lists to receive their contributions. Eligibility requirements for appearing on the list include a requirement that the group be a 501(c)(3) charity, conduct lobbying activities as defined under the expenditure test in Section 501(h) of the tax code and meet public accountability standards. Theses standards do not include any certification regarding checking terrorist watch lists. They do include certifications on fiscal accountability, such as an audit requirement, and limits on the proportion of administrative costs in a group's budget and a commitment that contributions will be used for the purposes described in the promotional information.

The director may impose sanctions, up to permanent expulsion, on organizations for "violating any provisions, other applicable provisions of law, or any directive instruction from the director." In such a case the organization has ten days to submit a written statement on why the sanction should not be imposed. There is no further administrative appeal.

Muslim Charity Says FBI Fabricated Evidence, 8 Indicted

On July 26, the Holy Land Foundation for Relief and Development, the nation's largest Muslim charity, sent a letter to the Department of Justice Inspector General to investigate FBI's handling of case, alleging "materially misleading" evidence. Later the same day the Justice Department unsealed an indictment of the charity and seven top officials, charging material support of Hamas, a designated terrorist organization, and money laundering.

Holy Land was shut down by the federal government in late 2001 and was unsuccessful in a lawsuit challenging the freeze order. (See the OMB Watch Executive Report for details.) A lawyer for the foundation said the court relied on secret evidence, including a 54-page FBI memorandum it claims had distorted and erroneous translations of Israeli intelligence reports. An independent translating service hired by Holy Land found 67 discrepancies and errors in a four-page FBI document used in that case.

The complaint describes several instances of incorrect or misleading information, including mention of Holy Land's financial support for Al Razi Hospital, claimed to have Hamas affiliations. The memo did not disclose that the U.S. Agency for International Development also funded the hospital.

A central issue in the case will be whether funding charities or other groups that have ties to terrorist organizations amounts to funding terrorism. If indirect ties can lead to criminal prosecution many international funders may be reluctant to make grants to troubled areas of the world. The Treasury Department's Office of Foreign Assets Control has issued "voluntary" best practice guidelines that would require grantmakers and service providers to investigate their clients and grantees to ensure they have no ties to terrorism. The guidelines have been criticized for putting foundations in the role of government enforcers.

Senate Finance Committee Asked to Consider Financial Burden of Reform Proposals

Comments by lawyers and accountants to the Senate Finance Committee at a July 22 Roundtable pointed out the financial and administrative burdens some staff reform proposals could impose on nonprofits. Some comments targeted a proposed IRS five-year review of each organization's tax-exempt status.

Among other ideas, the staff proposal would require nonprofits to file detailed information with the Internal Revenue Service (IRS) every five years showing that it continues to operate for tax-exempt purposes. Both the American Bar Association's Section on Taxation (ABA) and the American Institute of Certified Public Accountants (AICPA) said the costs of these reviews are likely to exceed the benefits. AICPA's remarks said, "In general, we support review by the IRS to ensure that exempt organizations are carrying out the purposes for which they were recognized as exempt. However, we are concerned that the five-year review proposal will require all organizations required to apply for tax-exempt status to prepare a great deal of information that the IRS will not have the resources to review." The ABA questioned whether the proposal is practical or possible, noting that over 1.6 million nonprofits would fall under the requirement. AICPA said, "We cannot commend changes that will impose financial burdens on all exempt organizations as a result of the acts of a few."

The staff proposed fees on nonprofits to pay the costs of the increased oversight. AICPA opposed this, saying, "The AICPA suggests that any increased enforcement would be better funded from the excise tax on the investment income of private foundations, which was imposed for this purpose, rather than diverting funds from the charitable uses for which they were donated."

Senate Finance Committee Chair Charles Grassley (R-IA) and Ranking Member Max Baucus (D-MT) send a letter to the Statue of Liberty Foundation seeking more information on governance issues. The committee began investigating the foundation in the spring after press reports that the foundation and National Park Service had been slow in efforts to re-open the statue after the September 11, 2001 terrorist attacks in New York.

Uniform Financial Guidelines for Government Grants Proposed

A coalition of nonprofits has published draft *Uniform Data Elements and Definitions for Grant Budgeting and Financial Reporting"* for use by government grantees as part of the federal grant streamlining process. The coalition is seeking comments from nonprofits and their accountants by September 30. After the guidelines are modified to incorporate input a new version will be released for field-testing, and all grantees will be urged to try them.

The Uniform Guidelines Coalition includes OMB Watch, the Urban Institute, the National Council of Nonprofit Associations, the National Association of State Auditors, Comptrollers and Treasurers, and the Greater Washington Society of CPAs. Bill Levis of the Urban Institute serves as Project Manager.

The objective of the project is to facilitate creation of core summary budget data elements for use by both federal and state governments. Comments can be sent to Kay Guinane or Bill Levis. The OMB Watch website has more background information on government grant streamlining.

Update on Elections and Nonprofit Advocacy

Complaints filed against Jerry Falwell Ministries at the Internal Revenue Service (IRS) and the Federal Election Commission (FEC) allege that the organization illegally endorsed President Bush and solicited donations for a conservative political action committee. A bill to repeal the electioneering communications blackout of broadcasts referring to federal candidates within 60 days of an election or 30 days of a primary or convention is introduced in the Senate, as the Wisconsin Right to Life Committee sues to overturn application of the rule to their grassroots lobbying ads

Falwell Ministries Accused of Partisan Electioneering

In early July Jerry Falwell Ministries, a 501(c)(3) organization, posted an endorsement of President George Bush on its website and circulated it via an email newsletter, *Falwell Confidential*. Both messages included a solicitation of donations and link to a conservative political action committee, the Campaign for Working Families. Americans United for Separation of Church and State filed a complaint at the IRS July 15 requesting an investigation. On July 27 the Campaign Legal Center filed a complaint at the IRS alleging violation of the prohibition on intervention in elections for 501(c)(3) organizations and another complaint at the FEC alleging illegal general public endorsement and solicitation of contributions by a corporate entity.

Falwell responded that the communications were paid for by a 501(c)(4) entity, the Liberty Alliance and that he was speaking as an individual and publisher and is legally entitled to express his views. However, the communications were made using corporate facilities, including the groups' shared website, which does not clearly distinguish between the 501 (c)(3) and 501(c)(4) entities. It bears the name of the Jerry Falwell Ministries, the 501(c)(3), but in the About Us section says it is a project of the Liberty Alliance, the 501(c)(4).

The Campaign Legal Center asked the IRS to "use its authority under Section 7409 of the tax code to enjoin Jerry Falwell Ministries Inc. from engaging in further direct express endorsements of any candidates for public office."

Electioneering Communications Challenges

A bill introduced in the Senate on July 21 by Sen. Saxby Chamblis (R-GA), S. 2702, would repeal the electioneering communications provisions of the Bipartisan Campaign Reform Act of 2002. It has five co-sponsors and has been referred to the Committee on Rules. The bill would effectively eliminate restrictions on broadcasts that refer to federal candidates within 60 days of an election or 30 days of a primary or party convention.

On August 3, the Federal Election Commission accepted two Advisory Opinion requests seeking interpretation of the electioneering communications rule. The first involved Russ Darrow, a Republican candidate for U.S. Senate in Wisconsin. His request, AO 2004-31 seeks clarification on how the rule applies to advertisements for his business, which bears his name. The second request comes from Citizens United, whose request, AO 2004-30 seeks permission to air broadcasts publicizing a book about Presidential candidate John Kerry. The same group has previously filed a complaint against advertisements for Michael Moore's film *Fahrenheit 9/11*. On August 6, the FEC dismissed that complaint based on stipulations from Moore and the film's distributor that it had already planned to delete references to federal candidates from advertising during the blackout period.

The Wisconsin Right to Life Committee has filed a lawsuit challenging application of the electioneering communications rule to grassroots lobbying ads it is airing now and wants to continue to run this fall. The ads urge the public to contact Sens. Russ Feingold and Herb Kohl, both Democrats, to end the filibuster against President Bush's judicial nominees. Feingold is running for re-election. The suit seeks an injunction against application of the rule to these facts, even though the Supreme Court upheld the general provisions of the law in McConnell v. FEC in December 2003. Wisconsin Right to Life is a 501(c)(4) organization that has endorsed Republican candidates.

The three-judge panel considering the case held a status conference on August 5 and told the parties to attempt to negotiate stipulated activities that may eliminate the need for protracted litigation. The Wisconsin Right to Life Committee could use "hard" dollars, raised and spent subject to federal campaign finance regulations, to pay for the ads, but said they have only minimal funds in their regulated PAC account. The parties will report their progress to the court on August 9.

Mine Safety Subordinated to Mining Company Interests

A front-page story in the *New York Times* August 9 examined the Bush administration's record over the last four years of subordinating mine safety issues to the special interests of the mining companies, stressing in particular the role of former mining executive Dave Lauriski, who is now head of the Mine Safety and Health Administration.

Among the rollbacks of mining safety protections under Lauriski's leadership:

- A proposed change to allow coal-dust levels in mines to quadruple, thus putting miners at a significantly increased risk of black lung.
- Erasing from the rulemaking agenda a proposed rule to regulate the structure and condition of coal waste impoundments, which can hold hundreds of millions of gallons of toxic coal wastes. The rule had been added to the agenda in the aftermath of an impoundment rupture that released over 300 million gallons of hazardous coal slurry into rivers and streams in Kentucky and West Virginia.

OMB Watch has been monitoring and reporting on these developments throughout this time. Our recent report, *Special Interest Takeover: The Bush Administration and the Dismantling of Public Safeguards* (available here), documents the rollbacks of mine-related workplace and environmental protections and highlights the problem of the "foxes in the henhouse" -- former executives of the mining industry, including Lauriski, who have been tapped by the administration to serve in the agency intended to regulate that very industry.

OMB Watch has also compiled a chart of rules withdrawn from MSHA's agenda. This chart compares MSHA's rationales for adding the rules to its agenda against its explanation for withdrawing them.

Other recent OMB Watch dispatches on mine safety rollbacks include the following:

- Federal Judge Rebukes Bush Administration's Hard-Rock Mining Rules
- Administration Moves to Allow Dumping of Mining Waste Into Streams
- Court Ruling Overturned: Mining Companies Free to Bury Streams Once Again
- Court Rejects Move to Allow Dumping from Mountaintop Mining
- Administration Moves to Clear Way for Dumping, Mountaintop Mining
- Administration Lifts Restrictions for Dumping Mining Waste
- Safeguards Weakened or Revoked

OSHA, Congress Weaken Workers' Protections Against TB

According to a July 30 memo from OSHA Deputy Assistant Layne Davis to OSHA Regional Administrators, field officers for the Occupational Safety and Health Administration must contact OSHA's Enforcement Directorate before issuing a citation of violations of new respiratory protection requirements for tuberculosis. This requirement further enervates a system of safeguards that has been increasingly weakened over the past year.

Last December, OSHA withdrew a rule aimed at limiting occupational exposure to tuberculosis. In its explanation, the agency argued that "the rate of TB has declined steadily and dramatically since OSHA began work on the proposal in 1993," so the rule is no longer necessary. Furthermore, the agency claimed, "An OSHA standard is unlikely to result in a meaningful reduction of disease transmission caused by contact with the most significant remaining . . . risk: exposure to individuals with undiagnosed and unsuspected TB. . . ." [68 Fed. Reg. 75,767 (2003)]. Moreover, the agency stated that workers would still be protected from TB by the respiratory protection requirements, which requires the use of CDC-certified respirators by health care workers working with TB patients, under which OSHA could still cite employers for health violations. However, OSHA's actions show a lack of commitment to enforcing even the limited scope of the respiratory protection requirements.

Even if fully enforced, the respirator requirement does not cover the full range of activities that would have been covered under the proposed rule that was withdrawn from its rulemaking agenda. Anti-TB protections in that rule would have included "the use of respirators when performing certain high hazard procedures on infectious individuals, procedures for the early identification and treatment of TB infection, isolation of individuals with infectious TB in rooms designed to protect those in the vicinity of the room from contact with the microorganisms causing TB, and medical follow-up for occupationally exposed workers who become infected" (62 Fed. Reg. 54,160 (1997)).

Further debilitating the safeguards, on July 14 the House Appropriations Committee approved a rider to the 2005 Labor, HHS, and Education Appropriations bill that would prevent OSHA from enforcing the annual fit-testing provisions of the TB respiratory standard. According to the agency, fit-testing (testing respirators for proper fit) is necessary to ensure protection against tuberculosis microorganisms. "Selecting the proper respirator is a vital step in protecting a user against potential exposures and adverse health effects," according to OSHA administrator John Henshaw. Accordingly, OSHA issued a final rule in August providing for fit-testing on an annual basis, rather than the one initial fit test currently required. If this measure passes, OSHA's ability to enforce protective and preventative standards for occupational tuberculosis will be further weakened.

Court Rejects Cost Considerations in Clean Air Act ... Almost

In a confusing opinion, the D.C. Circuit has rejected a rule that would have allowed the use of two ozone-depleting chemicals in certain circumstances despite the designation of a non-depleting alternative. Although the decision was based in part on the improper consideration of costs to industry, the court nonetheless declined to make a definitive holding on the permissibility of cost considerations in the disputed section of the Clean Air Act.

About the Case

The case was brought by Honeywell International, maker of a hydrofluorocarbon (HCFC) approved as a substitute for an HCFC scheduled to be phased out in accordance with Title VI of the Clean Air Act, which implements the Montreal Protocol on Substances that Deplete the Ozone Layer. Although the Environmental Protection Agency approved Honeywell's HCFC, the EPA also issued a final rule permitting the continuing use of two other ozone-depleting HCFCs as additional substitutes for the phased-out HCFC whenever "technical constraints" prevented companies from using Honeywell's approved alternative in foam end-uses. EPA also declined to limit existing uses of the two ozone-depleting HCFCs because "there would be a significant impact on small businesses" if EPA limited their use and because mandating non-ozone-depleting alternatives "would be difficult and prohibitively costly."

The court did not address Honeywell's claim that EPA's 180-degree turn between the proposed rule and the final rule on limiting the two ozone-depleting HCFCs constituted a failure to provide adequate notice of the ultimate decision. Instead, after a lengthy treatment of Honeywell's standing to sue, the court concentrated on Honeywell's argument that EPA should not have considered economic factors in its decision. Although the court did rule that flaws in EPA's reasoning justified vacating the rule, its explanation for that decision leaves unclear the extent to which economic analysis is forbidden by Title VI of the Clean Air Act.

Diverging Rationales

The court was unanimous that EPA erred in issuing the final rule, splitting instead on the question of appropriate remedy. Judge Randolph's separate opinion, dissenting from the majority on the remedy question, also offered an alternative concurring approach on the rationale for rejecting EPA's rule. There are two important questions for the court:

- Did EPA's rule depend on economic considerations?
- If so, were those economic considerations permitted by the Clean Air Act?

Although both the opinion of the court by Judge Sentelle and the Randolph concurrence agree that economic considerations found their way into the final rule (differing only in the reasoning that leads to that conclusion), the opinions diverge significantly on the second question.

Economic Considerations

One point of divergence for the Sentelle and Randolph opinions is the meaning of the key term "technical constraints." EPA argued that the final rule permitted use of the two disputed HCFCs only when "technical constraints" prevented the use of Honeywell's non-depleting alternative. Because the rule limited those additional uses to cases of technical constraint, according to EPA, any discussion of economic considerations in its explanation of the rule should be treated as a harmless error that should not be the basis for rejecting the rule itself.

Sentelle rejected that argument, noting instead that technical feasibility is not necessarily categorically distinct from economic feasibility:

> The flaw in EPA's position is the assumption that technical constraints exclude considerations of economics. In truth, economic feasibility is part of technical feasibility. It is often possible to fit a round peg in a square hole if enough money is spent to make the round peg fit. In other words, a given change in manufacturing technique may be "technically infeasible" only as compared to some baseline of what it would cost to change the technique.

Rejecting that categorical distinction gave the court freedom to identify all instances in the agency's published explanation in which the agency referred to economic considerations.

EPA gave Sentelle quite a bit of ammunition. The essence of EPA's justification for permitting limited use of the disputed HCFCs was that widespread use of them in certain commercial applications with special "technical considerations" would "make it difficult for businesses to switch to other, non-ozone-depleting blowing agents." These considerations are all ultimately, according to Sentelle, economic:

- One such special technical consideration, according to EPA, arises in the case of foam used to insulate refrigerated truck bodies and insulated rail cars. In this case, industry requires not just the insulating and flammability control properties of the foam but also foam that permits industry to "maximiz[e] internal dimensions" of the shipping cars. The desire to maximize the internal dimensions "arises because trucking companies want to transport as much food as possible per truckload to maximize their revenues," wrote Sentelle.

- EPA also argued that "it had insufficient information to assess the 'viability'" of alternatives to the two HCFCs because their use is so widespread in such a large number of diverse end-uses that there would be many company-specific "technical considerations" warranting their continued use. In some such "niche applications," EPA argued, "foam manufacturers may experience difficulties and delays in transitioning to" a substitute. Sentelle untangled the argument and found economics at its core:

> The implication is that economic factors caused those companies to be "locked in" to using these particular chemicals in the manufacturing process, despite the fact that within those end uses, "non-ozone depleting alternatives have been identified and, in limited cases, implemented successfully." In other words, even though it is technically possible to use manufacturing techniques that do not deplete the ozone layer, it would cost too much to require companies to transition to such techniques given those that, for cost reasons, they have already implemented. This, too, is therefore an economic justification for continuing to allow these companies to use [the disputed HCFCs].

- EPA had also identified "technical constraints" specific to small businesses, stressing "the constraints associated with cost and timing of transitioning to alternatives for small businesses, and the need to facilitate a smooth and equitable transition." Sentelle found it easy to dismiss this argument:

> Finally, EPA noted that the wide variety of products these types of foam are used to manufacture meant that small businesses might economically suffer from a regulatory requirement to use non-ozone-depleting alternatives. EPA noted, specifically, that it was necessary to "level the playing field for small businesses," and that those businesses might face "constraints associated with cost and timing of transitioning to alternatives," a justification that clearly considers costs. Even if the agency is correct to characterize such concerns as "performance" or "technical" factors, the fact remains that they are also economic factors.

Although Randolph ultimately agreed that economic factors were considered in the rule, he took a slightly less direct route than Sentelle. Randolph opted to begin with the facial evidence of the rule itself and EPA's argument that the rule's plain language meant an end-user can turn to the two ozone-depleting HCFCs only "if it is not actually possible to use anything else." EPA's discussion of the *consequences* of its decision does not necessarily mean that it relied on such considerations in its actual decision:

> Expressing concern over whether a substitute product actually works (or works as well) as the substance it is replacing is, of course, a decision that may carry economic consequences, as where a less functional foam product will be less commercially desirable. If a foam is denser, picnic coolers will have to be heavier to keep the same amount of food cold; if a foam is less insular, it will require thicker walls in refrigerators or houses that use it as insulation. But that does not convert every decision EPA makes about whether a substitute works into a decision about costs ....

Randolph appears to be arguing that discussion of cost consequences must be differentiated from a rationale based on costs. Without making that distinction, argues Randolph, "[t]he court defines too broadly what it means for EPA to impermissibly consider costs."

Reading the agency record with a keener eye, Randolph honed in on the agency's emphasis on the "cost and timing of transitioning to alternatives for small businesses." This passage proved for Randolph to be the most important evidence of cost considerations:

> It is difficult to understand this passage unless EPA believes there is some subset of end-users for whom it would be possible yet very costly to switch to non-ozone-depleting alternatives, and that the rule grants this subset some form of relief. This, in turn, suggests that EPA construes the term "preclude" to mean something less than "make impossible," such as to "make difficult" or "make cumbersome."

Basis for Rejecting the Rule

Reaching the conclusion (albeit by different routes) that EPA did consider costs in its final rule, the court next addressed the impermissibility of that consideration. The answer from each opinion is that the consideration of costs required the court to reject the rule. The reasons supplied by Sentelle and Randolph differ significantly, primarily because Randolph's are actually coherent.

Sentelle's rationale for rejecting the rule appears to be that EPA must provide some reason for considering costs before actually considering them -- assuming, that is, that EPA can consider costs--and that EPA failed to justify its consideration of costs in the administrative record. The sequence of the argument must, however, be unscrambled from the paragraph in which it is confusingly written:

1. In accordance with the leading Supreme Court authority, the court must "defer to the agency's expert judgment" in interpreting Title VI of the Clean Air Act, "unless [the agency's] interpretation is unreasonable or if the plain terms of the statute say otherwise."

2. If EPA decides that Title VI of the Clean Air Act permits it to consider costs, then, this standard of deference will apply, and the court will be required to accept EPA's interpretation unless it is unreasonable or plainly divergent from the statute's language.

3. EPA does not actually argue that Title VI allows it to consider economic factors in determining whether an HCFC is acceptable as a substitute.

4. EPA does note that the relevant section of the statute prevents the substitution of harmful substances when the agency has designated an alternative that "reduces the overall risk to human health and the environment" and "is currently or potentially available." Clean Air Act § 612(c). EPA argues that the term "available" permits consideration of "economic or practicality" concerns.

5. EPA failed to state this argument in the administrative record but instead raised it for the first time in the court case.

6. "Such a justification cannot pass muster ... as the agency did not offer that construction of the statute below .... Therefore, even assuming, without deciding, that the text of section 612(c) permits EPA to interpret the statute to consider costs, we must still reverse EPA's decision and remand to the agency. Without knowing the agency's interpretation of the statute, we simply have no way of evaluating whether its interpretation is reasonable."

Randolph's alternative rationale for rejecting the rule is based instead on the agency's failure to follow its own regulations. Randolph notes that related regulations allow EPA to consider the "cost and availability of the substitute" as a factor in assessing the acceptability of a substitute. That regulation is strictly limited, however, to assessing whether EPA should *forbid* the use of the substitute. Because the consideration of the costs for small businesses to transition from the use of a prohibited HCFC is therefore precluded by the existing regulations, Randolph concluded, "it is arbitrary and capricious for EPA to fail to comply with its own regulations," and thus the disputed final rule should be remanded back to the agency for further consideration.

Like Sentelle, Randolph refrained from directly addressing whether Title VI of the Clean Air Act permitted cost considerations, although he did signal nonetheless that such considerations are most likely barred:

> Whether CAA § 612(c) would permit substantive consideration of transition costs is not apparent on the face of the statute and presents a serious question of statutory interpretation. Heretofore, when Congress has wanted the Administrator to consider costs under the CAA it has expressly called for consideration of costs or practicality. *See, e.g.*, 42 U.S.C. § 7411(a)(1), 7412(d)(2), 7479(2)(C)(3) .... The court has repeatedly held in cases involving other sections of the CAA that cost plays no role in the promulgation of emissions standards .... The Supreme Court's decision in *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 467-70, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001), which rejected a reading of the term "public health" in the CAA that incorporated cost considerations, further cautions against reading economic considerations into the CAA where they do not appear on the face of the statute. Thus, whether CAA § 612(c) might permit consideration of practicality in extreme cases, such [as] where it would be so difficult to "fit a round peg in a square hole["] that a non-ozone-depleting alternative could no longer be said to be "available," is a question that is not yet before the court. EPA has not attempted to locate its approach in the statutory text, and it behooves the court, in light of the deference that may be due, to afford EPA the opportunity to decide whether transition costs are to be considered in evaluating a clean alternative's availability.

For Further Reading:

Decision in *Honeywell Int'l, Inc. v. EPA*, No. 02-1294, 2004 WL 1635626 (D.C. Cir. July 23, 2004)

Challenged rule:

- Proposed rule: 65 Fed. Reg. 42,653 (July 11, 2000)
- Final rule: 67 Fed. Reg. 47,703 (July 22, 2002)

1742 Connecticut Avenue, N.W., Washington, D.C. 20009
202-234-8494 (phone)
202-234-8584 (fax)

In This Issue

Economy and Jobs Watch: Tax Cuts Go Mostly to the Rich

The Congressional Budget Office has released a new study detailing the impact of recent tax changes on various income levels. The bottom line: The very, very wealthy made out very, very well.

A *New York Times* article about the study said about one-third of the tax cuts went to the top 1 percent of households (those making an average of about $1.2 million per year), with each receiving on average $78,460 a year. And about two-thirds of the benefits went to the top fifth of households making an average income of more than $200,000. This is in stark contrast with those in the middle fifth, with incomes averaging $51,500, who received an average of $1,090 a year -- about 1/70th the amount given the top 1 percent.

In addition, the richest 1 percent are paying a lower share of federal taxes in 2004 than in 2000, while those in the middle are paying a greater share. Moreover, these estimates likely understate the true tax cut at the top, since the CBO report did not include changes to the estate tax law -- which only affects millionaires.

Contrary to the administration's claims, not everyone is getting a tax cut. For millions of low-income taxpayers who pay only a payroll tax, there is no tax reduction.

Besides, for 2004, the Bush Administration is projecting a deficit of $445 billion. With a U.S. population of about 294 billion, that translates to about $1,500 per person. So the average household comes out significantly behind.

Finally, a host of other tax changes, particularly at the state level, were necessitated in part by the policy changes at the federal level. This has meant additional taxes, fees, tuition payments, and program cuts in other areas of government.

Given all of this, it should be no surprise that a recent poll found that a large majority, 71 percent of Americans, say they did not receive a tax cut, and a quarter of respondents said the administration made their taxes go up.

Recent Data Shows Decline in Nonprofit Employment, Earnings

On August 19, OMB Watch released a new report, "Recent Trends in Nonprofit Employment and Earnings: 1990-2004," which examines the recent history of employment and compensation trends in the nonprofit sector. It found that while growth in nonprofit employment continued during the 2001 recession and immediately after, it stalled over the past year, with significant declines in average hours worked, weekly earnings, and hourly wages. Data on individual states reflect this nationwide pattern.

According to government data, employment in the nonprofit sector has grown by only about 0.5 percent in the year ending July 2004 -- which is well below its average rate of 2.4 percent annual growth over the past 15 years. Average weekly earnings dropped significantly over the past year, indicating a weak labor market. This was due in part to declines in both hourly compensation and the average number of hours worked weekly, which had been stable through early 2003.

In the year ending June 2004, real (inflation-adjusted) weekly earnings fell by 5.2 percent. Also during this time period real hourly earnings fell by 3.9 percent.

The nonprofit sector of the economy is traditionally asked to help support the nation in times of economic weakness, and is currently expected to make up for reductions in publicly provided government services. The current data indicate that the sector is being asked to do more with less labor input.

Why does this matter?

The nonprofit sector is a large part of the economy, employing millions of people (nearly 11 million in 1998 according to Independent Sector) and supporting the volunteering efforts millions more. A downturn in this important sector is harmful for the overall economy.

Nonprofit organizations are also asked to perform a wide variety of public services, such as sheltering the homeless, providing support for the elderly, protecting the environment, promoting children's welfare, building parks, promoting the arts, and so on. A downturn in this area has consequences that extend far beyond the nonprofit organizations themselves.

Finally, cutbacks in government services as a result of Bush administration policies and state budget crises will place even more demands on the nonprofit sector, which is being asked to do more with fewer resources. While many organizations will be able to struggle to get by, the current situation cannot continue without seriously harming nonprofits, the issues they care about, and the people they serve.

Download full report (.pdf) Download press release (.pdf)

Watch for August 26 Release of Poverty, Income Statistics

This week, the U.S. Census Bureau will release its latest statistics on income, poverty and health insurance coverage, a month earlier than usual. It will show the 2003 poverty rate, household income information, and the percentage of Americans who are uninsured using the Census Bureau's "Current Population Survey" (CPS).

For the first time, the Census Bureau is combining the CPS national data with data from the "American Community Survey" (ACS), which measures a broad range of socio-economic indicators including income, poverty, education, transportation, housing, and labor force status. The ACS covers states, counties, and cities of 250,000 or more. Last year the reports were issued separately, but this joint release will provide a wealth of important information about the state of the nation, including states and some cities, which is especially useful as the election approaches.

The Census Bureau will hold a press conference at 10 a.m. EDT on August 26. To view the webcast (and access the reports), visit the Census Bureau's homepage and click on the income, poverty and health insurance icon in the top left corner.

A number of organizations are planning communications efforts to highlight "Poverty Day" August 26, including the Coalition on Human Needs, Connect for Kids, and Voices for America's Children. The Center on Budget and Policy Priorities and the Economic Policy Institute will be doing quick analyses of the data released that day. State-based groups, including the Economic Analysis and Research Network (EARN) and State Fiscal Analysis Initiative (SFAI), are also engaged in this effort to put a face on the statistics. The data will show:

- How much the slow recovery has hurt families and children
- How high child poverty rates are among working families
- Where are the "winners" and "losers" in this economy
- Whether families are better off than they were in 2000
- Whether some families are sinking deeper into poverty.

The focus will be on Arizona, California, the District of Columbia, Florida, Illinois, Michigan, New Mexico, Ohio, Pennsylvania, Texas and Washington. For information on work being done in those states, contact Debbie Weinstein at the Coalition on Human Needs.

On September 4, the nation's largest anti-poverty organization -- the Community Action Partnership -- also intends to focus the national spotlight on issues facing low-income Americans. The Partnership and its 1,000-member network of Community Action Agencies plan a "No Room for Poverty" National Rally in Washington, D.C. Thousands will gather on the Ellipse to urge Americans to work together to eradicate the causes of poverty and call on the Bush Administration to

convene a White House Conference on American Poverty.

Right-To-Know Resource Center Gives News Context

The Right-To-Know Resource Center provides critical resources on news of the day. Geared for reporters and other advocates who need background information on a timely issue, the Resource Center provides the context for understanding current events.

For example, a recent *Washington Post* story focused on the long reach of a short law, the Data Quality Act, which allows the public (including corporations) to challenge the data underlying government rules. The Resource Center has background on the law and how the private sector uses it, along with recent reports by OMB Watch.

In addition, whistleblower protections are now moving through Congress and may be sent to the president's desk. The Resource Center provides background and key links to existing whistleblower laws and groups, such as the Government Accountability Project, that work on the issue. See **Policy** section.

Other resources:

- Advocacy ideas and model strategic plans can help experienced advocates quickly map out a campaign and help emerging advocates hone their craft. See **Strategy** section.
- Registration for updates from journalists, national security experts and others on current developments of secrecy and openness, in **Connect**.
- Pointers to key government data on health, consumer safety, and environmental protection in **Library**.

The Resource Center, coordinated by OMB Watch, is part of OpenTheGovernment.org, a coalition for less secrecy and more democracy co-chaired by OMB Watch and the National Security Archive.

Secrecy Law Raised in Albany Terrorism Case

The U.S. attorney's office invoked the rarely used Classified Information Procedures Act (CIPA) to limit the amount of information disclosed in a case against two men arrested in Albany, N.Y. This comes on the same day media sources revealed that the document the FBI used to link one of the men to terrorists was incorrectly translated.

The CIPA is a procedural statute designed to protect against the unauthorized disclosure of classified information during a court case. It applies to information used by both the prosecution and defense. It is mostly used in cases involving alleged terrorists, spies, or others the military charges with crimes.

In the Albany case, the prosecution invoked the CIPA to hide information that would be released in advance of the trial. If allowed, CIPA would prohibit the defense from seeing the material and preparing a response. The suspects, Yassin M. Aref and Mohammed Mosharref Hossain, were arrested on charges of money laundering, providing material support to a foreign terrorist organization, importing firearms without a license, and conspiracy. The FBI began a sting operation after Hossain sought to borrow money from an FBI informant . The informant then invited Hossain to participate in a money-laundering plot based on the sale of a missile launcher to be used in a terrorist attack. Aref became involved when Hossain asked him to serve as a witness.

The FBI started investigating the two men after a notebook recovered from Iraq contained Aref's name and telephone number. The notebook was recovered from what authorities believe was a terrorist camp or insurgent hideout. The FBI mistranslated a word appearing before Aref's name, believing it said "commander" instead of "brother." Prosecutors relied on the "commander" translation, implying it meant that the men were dangerous and should be denied bail.

Aref's attorney, Terence Kindlon, cited the irony of invoking CIPA at this point in the process. "They had three press conferences announcing the arrest, one in Washington, D.C., and two in Albany. They put out all this prejudicial damaging information, much of which turns out to be based upon demonstrably false information, and now they want to shut everything down so we can't respond."

Hossain's attorney announced he would file a motion seeking the entire notebook that contains Aref's name so that all the information can be reviewed and any inaccuracies in affidavits or documents could be discovered.

The government has misused secrecy in past court cases. Recently declassified documents reveal that in a landmark case the government was not withholding information to protect national security but to cover up government mistakes. *United States v. Reynolds* established the government state secret privilege. After a 1948 Air Force plane crash killed several people, some relatives sought additional information on the crash. The government argued all the way to the Supreme Court that the accident reports could not be released, even to the court justices, for national security reasons. However the unsealed documents now reveal that the accident resulted from poor maintenance and inadequate training. The accident reports contained no security secrets. The case serves as a sobering reminder that the courts must carefully limit the government's use of secrecy.

Coalition Files FOIA Suit Against Homeland Security

A coalition of Illinois organizations filed a lawsuit under the Freedom of Information Act (FOIA) Aug. 17 against the Department of Homeland Security to obtain information about discriminatory activities post 9/11. DHS never responded to the original FOIA request.

The organizations filing the suit work closely on civil liberties and immigrant rights: American Civil Liberties Union of Illinois, the Illinois Coalition for Immigrant and Refugee Rights, the Midwest Immigrant and Human Rights Center, and the Muslim Civil Rights Center.

The organizations requested information on the number and nationality of those detained or deported by the federal government in Illinois, and more specifically, under Operation Tarmac, Operation Chicagoland Skies, Operation Landmark, and Operation Liberty Shield. Additionally, the groups asked for information about those detained under Section 412 of the USA Patriot Act. The groups hope that obtaining this basic information about government activities will help them and their clients understand the scope and impact of post-9/11 security measures on immigrants in Illinois.

The original FOIA request was submitted to two bureaus within DHS in September 2003. Under the law, federal agencies must respond to FOIA requests within 20 business days. Backlogs of FOIA requests are common at other agencies, and as such, requestors often get a response indicating that agency will require additional time to properly reply. DHS never sent any response to the Illinois groups' request. In its first years in existence DHS has already come under intense criticism for being overly secretive and unresponsive. Several FOIA lawsuits and other secrecy challenges have already been filed against the agency. DHS also extends its penchant for secrecy into the courtroom, using the unconventional tactic of filing classified evidence which neither the public nor the plaintiffs are permitted to see.

Justice Punishes Employees Who Cooperate with Congress

Senator Charles Grassley (R-IA), has written several stern letters to Attorney General John Ashcroft accusing the Justice Department of punishing employees that have cooperated with Congress.

Grassley believes the Justice Department has taken hostile actions and reprisals against Assistant U.S. Attorney Richard Convertino and his colleagues in Detroit because Convertino testified before Congress and has raised objections about the Justice Department. The Detroit prosecutors successfully convicted three men of operating a terrorist cell in Detroit but apparently had serious disagreements during the trial with Justice officials in Washington. After the trial Convertino accused the Justice Department of not providing sufficient support for the prosecution and hindering the case by limiting the attorney's use of strong evidence.

Last fall the Senate Finance Committee, chaired by Grassley, asked Convertino to testify about terror financing schemes. When the department learned that Convertino was subpoened to testify, it initiated an internal investigation of Convertino and his colleagues, apparently fearful of what might be disclosed concerning the trial troubles. Grassley views the investigation as retaliation against the attorneys and has insisted that they "be made whole and not suffer reprisals.''

This is hardly the first time that Bush administration, and the Justice Department in particular, has come under fire for trying to limit and control what information Congress receives. In June, Ashcroft repeatedly refused requests from members of the Senate Judiciary Committee to produce a copy of the recently leaked Justice Department memo that explored the legal justifications for torture. In March 2003, the department issued a directive instructing employees to inform the Office of Legislative Affairs before all potential communications with Congress, and mandated that liaison officials accompany employees to Congressional briefings. Grassley called the directive "an attempt to muzzle whistleblowers."

Lawmakers Attack Science of Endangered Species Act

Conservative lawmakers are using peer review and data quality language to obscure what amounts to an attack on the Endangered Species Act. Two new bills would require the Fish and Wildlife Service to establish minimum criteria for scientific studies used as the basis for listing species, and to conduct restrictive independent peer reviews on all data used.

Identical bills entitled "The Sound Science for Endangered Species Act Planning Act of 2004" have been introduced in the House (H.R.1662) and Senate (S. 2009). These data quality and peer review provisions would create extra layers of review to delay the listing of species. The Fish and Wildlife Service already has a backlog of 451 listed species awaiting critical habitat designations and 1,021 listed species without any recovery plans.

One provision would require the promulgation of criteria that scientific studies must meet in order for the agency to use them. This provision amounts to an individualized Data Quality Act for the Endangered Species Act. The Data Quality Act has received a great deal of criticism for providing industry with the opportunity to delay and weaken information used for regulations.

Another provision would require that "greater weight" be given to independently peer-reviewed science. This provision also mimics OMB's Peer Review bulletin, which was roundly denounced by the scientific community as an effort to manipulate and minimize scientific evidence.

House Resources Chairman Richard Pombo (R-CA), who has endeavored to reform the Endangered Species Act since being elected, has steadily pressed the attack on endangered species science. In July, the House Resources Committee passed the "Sound Science" legislation, sponsored by Rep. Greg Walden (R-OR), on a 26-15 vote. While Sen. Gordon Smith (R-OR) has introduced the legislation in the Senate, the bill currently has no co-sponsors in the Senate, and faces much

tougher opposition there.

Officials Seek Exemptions to Arkansas Access Law

City of Fort Smith officials are seeking to change Arkansas' state Freedom of Information Act (FOIA) after they were caught violating the law by having secret discussions about a real estate purchase.

The city administrator privately polled Fort Smith's Board of Directors via telephone to get approval to bid on real estate being publicly auctioned. City officials contend that if the matter had been discussed publicly, the city would have paid more as knowledge of their top price would have driven up bids. Therefore, the secrecy served the taxpayers' interest.

A private citizen, upset with the secret discussions, filed a lawsuit against the city claiming that the calls violated public meeting provisions in the Arkansas FOIA law, which does not allow public boards, officials or commissions to meet privately for any reason. A lower circuit court dismissed the case but the Arkansas Court of Appeals reversed the decision and upheld the citizen's claims that the calls were illegal. The City of Fort Smith officials are appealing the case to the Arkansas Supreme Court, which could rule this fall.

The case also moved FOI legislation to the top of the Fort Smith's legislative agenda. Officials are working now to build legislative support for exempting secret meetings of city councils when negotiating property purchases, litigation and labor relations -- some other state FOIA laws do exempt these types of meetings from disclosure. Information access advocates assert that weakening the FOIA would encourage further abuse by officials, who already disregard the law too often. Those opposing the changes have also raised concerns that efforts may invite wholesale gutting of the law.

FEC Adopts Rule to Control 527 Political Groups

On August 19, the Federal Election Commission (FEC) adopted a new rule to control nonparty political organizations by making it more difficult for certain independent organizations -- known as 527 groups -- to raise and spend donations in the 2006 election.

The rule will affect some organizations that currently claim exemption from FEC rules. The Bipartisan Campaign Reform Act (BCRA) placed new limits on political parties. Independent organizations such as the Media Fund and America Coming Together have been set up in response. Under this latest FEC ruling, if an organization solicits contributions based on an appeal to support specific federal candidates, the group becomes subject to FEC regulations.

The new rule is less far-reaching than those discussed earlier this year, when the commission considered broad restrictions not only on 527 committees, but also charities, trade associations, labor unions, social welfare groups and other nonprofit organizations operating under Section 501(c) of the tax code.

Instead, the new regulation focuses more directly on 527 committees, while allowing most major other nonprofits to escape heavy regulation if political work is only a part of their activities. Adopted on a 4-2 vote, the new regulation will take effect January 1, 2005 and will not affect current fundraising by 527 organizations.

Specifically, the regulation involves fundraising solicitations. If a plea to a prospective donor "indicates that any portion of the funds will be used to support or oppose a federal candidate," then the maximum that can be contributed is limited to $5,000.00 and cannot come from corporations or unions. This could harm the success of the fundraising of these organizations, which have received individual donations of millions of dollars.

In Addition, the 527 groups will be required to pay for at least 50 percent of their expenses, including salaries, rent and other overhead, with hard money.

The future of 527 organizations remains unclear. Campaign finance reform advocates allege that 527 groups will be able to evade the new regulations simply by tailoring their solicitations to talk about policy as well as election prospects. However, with increased FEC scrutiny, it is uncertain whether these nonparty groups will be able to adjust fundraising and spending practices to accommodate the new guidelines successfully.

Bush Pushes Faith-Based Initiative Without New Authority

The absence of new legislative authority has not deterred the Bush administration from using its executive powers to widely implement its Faith-Based Initiative throughout the federal government. That is the finding of a new report by the Roundtable on Religion and Social Welfare Policy documents.

Among the report's findings:

- President Bush has aggressively advanced his Faith-Based Initiative through executive orders, rule changes, and managerial realignment in federal agencies.
- He has overseen the creation of a high-profile special office in the White House on Faith-Based and Community Initiatives, which has connections in ten government agencies, each with a director and staff, to advance the efforts to win more financial support for faith-based social services.
- These federal agencies have proposed or created a host of new regulations that mark a major change in the doctrine of separation of church and state.
- Increased uncertainty about the full extent of federal funding about faith-based social services.

Regulatory News Briefs

- GAO Report Finds OSHA Underuses Audit System
- Bush Policies Leave Wetlands Open for Development
- Superfund Super Broke?

GAO Report Finds OSHA Underuses Audit System

A recent GAO report found that OSHA is underusing its audit system, thereby missing opportunities to address serious worker safety and health violations. The report reviewed 2002 and 2003 regional audits from the five OSHA regions conducting the most inspections. The report found that four out of the five regions studied failed to meet OSHA's requirements for annual and biannual audits. Furthermore, OSHA's average penalty fell far below the proposed average penalty. The lax use of audits by OSHA offices may have allowed significant problems to continue unaddressed.

Bush Policies Leave Wetlands Open for Development

In 2001, the Supreme Court ruled that federal law does not protect isolated wetlands -- those that do not cross state boundaries and are not navigable -- to the same extent as other wetlands. According to a report released by several environmental groups, the Bush administration has interpreted this decision in such a way that thousands of acres of wetlands have been drained by developers over the past year. EPA and the U.S. Army Corps of Engineers said last year that they could only protect wetlands connected to interstate commerce. The strict interpretation of the court ruling has left once protected wetlands open to development, such as those on the northwest shoreline of Galveston Bay. Once deemed to be of "national significance" by the Fish and Wildlife Service, the 120-acre stretch of wetland is now turning into a shipping-container terminal by the Port of Houston Authority. The Corps of Engineers ruled that only 19.7 of the 120 acres are protected from development.

Superfund Super Broke?

Alarmed by Inspector General reports revealing shortfalls in the Superfund clean-up budget for the last two years and indications from EPA staff that the shortfalls will continue for a third consecutive year, Reps. John Dingell and Hilda Solis sent a letter to the EPA demanding more information. Citing information from EPA's own staff, Dingell and Solis identified 46 sites in 27 states that will receive inadequate funding, if any, for Superfund clean-ups.

Snowmobiles Allowed in Yellowstone Despite Court Loss

The National Park Service (NPS) has announced that it will allow up to 720 snowmobiles per day in Yellowstone, beginning this coming winter, while it works on a final rule on that matter.

Despite a January federal court ruling rebuking the administration's efforts to reinstate the use of snowmobiles in Yellowstone National Park, NPS announced August 19 a plan that would allow snowmobile access to Yellowstone for up to three years while it drafts a new rule setting standards for snowmobile use.

Just six days before snowmobile season started last year, the Bush administration issued a rule reinstating the use of snowmobiles, which was scheduled for phase-out under a Clinton-era regulation. The judge shot down Bush's plan and ordered a new plan by November of this year. However, a U.S. District judge in Wyoming issued a temporary injunction banning the Clinton regulation, citing the economic impact on local businesses.

NPS has released an environmental assessment of the snowmobile use in Yellowstone and other national parks. After a thirty-day comment period, NPS will issue a proposed rule implementing the temporary rule.

Bush Contributor to Benefit from Weaker Hazardous Waste Rule

A top Bush campaign contributor could benefit from an EPA decision to weaken a Clinton-era proposal to restrict handling of certain hazardous wastes.

The rule, originally proposed under Clinton, would have enforced stringent handling restrictions on factory shop towels contaminated with solvents that can harm the health of workers. However, during the Bush administration, industry advocates were allowed to view an advanced copy of the regulation and propose changes, which were then adopted by the EPA, according to the *Washington Post*.

Industrial-laundry companies stand to benefit from the weakened rule, including Cintas Inc., owned by Bush campaign contributor Richard T. Farmer. Farmer and his wife have given $3.1 million to the Bush campaign.

Sen. Hillary Rodham Clinton (D-NY), Sen. Barbara Boxer (D-CA), Rep. Rosa L. Delauro (D-CT) and Rep. Henry A. Waxman (D-CA) have sent a letter to EPA, requesting an investigation. EPA denies that any favoritism took place in drafting the rule.

Exposure of industrial laundry workers to hazardous waste from factory shop towels can have serious health ramifications. Mark Fragola, a former employee of Cintas, suffered significant health complications after long-term exposure to

hazardous solvents on shop towels. Fragola spoke at a March 9 EPA public hearing on the rule.

Kennedy Calls for OSHA Accountability in Letter to Chao

Senator Edward Kennedy, Ranking Member of the Senate Health, Education, Labor and Pensions Committee, sent a letter to Department of Labor Secretary Elaine Chao on August 18 expressing his concern over the lack of "development and enforcement of health and safety regulation."

"Despite the demonstrated need for worker protections, the Occupational Safety and Health Administration and the Mine Safety and Health Administration have abandoned dozens of proposed safeguards," Kennedy wrote. "I'm concerned that the Department is doing too little to meet the challenge of keeping American workers as safe as possible." Kennedy asked the Department to send him information on rules withdrawn from OSHA and MSHA's rulemaking agendas, along with "specific timetables for action on all pending health and safety rules being developed" by those agencies.

Kennedy's letter follows the Department of Labor's issuance on June 28 of its semiannual regulatory agenda. As of the time of the agenda, OSHA had only promulgated nine rules under the Bush administration. Out of those, only one was economically significant. During the same time period, OSHA has withdrawn 24 rules, nine of which were economically significant, including a rule to protect against employer payment of personal protective equipment, have been repeatedly delayed.

White House Overrides Forest Service, Allows Gas Project

White House officials have overridden a decision by the U.S. Forest Service to deny a Texas energy company's request to explore for natural gas in a national forest, according to correspondence uncovered by the *Los Angeles Times*.

Although the Forest Service originally denied the request by El Paso Corp. two years ago, the agency made an about-face earlier this month and laid the groundwork for a future approval of the company's request to drill in the Carson National Forest, a section of New Mexico's Valle Vidal adjacent to the nation's largest Boy Scout camp.

According to the *Times* exposé, the Forest Service was prompted to change its position by Robert Middleton, director of a White House energy task force, after Middleton had met with representatives of El Paso Corp.

The Forest Service had previously rejected efforts to drill in the land because of concerns about water pollution and consequences for wildlife in the forest.

Now, according to the *Times*, the Forest Service has issued a report recognizing the probability of finding gas in the forest and envisioning 500 possible wells. This report is a precursor to eventually granting the request from El Paso Corp.

The move is now angering not only Forest Service staffers but also New Mexico officials and Boy Scout campers and staff members.

1742 Connecticut Avenue, N.W., Washington, D.C. 20009
202-234-8494 (phone)
202-234-8584 (fax)

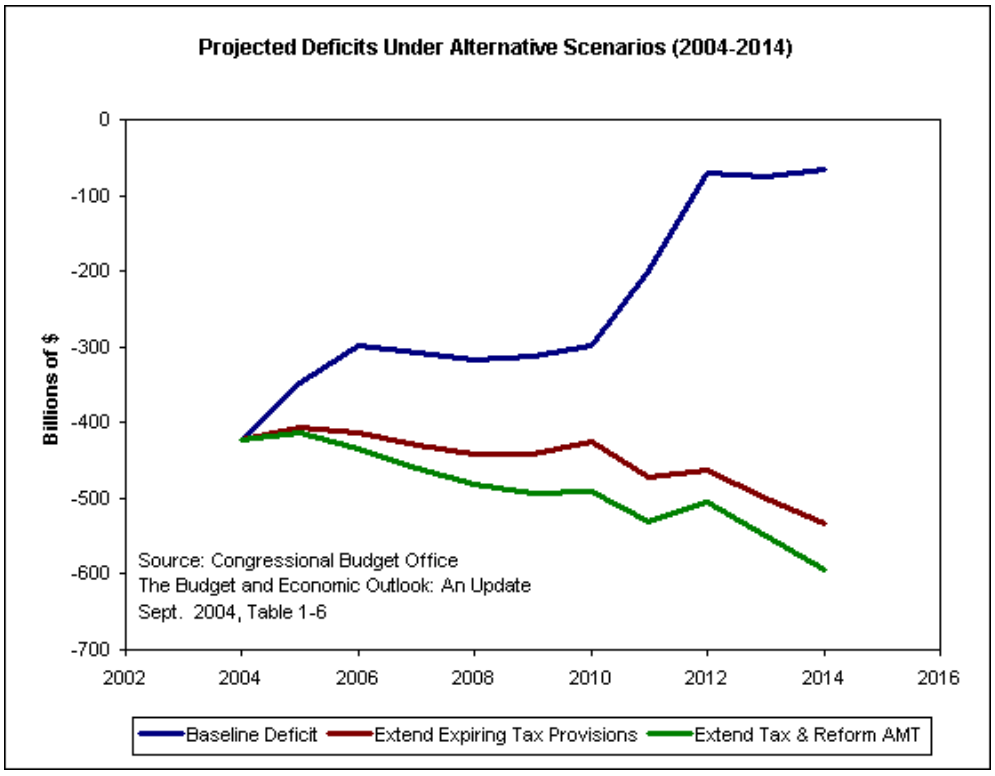
In This Issue

CBO Updates Budget Estimates: Massive Deficits to Grow

The Congressional Budget Office today released its semi-annual update on the nation's budget situation. The report confirms massive deficits for the current year and beyond. In addition, the report shows that deficits will not be "cut in half" in the next five years, as projected by the Bush administration.

To the contrary, if the president's tax changes are made permanent, deficits will continue to increase over the next 10 years and reach nearly $600 billion in 2014. The chart below uses data from the CBO report to show the effect on the baseline deficit if the tax changes are extended and if a modest reform of the Alternative Minimum Tax is enacted.

This recent experience contrasts sharply with the surpluses that reached over 2 percent of GDP just a few short years ago. The alternative scenarios produced in the report also highlight the devastating impact the tax changes will have on the budget if they continue unchecked. Extending the planned tax changes over the next 10 years will cost more than $2.2 trillion.



'State of Working America' Calls Economy Unbalanced

On Labor Day, the Economic Policy Institute (EPI) released its 2004 "State of Working America" report, showing that performance of the economy throughout the recovery has been unbalanced. "After almost three years of recovery, our job market is still too weak to broadly distribute the benefits of the growing economy," it found. "Unemployment is essentially unchanged, job growth has stalled, and real wages have started to fall behind inflation."

The annual study measures a range of economic indicators, including: employment, unemployment and underemployment; wages and job quality; and poverty, income, and wealth. An excerpt from the study, as well as many interesting facts sheets, are at EPI's *The State of Working America*

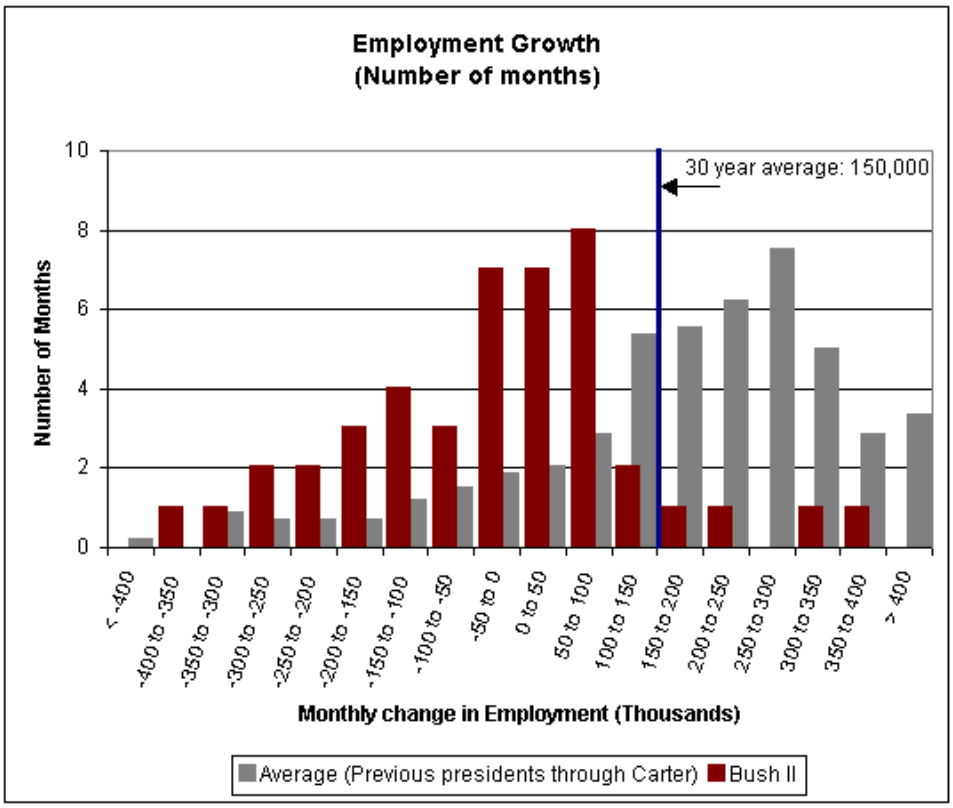
Labor Day Finds Little to Celebrate in Recent Trends

Yesterday we celebrated Labor Day. Unfortunately, there has not been much to celebrate in the labor market over the last 4 years. A look at the recent record shows an extremely under-performing labor market economy.

Employment

Since the start of 2001, the economy has lost nearly a million jobs. Part of the job-loss was due to the recession, however, even after 2001 the labor market has just barely crept along. Measuring from the end of the recession, the economy has added an average of only 18,000 jobs a month.

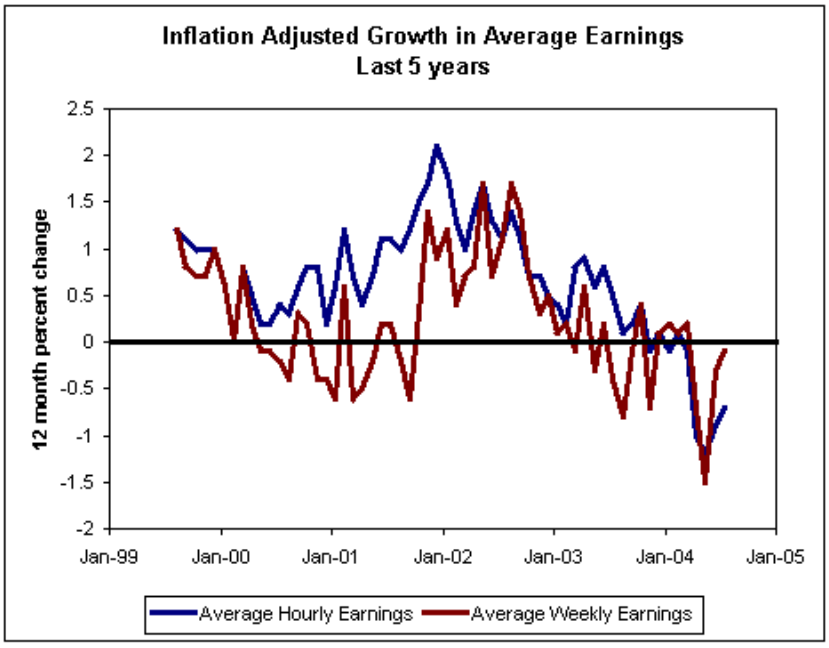
This stands in stark contrast with previous administrations and recent historical experience. Over the last 30 years, employment growth has averaged a healthy 150,000 jobs. Looking at the past six 4-year terms, on average, a 4-year term will contain 30 months with growth above this level. Under the Bush administration, there have only been 4 months with satisfactory levels of growth. (See figure below). The Bush Administration will be the only administration since Herbert Hoover in the 1930's to have a net job loss during its term in power.



Data: Bureau of Labor Statistics

Earnings

In addition to a weak labor market as measured by the number of jobs, it also appears that even those with jobs are not doing well. Average inflation adjusted weekly and hourly earnings have slowed to a crawl, and even declined over the past year. (See figure below).



Data: Bureau of Labor Statistics

Policy

The record of the last 4 years appears clear. The economy and the labor market have underperformed under the policies of this administration. While the labor market weakness has been emphasized, in fact, the average growth rate of the overall economy has been weak as well. Real gross domestic product has grown on average just around 2.5 percent under

Bush -- which is lower than past administrations, including the 3.3 percent average rate experienced during the Carter administration.

Administration economic policies, which were sold as economic and jobs stimulus, have obviously not had their claimed impact.

In the meantime corporate profits have soared, from $767 billion in 2001, to $1,167 billion in the most recent reporting period (2004, 2nd Quarter) -- an increase of more than 50 percent. It seems clear who is currently benefiting from the current economy as well as current policy.

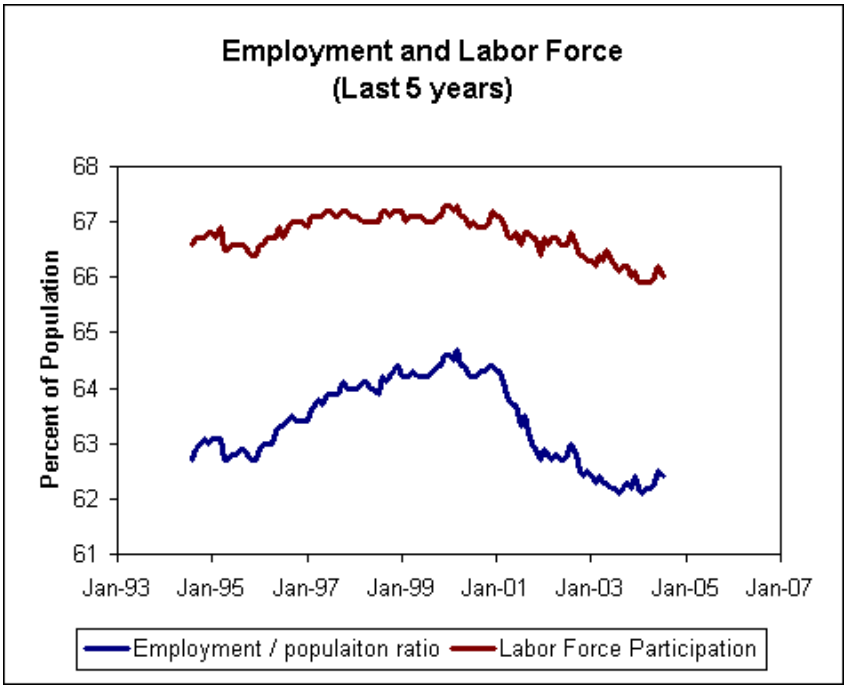
Economy and Jobs Watch: Sluggish Growth Continues

Employment growth continues to be below average. In August, the number of new jobs added was just 144,000, according to the Bureau of Labor Statistics (BLS). This is the third straight month that the data has been below its historical average -- over the last 30 years, the economy has added about 150,000 per month.

During the Bush term, there have only been 4 months in which employment growth has been above this average threshold. By contrast, looking over the 6 previous 4-year terms, administrations have averaged 30 months of employment growth per term above the 150,000 mark. (See Labor Day article this issue.)

In addition, the BLS also announced that the unemployment rate fell one tenth of a percentage point to 5.4 percent, primarily because of a decline in the labor force -- of the 174,000 decline in unemployed workers, 152,000 was due to workers leaving the labor force. This continues the trend of declining employment and declining labor force participation, which began in early 2001.

These signs continue to point to a weak labor market and the continuing failure of current policy to address the macroeconomic situation.



Appropriations: A Look Ahead

As Congress reconvenes today, the Defense Bill remains the only completed appropriation bill for FY 2005. The $417.5 billion bill was approved only just prior to the August recess. Members of Congress have a lot of work ahead of them if they wish to complete their appropriations work before the end of the fiscal year, which ends on September 30th, as only three other bills -- Homeland Security, Legislative Branch, and Military Construction -- have even made it through a full Senate committee.

If Congress is unable or unwilling to pass the other twelve appropriations bills before the end of the month, they may be forced to combine the remaining bills into a massive omnibus bill. The lack of time to adequately address the bills individually, along with both an extremely partisan political environment and a tight budget cap makes the omnibus route very likely. Resorting to an omnibus bill is somewhat detrimental because this process not only reduces bill discussion and debate, but it also makes way for bill sponsors to attach numerous pieces of unrelated legislation in order to gain needed Congressional support. Last year, seven spending bills were rolled into one omnibus bill for FY 2004, and as a result $10.7 billion worth of earmarks were passed along with the appropriation bills. Lawmakers passed thousands of provisions with most people not knowing where the money went. The same situation could very well occur again with the appropriation

bills for FY 2005. There is also a possibility that the bills -- either individually or as a group -- will not pass and that Congress would be forced to take up the issue in a lame-duck session after the November elections.

In addition to following a flawed process, the bills also reflect flawed domestic priorities. The budget bills are set to embody the domestic discretionary spending cuts proposed and supported by the current administration. Looking towards the future, domestic discretionary programs will see cuts based on the administration's funding request over the next five years, according to a recent report released by the Center on Budget and Policy Priorities. By 2009, the report claims, overall funding for all domestic discretionary programs besides Homeland Security will be cut by 10.4percent, or approximately $45 billion, when taking into account adjustments for inflation. This action will reduce funding for many basic services that citizens across the country rely upon.

Congress thus has a huge challenge ahead of them, not only in the next few weeks, but also in the upcoming years. The annual appropriations process requires time for both intelligent debate, committee testimony, and the opportunity for amendments to be proposed and decided upon. A rushed omnibus bill reflects a lack of congressional effectiveness in passing a responsible federal budget, and only makes it easier for the current administration to slip in spending cuts that affect multiple discretionary programs.

Senate Approves FOIA Exemption for Satellite Images

The Senate has approved a broad new Freedom of Information Act (FOIA) exemption that would restrict public access and use of commercial satellite imagery.

The proposal entitled "Nondisclosure of Certain Products of Commercial Satellite Operations," would impose strong restrictions on the dissemination of unclassified information that is relied upon for reporting to the public on disasters, international incidents, wars, and other news items. The provision would not only exempt the imagery from disclosure under FOIA but would actually prohibit the government from releasing the information. It also preempts any state or local disclosure laws that require access to such imagery information.

The Senate placed the information restriction in the National Defense Authorization Act for FY 2005, even though no national security issue appears to be involved. A House-Senate conference committee will consider the FOIA exemption proposal this month.

Various groups concerned with the vague and undiscussed provision are signing onto a letter urging the Committee Chairman to drop the FOIA exemption from the bill. For organizations interested in signing on to the letter contact Patrice McDermott with the American Libraries Association.

Coalition Reports Massive Classification Abuse, Secrecy Rose 60%

Testimony from two government officials before the House Subcommittee on National Security, Emerging Threats & International Relations confirmed that federal agencies are massively abusing their classification powers. The experts estimated that half of the classified information is wrongly restricted. The same week, OpenTheGovernment.org, a diverse coalition of more than 30 organizations, released a *Secrecy Report Card* quantifying the expansion of secrecy as well as the growing costs to taxpayers.

The subcommittee of the House Government Reform Committee held a hearing at the end of August to investigate the 9/11 Commission's conclusion that government secrecy is actually impeding anti-terrorism efforts. Overuse of classification prevents information from being more widely discussed or shared with either the public or government officials who lack sufficient clearance, including many law enforcement officials. The commission cited such obstructions to timely sharing of intelligence information among law enforcement agencies as a significant factor in their failure to prevent the 9/11 attacks.

J. William Leonard, Director of the National Archives' Information Security Oversight Office, told the subcommittee that in the past year over-classification has been "disturbingly increasing." Leonard also estimated that when officials have discretionary choices of whether or not to classify information they get it wrong more than half the time. This estimate was corroborated by testimony from Carol A. Haave, Undersecretary of Defense for Counter Intelligence and Security. Haave described the problem as extensive and projected that overuse of classification occurs 50 percent of the time.

According to data from Leonard's office compiled in OpenTheGovernment.org report card, the government spent $6.5 billion last year -- more than it has for at least the past decade. The study also found that the federal government spent at least $120 creating new secrets and maintaining them for every dollar it spent declassifying documents. This figure is a dramatic increase over recent years.

Examples discussed in the hearing indicated both the absurdity and seriousness of excessive secrecy. Harmless information clearly not warranting any security restrictions, such as the humorous plot against Santa Claus and the drinking preferences of a former dictator, are sometimes classified. Other examples demonstrate the serious danger from inappropriate classification. One study that found 40 percent of Army gas masks leak was classified, which delayed discussion and action to correct the life-threatening problem for six years.

Perhaps most serious is the intentional abuse of over-classification as a self-serving deception. Prior to the U.S. war on Iraq, the Central Intelligence Agency restricted figures on the amount Iraqi agents paid for aluminum tubes from a prewar intelligence report in order the hide the inaccuracy of the agency's conclusion that Iraq's willingness to pay high costs suggested the intention to use the tubes in a special national interest project. The amounts were between $10 and $17.50 per tube.

Rep. Christopher Shays (R-CT), Chairman of the Subcommittee, noted that as a contributing factor the increased number of officials that have the authority to classify information. Currently almost 4,000 government officials may categorize documents as secret, top secret, or confidential. Participants also cited the complex variety of rules that allow different agencies to restrict information under numerous categories as another obstacle to effective information sharing. These the number of restricted information categories has grown considerably since the 9/11 attacks, only making the problem worse and more confusing for officials.

OpenTheGovernment.org is a coalition of more than 30 organizations co-chaired by OMB Watch and the National Security Archive. Weekly updates from the coalition are available at www.openthegovernment.org.

On the Web, subscribe to Secrecy News. You can get policy updates from the coalition by registering here.

Industry Data Quality Challenge Weakens Dietary Guidelines: Deadline for Comments Sept. 27

An industry data quality challenge appears to have succeeded in weakening new U.S. Department of Agriculture (USDA) dietary guidelines.

Last year, the Center for Regulatory Effectiveness, an industry advocacy group, filed data quality challenges with USDA and the Department of Health and Human Services (HHS) over a World Health Organization (WHO) Report on Diet, Nutrition and the Prevention of Chronic Diseases. The agencies announced their intention to use the WHO report and its recommendation as a significant base for the pending 2005 Dietary Guidelines. The CRE challenge disputed two of the WHO report's recommendations which propose healthy levels for sugar and carbohydrates.

The WHO report recommended that for a healthy diet sugar consumption should remain below 10 percent of the total energy goal. The report also recommended that carbohydrates should comprise 55-75 percent of the diet. The CRE's challenge asserted that other studies placed maximum healthy sugar intake as high as 25 percent and that many successful low carbohydrate diets contradict the WHO recommendation. The group insisted that the WHO should not be used as basis for the new U.S. dietary guidelines.

Every five years the USDA and HHS review and update the dietary guidelines, famous for their food pyramid chart. A 13-member scientific panel recently released the recommended dietary guidelines, which acknowledge the link between sugar and weight gain, but do not specifically recommend that Americans limit sugar consumption. The panel claimed that more research was necessary before a clear position on sugar could be taken.

Consumer groups had hoped the panel would follow the WHO report and recommend clear limits on consumption of sugary foods such as soft drinks, candy, and cookies. Beverage makers and the sugar industry strongly opposed such a position and would likely support the data quality challenge. Concerns have also been raised about the USDA's objectivity, given the agency's role in promoting agricultural products. Last year, consumer groups requested the removal of seven panel members because of close ties to the food industry, but none of them were removed.

The new recommended dietary guidelines are now open for review. The USDA and HHS are accepting public comments until Sept. 27 and will hold a public meeting Sept. 21. Written comments can be submitted online or mailed into the address provided in the Federal Register notice.

Security Measures Invoked to End Safety Measures

A large sign in New York City, indicating the location of a natural gas pipeline to prevent accidents, was taken down after a website posted a photograph of the sign. John Young, the owner of www.cryptome.org, posts information on his site to draw attention to places needing increased security. Although federal regulations require that the location of natural gas lines be made as obvious as possible to the public for safety reasons, the company that owns the pipeline asserted that local laws allowed the sign's removal.

This incident illustrates how secrecy in the name of security increasingly overrides safety protections and the public's right-to-know, while doing little or nothing to improve security. The regulations requiring that natural gas pipelines be clearly marked were established to prevent accidental rupture that often causes injuries and deaths to residents, contractors, and emergency responders. Ironically, removing such information puts the public in greater danger of lethal accidents.

Reports by the Council on Foreign Relations and the National Academy of Sciences identify city power gates and compressor stations as the most vulnerable points to a potential attack that would leave a local power system down for several weeks. Since 9/11 some utility companies, such as Consolidated Edison, have addressed this threat by increasing fencing, security cameras, patrols around facilities, and inspections of pipelines.

Yet public disclosure of information is also a key part of the solution. A public that understands the risks around them can take steps to reduce them. Firefighters understood this when they opposed recent proposals by the U.S. Departments of Homeland Security and of Transportation to remove placards from hazardous materials containers. They noted that such placards help prevent accidents and inform first responders so they can properly assess and address emergencies involving toxic, explosive and hazardous materials.

National security is best enhanced, and harm from potential attacks minimized, by fixing problems and reducing risks at potential target sites. Moreover, while terrorist threats remain hypothetical, lethal accidents are certain to increase should safety warnings be eliminated. Foregoing safety in an elusive quest for security seems pennywise and pound-foolish. Policies must address both safety and security, and inform the public to improve the net protection of the public.

City Cites Terrorism in Secret Meeting on Gangs

The City Council of Staunton, Va., questionably used a terrorism provision to hold a secret meeting on gang activities. Using homeland security policies to hide non-terrorism information appears to be an increasing problem.

Amendments to Virginia's Freedom of Information Act (FOIA) allow secret sessions if the information is related to terrorist activity. In this instance, the City Council held a closed session to discuss "particular investigative and other preventive initiatives regarding gang activity." City Manger, Bob Stripling, asserted that this closed session fell into that category because "some type(s) of gang activity are terrorism because you are terrorizing the public."

This overly broad interpretation of the FOIA exemption, which grants the use of secrecy in limited circumstances, abuses the trust granted to the government. More and more often the government blocks public access to safety information in the name of security. Limitations were placed on these secrecy policies specifically to assure that only legitimate homeland security issues would be withheld and that other safety information would continue to be accessible to the public.

"There is criminal gang activity within a few hundred miles of Staunton," the city's customer relations coordinator stated. "Although there does not appear to (be) a significant problem with such activities in or near the city at this time, it's only prudent for us to be prepared in case that situation changes." But Councilman Richard P. Bell disagreed, saying much of what was covered could have been safely disclosed. Other Council members agreed the issue should be opened to public discussion.

This case brings into question how governments at all levels are using security issues to hide information of concern to the public.

Commission Finds Muslim Charities Shutdown Without Cause

A report published by the independent commission to investigate the 9/11 attacks has raised "substantial civil liberty concerns" regarding the government's shutdown in December 2001 of two Chicago-area Islamic charities. Since then, the government has neither proven either group was guilty of any terrorism-related crimes, nor convicted anyone involved.

Authorities closed the Global Relief Foundation (GRF) of Bridgeview and Benevolence International Foundation (BIF) of Palos Hills before any official finding that they were aiding terrorist organizations. Both had been under FBI scrutiny for years because of apparent ties to terrorist organizations. The report found that the concerns were "not baseless," but goes to say, "Despite these troubling links, the investigation of BIF and GRF revealed little compelling evidence that either of these charities actually provided financial support to al Quaeda -- at least after al Quaeda was designated a foreign terrorist organization in 1999. Indeed, despite unprecedented access to the U.S. and foreign records of these organizations, one of the world's most experienced and best terrorist prosecutors has not been able to make any criminal case against GRF and resolved the investigation of BIF without a conviction for support of terrorism."

The finding calls into question the government's claims to success in fighting terrorism and highlights the issue of the continued abuses of civil liberties towards Muslim charities in the name of 9/11. The FBI raids on the foreign, then the Illinois offices of both charities, were authorized under the post 9/11 Patriot Act, and required the approval of only one Treasury Department official.

The charities assets were frozen for about 10 months before the Treasury Department officially deemed them supporters of terrorism. As a result, both charities closed their doors permanently -- leaving over a million dollars suspended indefinitely. The director of Benevolence International pled guilty to diverting money to Islamic fighters in Bosnia and Chechnya but prosecutors later dropped charges that he aided terrorists. A co-founder of Global Relief was deported after an immigration judge deemed him a security risk.

The report concludes that these cases demonstrate the government's dramatic shift from pre-9/11 investigating and monitoring terrorist financing to actively disrupting suspect entities through freezing their assets. It also found many suspects are denied due process and organizations have been closed without formal evidence that they actually funded al Qaeda or other terrorist groups. The question becomes what is the threshold of information for the government to take disruptive action against suspect charities. For more background see OMB Watch's September 2003 report *The USA Patriot Act and its Impact on Nonprofit Organizations*.

IRS Audits Nonprofits, Lets Big Business Slide

The Internal Revenue Service (IRS) has begun a major effort to examine internal financial issues of charities and foundations. IRS Announcement 2004-206, issued August 10, said nearly 2,000 charities and foundations will be contacted and asked for information about their salary practices and procedures. The effort will include a broader review of foundations that will eventually include examinations of over 400 organizations, and conclude in July 2005.

The Senate Finance Committee has held public hearings this year focusing on excessive compensation; involvement in joint ventures and tax shelters; participation in fundraising activities; and participation in political campaigns. Its staff released draft proposals for reform during the summer, and nonprofit groups have provided input and responses.

While nonprofits are enduring increased audits, a study done by Syracuse University Transactional Records Access Clearinghouse concluded that the IRS audited fewer corporations and small businesses in 2004 than in previous years. The declining audits of businesses exposes a flaw in the administration's tough stance on corporate wrongdoing.

Unlike large corporations, most of whom operate with far larger budgets, 70 percent of charities have annual budgets of under $500,000. Tougher regulations and enforcement procedures could be overly burdensome to organizations so that people are discouraged from working for nonprofits or giving to charitable organizations, a development clearly not in the government's, or the public's interest.

FEC Seeks Comments on Electioneering Rule

The Federal Election Commission (FEC) has issued a Notice of Availability of a rulemaking petition filed in July that seeks to exempt promotion of political films, books and other materials that refer to federal candidates from the electioneering communications rule. Comments in support or opposition to the proposal are due September 27. During August a federal court turned down Wisconsin Right to Life's (WRLC) request for an injunction that would allow it to run ads mentioning Sen. Russell Feingold (D-WI), who is running for re-election.

The Petition notes "substantial uncertainty" about how the ban on broadcasts referring to federal candidates within 60 days of an election or 30 days of a primary or party convention apply to promotion of films like Fahrenheit 9/11. It proposes these ads be exempted, saying "These legal questions are precisely the kind that Congress did not anticipate and that the Commission is authorized to settle decisively by promulgation of an exception to the general rule. Legal sanctions should not loom over, much less be pursued against, the promotion of political documentary films -- however controversial ...."

The FEC is currently considering an advisory opinion request from Citizens United, (see AO 2004-30) which seeks permission to air broadcasts publicizing a book about Presidential candidate John Kerry. The same group has previously filed a complaint against advertisements for Michael Moore's film Fahrenheit 9/11. On August 6, the FEC dismissed that complaint based on stipulations from Moore and the film's distributor that it had already planned to delete references to federal candidates from advertising during the blackout period.

The Wisconsin Right to Life Committee lawsuit challenged application of the electioneering communications rule to grassroots lobbying ads it wants to run this fall. The ads urge the public to contact Democratic Senators Russ Feingold and Herb Kohl to end the filibuster against President Bush's judicial nominees. Wisconsin Right to Life is a 501(c)(4) organization that has endorsed Republican candidates.

The three-judge panel ruled that the Supreme Court's decision in *McConnell v. FEC* upheld the law and does not allow for challenges to its application in specific circumstances. The court also said the ads "May fit the very type of activity" the law was meant to prevent. WRLC said it would appeal, and has taken the ads off the air. The court noted that the ads could continue airing if WRLC used money subject to FEC fundraising restrictions and filed disclosure reports.

Bush Campaign Files Suit to Force FEC to Shut Down 527s

On September 1, President Bush and Sen. John McCain (R-AZ) filed a lawsuit against the Federal Election Commission (FEC) to force FEC action on a complaint the Bush campaign had filed last March against Democratic leaning independent political committees. Based on their announcement August 26, Trevor Potter, a campaign reform advocate and former FEC chairman, said he had anticipated the two would file a second suit as well seeking to force stricter regulation of *all* independent political committees, but they did not.

The new suit asks the U.S. District Court for the District of Columbia for an injunction forcing the FEC to act within 30 days and for an expedited hearing. The FEC said it will oppose the request.

The law allows parties that file FEC complaints and feel they are "aggrieved" if there is no action after 120 days to file a petition in federal court. In order to prevail the party must show that the FEC acted "contrary to law". The court will examine the credibility of the allegations in the complaint, the severity of the threat, resources available to the FEC and other factors, including whether Congress has provided guidance on the question. These types of suits are unusual and courts do no usually intervene.

The complaint charges that the groups are violating the law by spending soft money to defeat President Bush. The legal issues are the same as those debated throughout the year in FEC rulemakings and Advisory Opinions. See www.nonprofitadvocacy.org for more information.

On August 31 the Campaign Legal Center, Democracy 21 and the Center for Responsive Politics sent a letter to the FEC urging them to act on complaints the groups filed against The Media Fund, the Progress for America Voting Fund and Swift Boat Veterans for Truth.

Politics over Science: Change in Recovery Plan for Salmon Smells Fishy

The National Marine Fisheries Service (NMFS) announced August 31 it will not consider removing dams in the Columbia and Snake rivers in order to save the endangered salmon population. The announcement contradicts twenty years of research by both environmental groups and government agencies that supports breaching the dams as the most effective way to save the endangered fish population.

The NMFS announcement precedes their upcoming biological opinion (BiOp) due out November 30, which will provide a strategy for "how the basin's hydroelectric system must be operated to minimize harm to the 13 populations of salmon that the federal environmental law protects," according to an NMFS press release. A federal district court determined in June 2003 that the agency's previous BiOp did not adequately detail the mechanisms for protecting the ESA-listed salmon, ordered NMFS to develop a new BiOp, and ordered NMFS to rework the draft plan as required by the federal Endangered Species Act. *See National Wildlife Fed. v. National Marine Fisheries Serv.*, 254 F. Supp. 2d 1196 (D. Or. 2003). Although the previous plan did include dam breaching as an option, the one scientists identified as most effective, that strategy is notably absent from the revised version.

In its announcement, NMFS cited recent increases in the wild salmon population as evidence that current methods are effective in protecting the endangered fish, making the breaching of the dams unnecessary. "NOAA Fisheries credits measures to restore hundreds of miles of in-river and estuary salmon habitat, state-of-the-art technological upgrades to hydroelectric dams and other facilities, aggressive predator control, better hatchery and harvest practices, and favorable ocean conditions with boosting returns over the past four years."

The new findings contrast starkly with the 2000 NMFS report which considered the chance of salmon survival bleak without severe intervention: "[A]ll the Columbia River Basin salmon stocks are in a state of perilous decline, especially Upper Columbia Spring Chinook and Steelhead throughout its range. Put in starker terms: without substantial intervention, there is a greater than 50:50 chance that most of these ESUs will be extinct by the next century, some much sooner."

Earthjustice attorney Steve Mashuda told the BNA that the agency's draft biological opinion may not be scientifically or "probably even legally defensible." Close to an election time the policy seems to reflect voter concern over jobs provided by the hydroelectric plants in the area rather than the obligations of the Endangered Species Act. John Kober of the National Wildlife Federation told the Washington Post that "President Bush, on campaign swings through the region, has repeatedly insisted that dams on the Snake River are crucial to the economic life of the Pacific Northwest and that he would never allow them to be breached."

FDA Quietly Drops Rule to Protect Recipients of Contaminated Blood

The Food and Drug Administration (FDA) quietly abandoned work on a proposal to protect recipients of plasma-derived products, according to the agency's most recent statement of its regulatory priorities for the next six months.

The proposal was initially placed on the FDA's regulatory agenda, a semiannual publication of the agency's recent activities and upcoming regulatory priorities, back in 1999 in response to a House committee report identifying weaknesses in the FDA's efforts to protect the nation's blood supply from infectious agents.

Specifically, the proposal would have created enforceable standards mandating a tracking system and notification process for alerting, in cases of contamination or risk of contagion, persons who receive batches of products derived from blood plasma and self-administer the products over time.

The FDA argued at the time that voluntary industry programs for notification were inadequate to ensure the protection of these recipients. "[V]oluntary programs for notifying recipients ... are fairly new," the agency explained. "Thus the success of the voluntary programs cannot yet be fully assessed. However, the success of such voluntary programs will always depend on the continued voluntary support by manufacturers of blood products and the continued vigorous recruitment of patients/recipients to encourage full participation. FDA is concerned that the continued success of patient notification cannot be assured without regulatory standards ... and without a clear mechanism of enforcement in the event a notification program is found deficient."

The FDA dropped the item from its June 28, 2004 agenda, without any explanation.

1742 Connecticut Avenue, N.W., Washington, D.C. 20009
202-234-8494 (phone)
202-234-8584 (fax)

In This Issue

Appropriators Continue Slow Pace

With much of the appropriations work still left to do, the Congress has been creeping along with their annual appropriations work. To date, only two of the 13 bills have made it to conference. The likelihood of an omnibus bill, a lame duck session, and/or a continuing resolution seems to be growing.

Among the developments:

- After voting in favor of a $2.9 billion amendment providing emergency drought disaster assistance for farmers and ranchers, the Senate passed the FY 2005 Homeland Security spending bill (H.R. 4567). The bill is now ready to go to conference with the House, which passed its version of the bill in June.
- Following the example set by the House, the Senate Appropriations Committee voted in favor of blocking funding for the Labor Department to implement recent changes to overtime pay regulations. The vote on the Amendment, which was sponsored by Tom Harkin (D-IA), passed 16-13. (See related story.)
- Debate on the Transportation-Treasury bill is expected in the House this week, as is debate in the Senate on the Legislative Branch bill. The Senate hopes to have a vote on the Military Construction bill on Sept. 20.
- The Senate Appropriations Committee approved the $19.5 billion Foreign Operations bill, increasing funding by $120 million from FY 2004. During the markup, the panel chose to adopt the Leahy Amendment to transfer $150 million worth of humanitarian aid from Iraq reconstruction funds to Darfur, in the Sudan. Also, the bill approved by the committee reduced aid to the administration's Millennium Challenge Corp. by more than half; approving $1.12 billion as opposed to the $2.5 billion requested. In its version of the bill, the House also provided less funding for the Millennium Challenge Corp. than the administration had hoped to see.

Economy and Jobs Watch: Cyclically Adjusted Deficit Reaches Record High

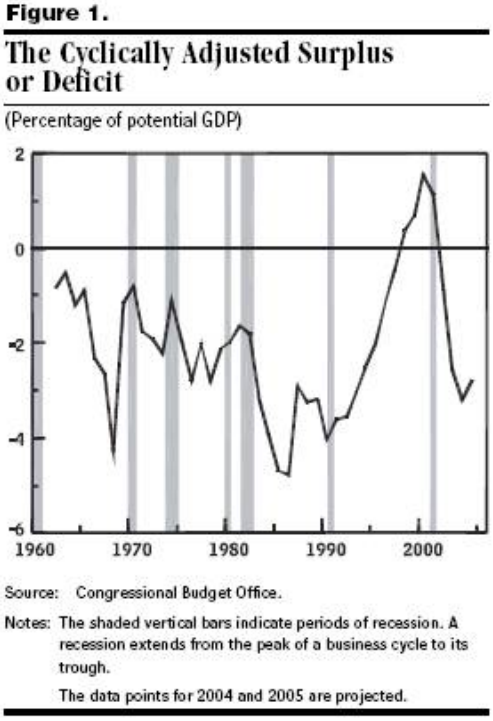
The cyclically adjusted deficit -- that is, the deficit adjusted to remove economic fluctuations -- reached an all-time high of $374 billion in 2004 according to a new report by the Congressional Budget Office. As a share of the overall economy, the cyclically adjusted deficit at 3.2 percent of GDP is at its highest levels since the early 1990's -- and has been exceeded in only 7 of the last 42 years (see chart below.)

When the economy fluctuates so do the finances of the federal government. In particular, during times of recession, tax revenue tends to decline, and spending tends to automatically increase -- thus increasing the deficit (or decreasing a surplus). Government finances are in part determined by these "cyclical" factors. The other part is determined by tax and budget policy decisions made by the president and Congress. The Congressional Budget Office (CBO) is able to analyze the historical pattern of the nation's finances to distinguish which components of the deficit that are: a) due to the cyclical factors and b) due to non-cyclical policy decisions.

In their most recent report on the topic, the CBO found that just 11 percent of the deficit in 2004 was due to cyclical factors -- leaving the remaining 89 percent of the deficit as a result of policy decisions, and not cyclic economic factors. The size of the cyclically adjusted deficit is projected to grow by $89 billion to $374 billion -- an increase of 31 percent in just the past year.

These numbers indicate that the current deficit is "structural" and will not simply go away when the economy recovers. The fundamental cause of this imbalance seems clear -- over the last couple years, federal revenues have remained at their lowest level as a share of the economy since the 1950's. What is needed is a policy change that raises adequate revenue to responsibly fund our nation's priorities -- and current policy is not living up to that test.

Figure 1.



Source: Congressional Budget Office.

Notes: The shaded vertical bars indicate periods of recession. A recession extends from the peak of a business cycle to its trough.

The data points for 2004 and 2005 are projected.

Return of a 'CYA' Budget Policy

The long-ago defeated proposal for a balanced budget constitutional amendment is rearing its ugly head once again. Unable to pass a budget this year and having created near-record deficits, some members of the House are desperate to create the appearance of being fiscally responsible, and are considering bringing up a vote on the measure (H. J. RES. 22).

A constitutionally mandated requirement to balance the budget every year would have terrible economic consequences. It would destabilize the economy by amplifying downturns in the business cycle; and it would restrict the nation's ability to invest in projects that would yield significant benefits in the future. (A good example of the various arguments made against the amendment is a Clinton-era Treasury Department memo by Brad DeLong.)

In addition, more than 1,000 economists have publicly opposed the amendment, including 11 Nobel laureates. The letter was coordinated by the Economic Policy Institute in 1997 (See press release).

It would be unfortunate if the return of this inherently misguided and economically risky amendment distracts Congress when they have so many important issues to address. This House Judiciary Committee may take this up this Wednesday, Sept. 22, and full House action could be next week.

Take Action Now! Urge Congress to reject the Balanced Budget Amendment.

Congress Defies White House, Saves Overtime for Millions

Both the Senate Appropriations Committee and the House of Representatives have defied a White House veto threat and voted to save overtime rights for millions of workers.

On Sept. 9, the House voted to attach a pro-labor amendment to the FY 2005 Labor-HHS appropriation bill, overturning a key provision of President Bush's new overtime regulations, which took effect Aug. 23. The amendment sponsored by David Obey (D-WI) passed the House with a roll-call vote of 223-193, including 22 Republicans.

Under the administration's new overtime rules, workers who earn less than $23,600 a year will become automatically eligible for overtime pay, which is a significant increase from the current threshold $8,060, that was set in the 1970s. While this seems to be increasing the number of workers receiving overtime pay, critics of the new regulations say this gain is offset by provisions within the bill that would end up exempting millions of administrative and white-collar workers from being able to collect overtime. As a *Washington Post* article states, the new overtime regulations would "make it easier for employers to reclassify their workers as 'executive,' 'administrative,' or 'professional' employees, who are not entitled to the overtime protections of the FLSA [Fair Labor Standards Act]." The new regulations could, as the Economic Policy Institute estimated, strip up to 6 million workers of their overtime rights. The Obey amendment would keep the expansion in the lower income category, but reject the reclassification rules for moderate-income workers.

On Sept. 15, the Senate Appropriations Committee joined the House in demonstrating their opposition to the overtime regulations by passing an amendment by Sen. Tom Harkin (D-IA), which was very similar in context with the Obey amendment. The Harkin amendment requires the immediate reinstatement of the previous overtime rules, with the exception that the eligibility threshold is raised to $23,600. The committee voted 16 -- 13 to add language to the $142.5 billion Labor-HHS appropriations bill that would block funding from the Labor Department to implement the recent changes. Senate Appropriations Committee Chairman Ted Stevens (R-AK) criticized the vote; saying that the "Harkin language" will make it tougher for the bill, S. 2810, to see floor consideration. Even so, the support shown by Congress for both the Harkin and Obey Amendments is a real victory for labor groups and working people across the country.

However, passage is still not assured as the administration has threatened to veto the final Labor-HHS funding bill if it contains Harkin/Obey language. A Statement of Administration Policy released on Sept. 8 regarding the bill stated the following:

"[T]he President's senior advisors would recommend that he veto the final version of the bill if it contained any provision prohibiting or altering the Labor Department's enforcement of the final overtime security rule."

In addition, House Appropriations Committee Chairman C.W. "Bill" Young (R-FL) has indicated that the amendment will be stripped in conference. He noted that the House approved a retriction last year, but it too was stripped in conference.

We have yet to see if the Labor-HHS appropriations bill will even make it to conference, if it will be postponed to a lame duck session, or perhaps extended through a continuing resolution until next year. Whatever the case, it was an important first step for both members of the House and members of the Senate Appropriations Committee to stand up to the administration and vote against their new -- and potentially harmful -- overtime rules.

Tell Congress and the White House to save overtime rights and support the Obey/Harkin amendment! Click here to send a message to your representatives.

Congressional Report Cites Growing Bush Secrecy

Rep. Henry Waxman (D-CA) released a report last week detailing the vast expansion of secrecy and restrictions in public access to government information under the Bush administration. The Special Investigations Division of the House Government Reform Committee's minority staff prepared the report, "Secrecy in the Bush Administration," for Waxman.

The report systematically analyzes long standing federal public access laws, new laws that restrict public access, and barriers to congressional access. The report examines changes in the implementation of several major open government laws including the Freedom of Information Act, Presidential Records Act and Federal Advisory Committee Act. Investigators found that these laws, which were designed to ensure public access, have been undermined by various new policies and an overall culture shift that accompanied the Bush administration.

The report also found that laws allowing the government to restrict public access to government information have been abused by broad and excessive use. While touting a need for great security, the Bush administration created new restrictions on access and information and expanded the scope and use of several pre-existing security-based information restrictions. Ironically, the 9/11 Commission concluded that the excessive restriction of information contributed to the success of the terrorist attacks, and it strongly recommended reforms that would allow easier sharing of information among government officials and the public. The Waxman report notes that an Executive Order from President Bush directly contributed to the overclassification of documents, which greatly restricts the government's ability to use or share information even with other government officials.

Finally, the report details the new difficulties that even Congress faces accessing and using information due to policy changes under the Bush administration. The point that these access restrictions are not limited to the general public is an important and troubling one. Lawmakers need to easily obtain complete and objective information because they must make important decisions that will affect the entire country. Blocking access impedes their ability to discharge their

responsibilities.

Overall, the comprehensive secrecy report concludes the administration has exhibited a clear and consistent pattern of restricting public access and increasing government secrecy. The cumulative result is an unprecedented assault on the principle of open government.

Waxman also introduced new legislation to coincide with the secrecy report, described in a related story.

Waxman Introduces Open Government Bill

Open government advocates, who have suffered for years in defensive efforts to hold back a rising tide of secrecy, just got something to cheer about. Rep. Henry Waxman (D-CA) introduced a bill last week to make it easier for citizens to challenge agency denials under the Freedom of Information Act (FOIA) in court. The legislation would also reverse several policies and practices tied most closely to the Bush administration that undermine open government.

"The Restore Open Government Act of 2004" (H.R. 5073), would restore the presumption that agencies release requested documents absent an identified harm under FOIA. Further, the bill would narrow the secrets that businesses could keep when submitting reports on problems and vulnerabilities in our transportation, energy and communications infrastructure ("critical infrastructure information" or CII) to the Department of Homeland Security. It reverses the Bush executive order (E.O. 13233) on presidential records, wherein former presidents may veto requests to release their administration's papers. The bill would also ensure openness when the president obtains advice through committees such as Vice President Cheney's energy policy task force.

The bill is co-sponsored by Reps. Dennis J. Kucinich (D-OH), Bernard Sanders (I-VT), Elijah E. Cummings (D-MD) and Del. Eleanor Holmes Norton (D-DC).

To learn more about these issues, visit the OpenTheGovernment.org Right to Know Resource Center, which points to backgrounders on "critical infrastructure information" and other homeland security issues. For those interested in how the federal government is using the new CII law, OMB Watch tracks how the Department of Homeland Security implements CII protections, and its impact on public health and safety.

Study Finds Nuclear Facilities Vulnerable to Attack

Access to information on nuclear security has been hard to come by, but some information has been surfacing that raises concerns about the security of America's nuclear power plants. Since 9/11, nuclear reactors and chemical plants have received considerable attention with critics calling for stronger government requirements and oversight to better ensure the safety of neighboring communities.

Government action to beef up security at nuclear facilities has been slow; it often allows industry to take voluntary steps in the absence of strong regulation. Officials have hidden information behind a veil of increased secrecy with the explanation that information restrictions prevent terrorists from obtaining dangerous data. However, recent reports and testimony indicate that this secrecy also keeps the public uninformed about safety risks and potentially irresponsible decisions made by officials.

Risks from the Air

Since the 9/11 attacks, the possibility that airplanes could be used to attack atomic generating stations has become very real. Critics have called for increased precautions against this type of attack such as strengthening spent fuel containment pools and erecting additional barriers to deflect or diminish any impacts.

Currently, the Nuclear Regulatory Commission (NRC) and energy companies maintain that such efforts are unnecessary. They assert that reactors are already hardened, secure structures, and claim that the possibility of an attack that would release radiation is highly unlikely. Power companies believe that the critics are merely trying to drive the cost of nuclear energy up so that plants have to close down.

According to the *Los Angeles Times*, a recently leaked study conducted by the German government indicates that nuclear plants may be more vulnerable to this type of attack than the NRC and energy companies claim. The study noted that higher speed impacts from airliners, which pilots were able to accomplish in simulators approximately half the time, could result in uncontrolled releases of radiation.

The two main concerns from such an attack are the reactor core and spent fuel storage. If the reactor's core were damaged, it could meltdown and result in an uncontrolled radioactive reaction. Spent nuclear fuel rods are stored in enclosed ponds of water, but if an attack damaged a pond and the cooling water drained away, the fuel would catch fire and release massive amounts of radiation. A 1997 report by the Brookhaven National Laboratory concluded that a spent fuel fire could render 188 square miles uninhabitable and cause as many as 28,000 cancer deaths.

Land Based Risks

Since the 9/11 attacks, efforts have been underway to improve security measures at nuclear plants throughout the country, especially from ground attacks. The NRC has ordered companies to prepare themselves for defense against larger more organized attackers then previously required. But Government Accountability Office (GAO) auditors reported during a House Government Reform Committee hearing that it could be years before NRC knows if facilities are meeting these

new requirements. Apparently, there is little real world data or oversight and plants are only required to file minimal paperwork.

The GAO also reported a clear conflict of interest in the security testing. The industry trade association, the Nuclear Energy Institute, contracted Wackenhut, a major security firm, to train and manage adversary teams used to test the security measures at nuclear power plants. However, Wackenhut also provides security guards to half the facilities. Concerns were raised over NRC allowing this controversial contract because of the conflict of interest. According to the Service Employees International Union, which includes the largest union of security officers, Wackenhut was already been caught cheating during a 2003 security drill at a nuclear weapons site in Oak Ridge, Tennessee. The organization operates an entire website devoted to documenting problems with the security company. The website also contains a report entitled "Homeland Insecurity: How the Wackenhut Corporation is Compromising America's Nuclear Security" that details the firm's failings at nuclear security including numerous security lapses, training cutbacks, and lax security measures.

Accountability and oversight for nuclear security has become more difficult recently as the NRC has re-removed almost all related data from its web site. The agency had completely shut down its site immediately following the 9/11 attacks but had eventually reposted most of the site including information on security. Without access to such information, watchdog groups working on nuclear issues can not effectively represent public interests or criticize officials' decisions.

Homeland Security Whistleblowers Work Together

Homeland security whistleblowers recently joined together in two different efforts. One group of whistleblowers issued a memo calling upon other government officials to come forward with information on mismanagement and deception. Another group released a letter criticizing the 9/11 commission's report for not attaching accountability to specific individuals.

Call to Whistleblowers

A group of 10 former government employees who have blown the whistle on issues from Vietnam to Iraq issued a public memo Sept. 9, calling upon current government officials to disclose classified information being wrongly withheld from the public. The officials worked for the Defense, Labor and State Departments, the FBI and the CIA. The group listed 12 specific documents that should be disclosed, including information on FBI misconduct, terrorism prisoners, security breaches, as well as costs and troop number estimates for the Iraq war.

The group asserted that government deception and secrecy actually costs lives and reduces national security, an opinion shared by the 9/11 commission, which concluded that information restrictions contributed to the success of the terrorist attacks. The group's memo acknowledges that whistleblowers currently have little actual protection under the law, and often face retaliatory actions such as the job loss.

Whistleblowers Unsatisfied

Another group of 25 homeland security whistleblowers released a letter critical of the 9/11 commission's report, claiming it does not accurately reflect their testimony and fails to hold any individuals accountable. While the commission acknowledged the contribution that information restrictions and excessive secrecy played in allowing the terrorists to succeed, it did not attach responsibility to any specific officials. The group believes that without this direct accountability, efforts to reform the intelligence community will be ineffective.

The whistleblower letter also criticizes Congress for not hearing testimony from field intelligence and national security employees with knowledge of corruption and mismanagement during recent hearings on sweeping intelligence and security reform.

Health Effects and Misinformation Drive 9/11 Suit

Leaseholders of the World Trader Center now face a suit from recovery workers, after hundreds of thousands of people were exposed to toxics immediately after the 9/11 attacks. This comes at the same time that a report reveals the government has not monitored or studied people suffering adverse health effects from 9/11.

Fourteen plaintiffs, including police officers, firefighters, transit workers, and other rescue workers filed the lawsuit Sept. 10. The law firm handling the case said more than 800 other plaintiffs are participating and that number could increase. The plaintiffs claim workers were not advised of the health risks in lower Manhattan, and proper precautions were not taken by the leaseholders of the trade towers. According to the law firm, additional actions will be taken against local governments in New York and New Jersey, as well as the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration.

The General Accountability Office (GAO) released a report on Sept. 8 regarding the health effects from the aftermath of 9/11. It found that up to 400,000 New Yorkers breathed some of the most toxic air ever recorded. According to the report, "Almost all the firefighters who responded to the attack experienced respiratory harm, and hundreds had to end their firefighting careers due to WTC-related respiratory illness." It also states that the government has not made an effort to study the health effects of exposure in New York City and across the country. The lawsuit seeks legislation that would set up testing programs for exposed citizens.

After the attacks, a great deal of controversy arose concerning the accuracy of EPA statements about the safety of lower Manhattan. An Aug. 21, 2003 EPA Inspector General's report revealed that EPA statements to the public immediately after 9/11 did not fully represent the data the agency possessed. The White House apparently influenced the wording of the statements to downplay potential health risks mentioned in EPA's original drafts. These statements misinformed people

who lived and worked in lower Manhattan that the area was safe. However, a subsequent Senate Environment and Public Works Committee report concluded that EPA and the White House did not act inappropriately in addressing public health concerns in New York City after 9/11.

Audit of Sensitive Security Information Requested

The Government Accountability Office (GAO) received a request from two House members last week, asking for an investigation into the Department of Homeland Security's (DHS) use of the "sensitive security information" (SSI) provisions. SSI receives protected status, which shields it from public disclosure.

Reps. David Obey (D-WI) and Martin Olav Sabo (D-MN) sent the Sept. 14 letter, expressing concerns that DHS and the Transportation Security Administration (TSA) were misusing the SSI label. They cited several examples including a recent security designation for an executive telephone list circulated to DHS staff. The list was stamped "Sensitive But Unclassified." It is highly questionable how a list of government phone numbers would qualify as SSI. Additionally, the representatives pointed to examples where TSA labeled information as SSI that was already released and in the public domain.

Specifically, Obey and Sabo requested that GAO examine the procedures for categorizing information as SSI; procedures for removing SSI designation; any internal checks to review SSI designations; and the internal operating structure for SSI actions.

The representatives made strong statements in the letter that while the transportation sector does need to protect truly sensitive information, the public has a right to know about information that could affect their safety and security.

For more information on SSI, see:

- "TSA to Expand 'Sensitive Security Information'"
- "Transportation Bill Pre-empts State Sunshine Laws"

Data Quality Act Progresses in the Courts

The debate over whether the Data Quality Act (DQA) is judicially reviewable might be getting closer to an end. The federal judge reviewing an industry DQA lawsuit questioned whether the statutory language provides for such review during oral arguments Sept. 3.

The case, brought by the Salt Institute and the Chamber of Commerce against the Department of Health and Human Services (HHS), is currently pending in a federal district court in Virginia. The plaintiffs claim that the National Institutes of Health (NIH) relied on a flawed study when disseminating information that claims or suggests that reduced sodium consumption will result in lower blood pressure in all individuals.

The judge presiding on the case, U.S. District Judge Gerald Bruce Lee, voiced skepticism that the DQA provided the court the ability to review agency decisions. Lee observed that the plain language of the DQA law makes no mention of judicial review. Additionally, he cited the lack of legislative history, since the DQA passed Congress as an appropriations rider with no discussion or debate. Lee also questioned if the plaintiffs met the three-part test to have standing in court, noting that the Salt Institute could not demonstrate any harm suffered from the NIH information. Lastly, the judge echoed what many public interest groups have stated since the inception of the DQA -- that allowing judicial review would limit scientific discourse.

A recent brief from the Department of Justice (DOJ) recommend the dismissal of this lawsuit for the same reasons Lee raised. DOJ asserted that the plaintiffs lack standing to challenge the sodium study that underlies the agency statements because it is not sufficiently demonstrated that they incur any injury because of the agency's statements. Additionally, DOJ stated that the court does not have subject matter jurisdiction, and even if it did, there is no statutory basis for federal court review.

If Lee dismisses the lawsuit, it would reinforce an earlier DQA ruling in which a Minnesota federal district court ruled that the DQA does not permit petitioners to seek judicial review. In the Minnesota ruling, the data quality issue was a minor one within a bigger complaint. (See Related Analysis.)

House Resolution on Energy Task Force Fails

The House Energy and Commerce Committee rejected a resolution last Wednesday that would have sought information on Vice President Dick Cheney's energy task force. The resolution sparked a rowdy and highly partisan committee session in which no debate was allowed before the vote.

Reps. John Dingell (D-MI), Henry Waxman (D-CA) and Edward Markey (D-MA) introduced House Resolution 745 on July 22. If passed, it would have asked President Bush to provide the House with specified task force information within two weeks. The information would include:

- Names of all present at each task force meeting
- Names of professional support staff for the task force
- Names of everyone members and support staff met with to gather information relevant to the task force, and the date, location and subject of each meeting
- Direct and indirect costs of developing the National Energy Policy.

In an unusual move, Republicans on the committee did not issue a press release about the markup, apparently in an attempt to minimize attention. The Energy and Commerce Committee Chairman, Rep. Joe Barton (R-TX), asserted that Democrats were using the resolution as a political tool to embarrass the administration before the elections.

After only allowing Dingell, the ranking Democrat, to give an opening statement the Republicans called for a vote without allowing any debate on the motion. Shouts and boos erupted. Waxman even left the room after claiming the representatives were acting like teenagers. The resolution was voted down in a party line vote of 30-22.

For background on the energy task force, see the following OMB Watch articles:

- "Supreme Court Denies Cheney's Bid to Avoid Discovery in Energy Task Force Decision"
- "Judge Orders White House to Turn Over Energy Task Force Documents, Again"
- "DOE Forced to Turn Over Energy Task Force Documents"
- "Court Orders Release of Additional Energy Task Force Documents"

Highlights from the Right to Know Resource Center

Homeland security is the hot issue of the day. So what could be better than to highlight in one place the many resources and groups working to represent the public's interests in homeland security debates? The Right to Know Resource Center, coordinated by OMB Watch for OpenTheGovernment.org, introduces the many facets of homeland security policies, explains the impacts on efforts to undermine the Freedom of Information Act and summarizes restrictions on the free flow of information in our open society that give the biggest opportunities for abuse.

To visit the Resource Center, go to www.openthegovernment.org/article/subarchiveboxes/4/. And let us know how we can make it better.

Nonprofits Needed to Help Fill Poll Worker Shortage

Low turnout among young voters is often ascribed to apathy, but part of the problem is the barriers young people face when casting ballots or trying to work at the polls. Nonprofits can help remove these barriers.

In many states, to register to vote, you must establish a "fixed and permanent" address. Yet many young people's "fixed and permanent" address is miles away from where they spend eight months of each year. College residence generally does not qualify as "fixed and permanent" for purposes of voting, since it does not demonstrate intent to establish residency.

Residency issues also often prohibit students from becoming poll workers. Many states require that poll workers be registered in the state, which is a problem for many students. This is especially crucial at a time where Election Boards are warning of poll worker shortages.

Congress passed the Help America Vote Act (HAVA) in 2002 to assist the states in resolving many of these issues. It established the U.S. Election Assistance Commission (EAC) to oversee implementation, including the HAVA College program. The program was created to encourage students enrolled at institutions of higher education to assist in local election administration by serving as poll workers.

However, the EAC has not been adequately funded by Congress and many students are not getting the help they need. In addition, many organizations dedicated to increasing the number of registered youth voters have not taken effective action to assist students to become more involved.

Nonprofits can provide a critical public service by taking steps to increase both voter turnout and participation. Voting gives students a voice in our democracy, but participation ensures there will be a democracy to vote in. For information on how your group can help see NPAction's Nonprofits Can Help America Vote! website.

Independent Political Committees Controversy Hits Courts

The Bush campaign lost the first round of a legal bid to force the Federal Election Commission (FEC) to act on a complaint it filed against political committees opposing his re-election, but attorneys for the campaign promised to pursue the issue. Meanwhile, the House sponsors of campaign finance reform legislation filed suit against the FEC seeking stricter rules regulating political committees.

On Sept. 1 the Bush campaign sued the FEC in the U.S. District Court for the District of Columbia asking for an injunction forcing the FEC to act on the campaign's complaint challenging the legality of soft money spending by independent groups working to defeat President Bush: The Media Fund, America Coming Together, and MoveOn.org's Voter Fund. The legal issues are the same as those debated throughout the year in FEC rulemakings and Advisory Opinions. See www.nonprofitadvocacy.org for more information.

The court ruled against the Bush campaign on Sept. 15, saying the law does not permit courts to intervene unless the FEC delay is unreasonable. Counsel for the FEC noted that the campaign's complaint is 550 pages long and "the issues they raise are complex and fact-intensive, and involve controversial and unsettled legal and constitutional questions." They also argued that the campaign would not suffer irreparable harm, a required threshold before an injunction can be issued, because campaign finance laws are "designed to protect the public interest" and not "to protect a candidate from public criticism, or from the registration of voters who might support his or her opponent." Attorneys for the Bush-Cheney campaign argued the case is unusual because outside groups have spent $80 million on this election and are still active.

The judge rejected the campaign's argument, even though he said the FEC is notoriously slow in resolving complaints, noting "that's the way Congress set it up and apparently that's the way Congress likes it." The Bush campaign said it will pursue the issue, but it was not clear whether or not they will appeal the ruling. The decision means the court will not force the groups in question to cease their activities before the election.

The issue of what independent groups should be regulated by the FEC remains in the courts however, as the result of a federal lawsuit filed Sept. 14 by Reps. Chris Shays (R-CT) and Martin Meehan (C-MA), House sponsors of the Bipartisan Campaign Reform Act of 2002. The suit asks the court to force the FEC to approve stricter regulations for independent political committees than those approved by the FEC last month. For a summary of the new rule, see the August 23, 2004 OMB Watcher.

Tax Bill May Include Church Electioneering and Charity Tax Provisions

While House and Senate negotiators are beginning to advance must-pass export tax repeal legislation (H.R. 4520, S. 1637), some lawmakers are beating down doors to slip legislation harmful to nonprofits into the bill by the backdoor -- a bill that would allow church electioneering.

Political pressure is building on powerful House lawmakers as well as on Senate conferees to the export tax repeal bill to allow religious organizations to endorse political candidates and use their resources for partisan activities. Conservative lawmakers are trying to include the, Houses of Worship Free Speech Restoration Act, H.R. 235, into the American Jobs Creation Act of 2004, H.R. 4520, currently slated to go to conference. The church electioneering bill has already been rejected twice in the House.

H.R. 235 discriminates against nonreligious nonprofits by giving religious organizations rights that other 501(c)(3) groups would not have. It would also permit considerable expenditures of tax-deductible funds to publicize endorsement-sermons and other election-related presentations made during religious services or gatherings through television, radio, and other media. This soft-money loophole would hurt all nonprofits.

See our action alert to let your representatives know HR 235 is a bad idea for nonprofits.

On another front, a series of reforms proposed by Senate Finance Committee staff that would provide greater scrutiny of charities is also currently under debate. In July, the Senate Finance Committee held hearings on possible reform to the tax laws that govern nonprofits. The Finance Committee is angling to get some language on accountability included into pending tax legislation. Committee staff began drafting language in case legislators decide to move forward with proposals to eliminate some controversial charitable tax deductions to raise revenue this year.

This effort has been bolstered by the recent release of a Brookings Institute study, Sustaining Nonprofit Performance:The Case for Capacity Building and the Evidence to Support It. The study showed that public confidence in charitable organizations has steadily declined over the past few years.

Courts Rule on Nonprofits Electioneering Communications

Federal Election Commission (FEC) regulations have come under scrutiny lately as the U.S. District Court for the District of Columbia and the Supreme Court have ruled on lawsuits regarding electioneering communications. These actions have implications for nonprofits.

On Sept. 18, District Court Judge Colleen Kollar-Kotelly struck down more than a dozen of the FEC's current rules on political fundraising, including rules regulating electioneering communications of 501(c)(3) groups.

In 2002 the Commission ruled that 501(c)(3) organizations were exempt from a rule that restricts paid broadcasts that mention clearly identified federal candidates within 60 days of an election or 30 days of a primary or party convention. The logic was that 501(c)(3) organizations are already prohibited by tax law from electioneering; hence, any mention of a candidate would only be for non-electioneering purposes, such as lobbying.

In its ruling, the Court found that the agency had not adequately explained its dependence on Internal Revenue Service enforcement against rogue 501(c)(3)s. The Court noted, "It is the FEC, not the Internal Revenue Service (IRS), that is charged with enforcing FECA." (Op. at 151) The IRS does not view Section 501(c)(3)'s ban on political activities to include activities detailed under FECA.

The Court declined to enjoin the rules, instead remanding them to the FEC for further action consistent with the opinion.

The District Court opinion resulted from a lawsuit filed by Reps. Chris Shays (R-CT) and Martin Meehan (D-MA), the two sponsors of the House version of the new campaign finance reform law, who were dissatisfied with the FEC regulations being published by the FEC to implement the new law. Supporters of the new law have expressed delight in the court's decision.

Yet because the Court told the FEC to write new rules to govern key aspects of fundraising, including when candidates and outside parties can coordinate activities and whether 501(c)(3) organizations should be exempt from the paid ad restrictions, it is not clear what the outcome will be. It appears the existing FEC rules will stay in effect until the FEC can write new rules or challenge the Court's opinion -- likely through this election cycle.

The District Court's ruling came on the heels of a Sept. 14 Supreme Court decision not to issue an emergency injunction in a case involving Wisconson Right To Life (WRTL), a 501 (c)(4) organization that has endorsed Republican candidates. WRTL aired ads urging the public to contact Sens. Russ Feingold and Herb Kohl, both Democrats, to end the filibuster against President Bush's judicial nominees. Feingold is running for re-election. The suit sought an injunction against application of the rule to these facts, even though the Supreme Court upheld the general provisions of the law in December 2003. WRTL's attorney said the group will continue their appeal, even though there will is no chance of relief before the November election.

In the McConnell case the Supreme Court held that the rule prohibiting paid ads is not unconstitutional on its face. However, WRTL argued that it was unconstitutional "as applied" to their situation. The lower court rejected the "as applied" theory, noting the ads WRTL wishes to broadcast "may fit the very type of activity" that Congress and the Supreme Court meant to regulate. Court documents in the case are on the FEC website.

A few days before the Supreme Court action, the Federal Election Commission issued two Advisory Opinions clarifying application of the paid broadcast prohibition. The first, AO 2004-30 was requested by Citizens United, a 501(c)(4) organization that wished to broadcast ads promoting a book and film critical of John Kerry. The FEC said this would be impermissible under the electioneering communications rule, since the group does not qualify as a media organization, as it claimed to do.

The second, AO 2004-33 was requested by the Ripon Society, which wishes to run ads featuring a Republican member of the House, Rep. Sue Kelly (R-NY), and praises "Republicans in Congress". The FEC said the ad could not be run in Kelly's district, since she appears in it. However, the ad could be run in other districts, since it does not name any candidate specifically. However, if the group coordinates with the Republican Party it would lose its independent status and have to use hard money for such ads.

Bush Expands Faith-Based Initiative to Vouchers, State Control

In an effort to further weaken the wall separating church and state, President Bush is seeking to expand his faith-based initiative to the state and local levels. He is pushing state and local governments to adopt rules and policies similar to federal regulations that favor faith-based groups in government-funded programs.

Most federal grant services programs are administered at the local and state levels. According to a report issued last year by the Roundtable on Religion and Social Policy, only a few states have made the specific regulatory changes aimed at increasing participation by the faith-based service providers. However, many faith-based groups have been receiving government grants for years.

Jim Towey, director of the White House Office of Faith-Based and Community Initiatives (FBCI) has reassured state groups that the Bush administration is committed to further easing regulations of faith-based groups. President Bush has, through executive order, mandated that federal funds be awarded to faith-based groups even if they refuse to follow state and federal civil rights laws. For example, in Maine, state laws bar federal grants to religious groups that discriminate against minorities. In a meeting with the leaders of Catholic Charities of Maine, Towey stated that the White House was studying "what to do when local ordinances discriminate against faith based groups like they do here in Portland".

The Bush administration has repeatedly failed to win Congressional approval of its faith-based initiative because it permits

federal dollars to be awarded to religious groups that discriminate in hiring. In response, the administration has issued executive orders that force several federal agencies to award public dollars to faith-based groups without the usual constitutional safeguards.

Additionally, the Bush administration will continue to push vouchers as a way to fund faith-based service providers. Currently, any organization that provides direct federal funding for social welfare services is prohibited from using such funds for "inherently religious activities." However, new regulations pushed through by the administration created a system of vouchers to allow faith-based organizations to get around the inherently religious activities restriction. When the organization receives indirect government funding, for instance, vouchers, they are not required to separate the financed service from the inherently religious activity. These regulations were approved despite the fact that Congress did not pass H.R. 7, the Charitable Choice Act of 2001, which contained a similar provision.

Using these regulations, the Bush administration has extended the use of vouchers to provide funding to organizations offering substance abuse treatment, childcare, and job treatment. This has marked a major shift in the constitutional separation of church and state. For example, in August, Bush announced $43 million in funding for faith-based organizations and stated, "one of the most effective ways our government can help those in need is to help the charities and community groups that are doing God's work every day. That's what I believe government ought to do."

The administration has encouraged faith-based groups to develop programs to treat substance abuse. It has proposed the Access to Recovery program, which provides $100 million in vouchers to recipients of social services in up to 15 states. Recipients use the vouchers to choose rehabilitation programs, including those that are faith-based.

Without vouchers, many faith-based groups would not have applied for the grants. To receive direct funding, the faith-based organizations would have been subjected to government oversight and increased scrutiny from watchdog organizations. Vouchers effectively remove the oversight attached to direct funding by eliminating the question of whether there has been a mingling of religious services with the federally funded program.

Historically, Americans have been free to contribute only to the religious groups of their choosing. Voucher programs violate this principle by forcing taxpayers to subsidize religious social service programs that have minimal government oversight. Taxpayers should not be required to subsidize programs that may promote concepts they disagree with. People in need should not be forced to participate in religious activity in order to receive vital services. In addition, the voucher system assumes a range of choices in service providers that is rare.

It does not look like the faith-based train is going to stop anytime soon. In his announcement publicizing the addiction vouchers that will fund religious programs, Bush stated, "Government is not good at changing hearts. The Almighty God is good at changing hearts, which happens to be the cornerstone of effective faith-based programs." His comments do not address the role poverty plays in the need for services. A change in heart does not produce a change in income.

For more information on faith-based programs see:

- The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative
- Death by a Thousand Cuts (OMB Watch)
- HR 7 In-Depth (OMB Watch)
- Analysis of Charitable Choice (OMB Watch)

Report Discovers 'Pattern of Failure' to Serve Public

OMB Watch's new report, *The Bush Regulatory Record: A Pattern of Failure*, analyzes the last year of federal regulatory activity for four key agencies charged with serving the public interest and places its findings in a broader four-year context.

The agencies studied are the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), the National Highway Traffic Safety Administration (NHTSA), and the Occupational Safety and Health Administration (OSHA).

The report finds that, even though overwhelming majorities of the public believe the government plays an important role in protecting the public interest, the Bush administration continues to shape regulatory policy in ways hostile to the public interest. It continues to abandon work on documented public health, safety and environmental problems, and has done virtually nothing to identify other priorities needing attention. It cannot meet even short-term benchmarks for action, and is allowing proposals for addressing long-identified needs to languish on its regulatory agenda. Finally, what little this administration has accomplished is made to weak to meet the public's needs.

The report is available, along with charts of supplemental information at www.ombwatch.org/regs/patternoffailure.

OMB Watch Launches Regulatory Weblog

OMB Watch is pleased to announce the launch of *RegWatch*, its new blog (short for "weblog") to track regulatory issues. Bookmark it at www.ombwatch.org/regwatch.

House Committee, Journals Call for More Clinical Trial Data

Members of the House Energy and Commerce Committee blasted the Food and Drug Administration (FDA) last week for urging drug companies to withhold information on the efficacy of antidepressants used on children. The controversy comes just as patient advocacy groups, the American Medical Association, and a dozen medical journal editors are calling on pharmaceutical companies to register their clinical trials in order to meet increasing public demand for information on the effectiveness and safety of drugs.

Lack of Information on Clinical Trials Leads to Use of Ineffective Drugs

After British scientists determined in February that many antidepressants were not only ineffective but perhaps even unsafe for children, the FDA and the House Subcommittee on Oversight and Investigations began to review the clinical trials withheld from the public. The FDA also conducted its own studies on the safety and efficacy of antidepressants used on children. Two internal FDA studies confirmed that antidepressants do pose an increased risk of suicidal ideation for children.

Furthermore, two thirds of clinical trials on antidepressants used on children found that the antidepressant medication performed no better than placebos.

According to testimony from drug companies during a House Energy and Commerce Committee hearing on Sept. 9, FDA encouraged drug companies to withhold clinical trials information from the public. Drug company executives testified that FDA regulators said that releasing the information could scare parents and physicians away from the drugs. According to the *Washington Post*, "Janet Woodcock, FDA's deputy commissioner for operations, responded that regulators believe the jury is still out on the drugs. The negative trials, she said, did not mean the medications were ineffective." Because the FDA allowed and even urged the drug companies to withhold the clinical trial data, physicians and the public were denied critical information on the efficacy of such drugs.

On September 15, FDA's Psychopharmacologic Drugs Advisory Committee and Pediatric Advisory Subcommittee recommended in a vote of 25-1 that antidepressants for children include a "black box" label warning of the increased risk of suicidal ideation associated with the drug. The black box warning is the highest level of label warning that the FDA issues. In a public statement, FDA supported the assessment of the committee.

Journal Editors Demand Registration of Clinical Trials

As reported by OMB Watch in July, FDA is actually required to keep a databank of information on clinical trials by the FDA Modernization Act of 1997, but the agency does not enforce it. The FDA had previously argued that it has not enforced the law because though the statute gives them the authority to establish the database, it does not give the agency explicit authorization to enforce reporting requirements. One indication of the incompleteness of the database is that a mere 16 percent of the registered trials were reported by the pharmaceutical industry, even though more than 80 percent of trials are funded by for-profit companies. Because the act is not enforced, drugs companies can pick and choose which studies they will make publicly available.

Gregory D. Curfman, Executive Editor of the *New England Journal of Medicine*, told the *Washington Post*, "When a pharmaceutical company sponsors a clinical trial and the results turn out not to be in the best financial interests of the company, it has been our experience these results are not made public."

The editors of 12 medical journals have responded by requiring drug companies to register their trials -- before the results of the study are known -- in order for the resulting studies to be eligible for publication. The editors hope to compel the pharmaceutical industry to release more information, particularly when studies yield results unfavorable to the industry. Although pharmaceutical companies could still withhold results, knowledge of the undisclosed clinical trials would still reveal critical information to the public.

The House Energy and Commerce Committee will conduct another hearing Sept. 23 on "FDA's Role in Protecting Public Health: Examining FDA's Review of Safety & Efficacy Concerns in Anti-Depressant Use by Children."

Congress Defies White House, Saves Overtime for Millions

Both the Senate Appropriations Committee and the House of Representatives have defied a White House veto threat and voted to save overtime rights for millions of workers. **Full story**.

OSHA Sets Ergonomics Guidelines for Poultry Workers

The Occupational Safety and Health Administration (OSHA) released their voluntary ergonomics guidelines for the poultry industry without fanfare on Sept. 2.

The guidelines are part of OSHA's "four-pronged" method for reducing musculoskeletal disorders (MSDs). This is the third set of ergonomics guidelines released by OSHA.

Though the guidelines are supported by both union and industry, union representatives concede that the guidelines are not likely to change the way the industry functions. Jackie Nowell, safety and health director for the United Food and Commercial Workers union to told the BNA, "We didn't have a problem with the proposed guidelines, and we don't have a problem with them now. Is it going to change the industry? No."

According to the University of Maryland's Environmental Safety Division of Administrative Affairs, "Repetitive Motion Illness or Cumulative Trauma Disorders represent almost 1/2 of all occupational illnesses reported by the Bureau of Labor Statistics." Though the estimates vary, the cost of such injuries could exceed $100 billion annually.

Despite these astounding numbers, OSHA continues to allow industry to regulate itself and has only offered voluntary best-practice guidelines. Moreover, as reported in the recent report, The Bush Regulatory Record: A Pattern of Failure, a rule promulgated by OSHA this year eliminates the requirement that MSDs be reported separately rather than be lumped in with the total number of workplace injuries, making it more difficult to track this prevalent and dangerous workplace hazard.

NHTSA Finally Issues Long-Delayed Tire Pressure Rule

The National Highway Traffic Safety Administration (NHTSA) issued a proposed rule Sept. 16 for requiring tire pressure monitoring systems. The ruling came a full year after its first attempt at a rule was overturned by a federal court, and two months after Public Citizen returned to that same court seeking an order compelling NHTSA to stop delaying and issue a rule.

NHTSA issued the Notice of Proposed Rulemaking (NPR), announcing the agency's intent to require a tire pressure monitoring system (TPMS) that alerts drivers when the air pressure in their tires becomes dangerously low. The TPMS system envisioned by the proposal would only be required to work with the tires on a vehicle at the point of sale, however, and would not be required to work with replacement tires.

The TPMS rule addresses the common hazard of driving on underinflated tires. Underinflated tires make vehicles more difficult to handle and increase the risk of crashing because of tire blow-outs, flat tires, skidding, and hydroplaning.

NHTSA was required to produce a TPMS rule by section 13 of the Transportation, Recall Enhancement, Accountability, and Documentation Act ("TREAD Act"), Pub. L. No. 106-414 (2000). Congress passed TREAD in the aftermath of the Ford-Firestone controversy.

NHTSA issued the new proposed rule after its first attempt at a TPMS rule was overturned by a federal court. During the first rulemaking, NHTSA recognized a distinction between "direct" and "indirect" systems:

- A **direct system** warns a driver when any tire or tires are significantly underinflated. It functions from the moment a vehicle is turned on, operates on any road surface, and can be installed in any vehicle.
- An **indirect system**, by contrast, warns a driver when (1) any single tire or combination of three tires (2) is 30 percent or more underinflated *as compared to the other tires*. Unlike a direct system, it cannot detect underinflation of all four tires or underinflation of two tires on the same axle or on the same side. Further, the system does not work until the vehicle has been driven for at least ten minutes, and even then it does not function on bumpy or gravel roads or at speeds above 70 miles per hour.

NHTSA recognized that a direct system would be more reliable and would prevent more harm -- 4,050 more injuries and 30 more deaths -- than an indirect system, but it opted, under White House orders, to require an indirect system.

After a federal appeals court in August 2003 rejected the indirect TPMS rule for insufficiently meeting the mandate of TREAD, NHTSA was ordered back to the drawing board. The plaintiffs in that case, Public Citizen and other consumer and safety groups, observed a pattern of delay in the year that followed the court ruling:

Document	Anticipated Deadline for Final Rule
Monthly status report to Congress (Nov. 2003)	May 1, 2004
Status report (Feb. 2004)	July 2004
Status report (June 2004)	August 13, 2004
Unified Agenda (June 28, 2004)	September 2004

Frustrated that needless deaths and injuries were occurring while NHTSA delayed action, the plaintiffs returned to court in July 2004 with a motion to compel NHTSA to comply with the court's previous judgment and issue a TPMS rule without delay.

In response to the plaintiffs' motion, NHTSA actually used its delay as evidence of progress. In its response brief, the agency pointed out that it had submitted a draft notice of proposed rulemaking to the White House Office of Management

and Budget (OMB) for its approval, but OMB returned it to the agency to work on "[u]nanticipated issues requiring further analysis."

The new notice of proposed rulemaking now puts an end to that dispute, but there will still be a significant period of time before a final rule is actually issued. The NPR calls for a new comment period that will be open until as late as November 2004.

Nuclear Commission Avoids Accountability in Secret Rule Change

The Nuclear Regulatory Commission illegally issued new orders, without opportunity for public participation, that secretly change terrorism preparedness requirements for nuclear facilities, according to a challenge filed by two citizen groups and recently argued in a federal appeals court.

Citizen action groups Public Citizen and San Luis Obispo Mothers for Peace petitioned the D.C. circuit appeals court for review when the Nuclear Regulatory Commission (NRC) revealed that it had changed the "design basis threat" (DBT) standards, which define the threats of terrorism and sabotage against which nuclear facilities must be protected. NRC announced the changes in a *Federal Register* notice -- not as a notice of proposed rulemaking, in which the public would have an opportunity to submit its assessment of the changes, but as an order abruptly declaring that the old DBT is now superseded by a new DBT outlined in an attachment that would remain hidden from public view.

A Context of Failure and Secrecy

"The steps that should be taken to protect nuclear installations against terrorist attacks are a matter of great public concern and a legitimate subject for public discussion and debate, even -- or perhaps especially -- when such discussion may lead to the revelation of flaws in security procedures that require a remedy for the protection of the public," the petitioners explained. NRC's secret rulemaking process and undisclosed DBT standards make such public scrutiny impossible.

This challenge coincides with several recent criticisms of NRC for not doing enough to protect the public with improved nuclear facility safeguards.

- The Government Accountability Office (GAO) discovered that nuclear power plant security teams failed *54 percent of the time* to defeat attackers in mock attack drills, except when the facilities artificially increased security levels above the requirements of their normal security plans.
- The Project on Government Oversight revealed that NRC allowed the nuclear energy industry's own lobby to create the mock terrorist teams used to test nuclear power plant security -- and the lobby, in turn, contracted with the same firm that already supplies security services to most nuclear facilities. In other words, the same company that secures nuclear facilities was allowed to judge its own performance and that of its competitors.
- The GAO testified that NRC's review of nuclear facility security may be lacking. NRC has visited only four or five plants to inspect security plans; for all the others, it is relying on simple check-list forms submitted by nuclear power plant owners.

Moreover, the secret DBT rulemaking is only one of several recent examples of excessive secrecy at NRC:

- NRC announced in August that it would hide all information about nuclear facility security -- even the success or failure of the new mock terrorist drills, with which the GAO discovered significant weaknesses, and NRC's enforcement of security requirements.
- The Atomic Safety and Licensing Board, the NRC's adjudicatory arm, ruled against the government for failing to disclose information about the controversial Yucca Mountain Project.
- That same board declined to allow a public hearing on environmental justice concerns about a company's attempt to expand a facility located in a low-income and minority area.

Further, it is not the only example of NRC attempting to avoid the requirements of an open, accountable regulatory process. Public Citizen and the Nuclear Information and Resource Service have recently argued a separate federal court case against NRC for issuing rules that truncate public participation in licensing decisions, by forcing concerned members of the public to file all their legal arguments simultaneously with their motion to intervene in a licensing case. The rule change, which eliminates the on-the-record, public hearings required by federal law, shortens the amount of time intervenors would have to prepare their arguments from four months to two.

About the Challenge

The petitioners argued that the Administrative Procedure Act and the Atomic Energy Act required NRC to submit DBT changes to an open rulemaking process in which the public would have an opportunity to participate. A previous court decision in *Union of Concerned Scientists v. NRC*, 711 F.2d 370 (D.C. Cir. 1983), interpreted the Atomic Energy Act requirement of a hearing before NRC may issue "rules and regulations dealing with the activities of licensees," 42 U.S.C. § 2239(a), as adopting the Administrative Procedure Act's requirements of notice-and-comment rulemaking while specifically excluding the APA's "good cause" exemptions from public rulemaking procedures.

Because NRC's DBT order specifically noted that it superseded the long-established DBT regulations in 10 C.F.R. § 73.1, the petitioners argued, and because it creates policies applicable prospectively across the board, it must be considered a regulation. The closed rulemaking process and the secret details of the rule make the entire DBT change an impermissible secret rulemaking, leaving communities in the dark about the security of nuclear facilities in their own backyards.

NRC in fact admits that it allowed the nuclear power industry, but not the public, to participate in the DBT rulemaking. The

petitioners discovered that NRC Commissioner Edward McGaffigan. Jr., addressed a conference two weeks before the order was issued and confessed that "cleared industry representatives" were allowed to shape the resulting order.

The government's arguments in response are complicated and clever, if not persuasive.

- NRC argued that the order was not a rule at all. Even though the order explicitly states that it supersedes the DBT regulations of 10 C.F.R. § 73.1, NRC attempted to back away from the breadth of that claim and offered the post hoc explanation that it only supplemented existing DBT regulations with the new order. The word "supersede" was, NRC argued, merely an "inartful" mistake.

- NRC also argued that the petitioners failed to exhaust their administrative remedies. The argument makes little sense, however, because there were no administrative processes in which the public could participate. NRC did announce a post hoc opportunity for hearings after the issuance of the order, but a previous court decision in similar circumstances held that the statute of limitations for petitions for judicial review of a procedurally defective rule runs from the date that the rule is issued. Had the petitioners waited to go through the post hoc process before filing their court challenge, they would have run down the clock and lost forever their right to petition the court. NRC argued against the relevance of that precedent by highlighting a trivial distinction that does not, ultimately, undermine the general principle of the case.

- NRC argued that the petitioners were capriciously attempting to use the courts to force NRC to adopt a notice-and-comment rulemaking process in lieu of an adjudication for the issuance of its order. This argument blurs the process by which NRC created the order with the two subsequent licensing decisions in which it reiterated and applied the new DBT order. NRC had already issued the challenged order, which it subsequently appended to its two licensing decisions, *before* the licensing hearings. Moreover, the order is a rule of general applicability to all NRC licensees, not an application of a general principle to specific factual details that is the hallmark of an adjudicatory decision.

The case was argued on Sept. 10, before a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit.

1742 Connecticut Avenue, N.W., Washington, D.C. 20009
202-234-8494 (phone)
202-234-8584 (fax)

In This Issue

Bill to Regulate Independent Political Committees Introduced in Congress

The "527 Reform Act of 2004", introduced on September 22, would limit soft money for independent political groups, but does not clearly exempt advocacy groups exempt under Section 501(c) of the tax code.

The Congressional sponsors of the Bipartisan Campaign Reform Act of 2002 (BCRA) announced a bill meant to regulate any group "described in" Section 527 of the tax code whose "major purpose" is to influence federal elections. The bill does not define "major purpose". There is no exemption for charities, social welfare groups or other organizations exempt under Section 501(c). There is concern that 501(c) groups could said to be "described in" Section 527 as a result of their electoral activities.

The proposal would apply to major purpose groups that receive more than $25,000 per year, prohibit corporate or union contributions and limit individual contributions to $25,000 per year. Groups focused solely on state and local elections would not be covered. These include campaign committees of state or local candidates and state or local party committee. Groups that work exclusively on elections with no federal candidates, ballot measures and influencing appointments, nominations and such would be exempt.

The exemptions would not apply if a covered organization spent money on a public communication that "promotes, supports, attacks or opposes" a federal candidate within two years of a federal election. The bill does not distinguish between statements made about federal officeholders in relation to their official duties and candidates. As a result, it could effectively ban any criticism of a member of the House of Representatives by a covered organization, since elections for House seats are held every two years.

At a press conference announcing the bill the sponsors said 501(c) groups would not be impacted and abuse would be prevented by adequate enforcement of existing laws. This position is at odds with their challenge to the FEC's rule exempting 501(c)(3) organizations from the electioneering communications rule.

The Senate version, S. 2828, is sponsored by Senators Russ Feingold (D-WI) and John McCain (R-AZ) and co-sponsored by Senators Joe Lieberman (D-CT) and Charles Schumer (D-NY). The House version, HR 5127 is sponsored by Reps. Christopher Shays (R-T) and Martin Meehan (D-MA).

This article revised October 8, 2004.

House Committee Drops Balanced Budget Amendment -- for Now

The House Judiciary Committee convened in mid-September to consider a constitutional amendment to balance the budget but failed to make headway on the proposal. When the committee met Sept. 22 to debate and vote on the measure, Democrats clearly demonstrated their opposition and offered several amendments, including one by John Conyers (D-MI) to exempt Social Security. The committee adjourned before voting on the amendment, and upon reconvening did not have a quorum, and thus could not complete the vote. There was brief speculation that the amendment would go straight to the House floor; however, it appears House Republicans have dropped their work on the amendment for now.

This amendment has been brought up in the House several times and was part of the Republicans' "Contract With America" in the early 1990's. Rep. Ernest J. Istook Jr. (R-OK) pushed for the amendment, hoping the House would vote on it before adjourning for the elections.

The policies put forth in the Balanced Budget Amendment are fiscally and economically irresponsible. According to OMB Watch Economist and Senior Budget Policy Analyst John Irons, the amendment could "destabilize the economy by amplifying downturns in the business cycle. It would also restrict the nation's ability to invest in projects that would yield significant benefits in the future." (See press release.) In 1997, over 1,000 economists, including 11 Nobel Prize winners, signed a statement opposing the policies laid out in the Balanced Budget Amendment.

Max B. Sawicky, an Economic Policy Institute budget and fiscal policy expert, registered his opposition to the proposed policy in a letter to House Judiciary Committee Chairman James Sensenbrenner (R-WI). Sawicky points out that the growth seen in the recent recovery, weak as that growth has been, would probably not have occurred if the amendment had been in place.

The Balanced Budget Amendment was likely floated for its political value with constituents, even though well-designed budget rules and responsible legislation are more effective for preserving a healthy economy. For now, House Republicans have dropped work on the amendment; we hope that the issue is not picked up again in a post-election lame-duck session.

For more information on House proceedings concerning the amendment, see a Sept. 30 *Washington Post* article, "GOP Drops Work on Balanced Budget."

Economy and Jobs Watch: The Lost Years -- by the Numbers

Over the past 4 years there has been a dramatic shift in the nation's fiscal policy. Has the new strategy worked? The numbers indicate it has not.

Employment:

January 2001: 132,388,000
August 2004: 131,475,000
Decline of 913,000

Note: Data seasonally adjusted.
Source: Bureau of Labor Statistics.

Real Gross Domestic Product:

2001 Q1: $9,875 billion
2004 Q2: 10,784 billion
Average annual increase 2.6%*

*Over the same period in his term, President Jimmy Carter had a better growth rate (2.9%).
Source: Bureau of Economic Analysis.

Stock Market -- Dow Jones Average:

Jan. 2, 2001: 10,646
Oct. 1, 2004: 10,193
Decline: 4.3%*

* The poor stock market performance over the past several years cannot be explained simply by pointing to the events on 9/11. The Dow Jones Average on Sept. 10, 2001 was 9,431. When the market reopened on the 17th, the Dow fell 675 points by the close of the day. Less than 2 months later, the Dow had already recovered all of its ground and more, and by the end of that year it reached 10,000.

Source: Yahoo! Finance

Deficit

Fiscal year 2000: +$236 billion -- Surplus
Fiscal year 2004: - $422 billion -- Deficit
Decline of $658 billion

Source: OMB and Congressional Budget Office

Poverty Rate

2000: 11.3%
2003: 12.5%
Increase 1.2 percentage points

Source: Census Bureau

Median Household Income (in inflation adjusted 2003 dollars)

2000: $44,853
2003: $43,318
Decline $1,535

Source: Census Bureau

Congress Spends $146 Billion To Extend Certain Tax Cuts Without Offsets

Congress voted to extend so-called "middle-class" tax reductions last week, and chose not to offset any of the cost of the $146 billion measure. In addition, the bill also includes $13 billion in tax cuts for businesses. When factoring in the additional interest costs, the bill will increase the deficit by over $200 billion.

Despite the "middle-class" label, the tax cuts still benefit upper income individuals more than the middle class. The Center on Budget and Policy Priorities estimates that the bill means a typical family would see a tax benefit of just $162 in 2005. Those in the top 20% of income earners would, on average, see a much larger tax benefit of $1,317, and those with incomes between $200,000 and $500,000 will receive an average of $2,390.

Since the costs are not offset, these changes must eventually be paid for, and most of the population will likely come up losers -- see "The Ultimate Burden of the Tax Cuts" by William G. Gale, Peter R. Orszag, and Isaac Shapiro for more details.

Much of the cost of the bill could have been paid for with revenue increases that are part of the FSC/ETI bill now under consideration. Rather than choosing to use increased revenue from corporations to pay for the income tax measures, some in congress and the Bush administration are instead likely to opt to reduce corporate taxation by approximately $50 billion. For more on this matter, see "Large Corporations May Receive More Tax Breaks" in this issue.

Large Corporations May Receive More Tax Breaks

The House and Senate continue to move forward on a substantial corporate tax bill. The Foreign Sales Corporation and Extraterritorial Income Exclusion (FSC/ETI) bill is designed to remove certain corporate tax subsidies that were ruled illegal by the World Trade Organization. Repealing the subsidies would increase federal revenue by approximately $50 billion over the next 10 years. (The bill is currently in conference. See a summary of the differences between the House and Senate version.)

Rather than using the revenue to reduce the massive $422 billion deficit, or to offset some of the $146 billion price tag of the tax-cut extensions passed last week (see "Congress Spends $146 Billion to Extend Certain Tax Provisions Without Offsets" in this issue), some in Congress and the Bush administration are seeking instead to replace the banned subsidies with $50 billion in new corporate tax breaks. This would be on top of the $13 billion in tax breaks for corporations already passed as part of the "middle-class" tax package.

The additional cuts would come at a time when corporate tax revenue is at historic lows and when many of the largest and most profitable corporations currently do not pay their fair share of taxes. The latter is confirmed by a new study recently released by Citizens for Tax Justice and the Institute on Taxation and Economic Policy. The study by Bob McIntyre and T. D. Coo Nguyen looks at federal income taxes paid by 275 of the nation's more profitable Fortune 500 companies from 2001-2003 and reveals that:

- Eighty-two of the 275 companies paid zero or less in federal income taxes in at least one year from 2001-2003.
- The companies who paid "less" experienced multiple tax-free years. In the years they paid no income taxes, these companies earned approximately $102 billion in pretax U.S. profits. Due to excessive tax breaks, the firms were handed tax rebate checks from the U.S. Treasury totaling $12.6 billion.
- Loopholes and other tax subsidies enjoyed by the 275 companies reduced federal revenues by $43.4 billion in

2001, $60.8 billion in 2002, and $71 billion in 2003.
- In three years, these companies received $175.2 billion dollars worth of tax breaks. Half of these tax break dollars went to just 25 of the companies.

The report, "Corporate Income Taxes in the Bush Years," also includes other findings highlighting how U.S. tax policies are currently geared toward business interests. Federal income taxes pay for many important programs and services, so when corporations get special advantages, it both increases the deficit and reduces government spending for services most Americans rely upon.

Continuing Resolution Passes, Omnibus Bill Expected

After much speculation, and on the final day of the fiscal year, the House and Senate passed a continuing resolution (CR) (H.J. Res. 107) to fund non-defense government programs and agencies, and other expiring programs, at current levels through Nov. 20. The CR was needed because Congress failed to perform one of its key duties on time -- the appropriation of funds for government programs. Democratic Whip Steny Hoyer (MD) observed, "The Republicans' failure to pass appropriation bills on time has real-world consequences to real people, to states, localities, municipalities, and every individual."

The Sept. 30 passage precedes a lame-duck session likely to begin the week of Nov. 15, in which Congress will have to complete unfinished legislation, including:

- The Defense Reauthorization bill
- The Foreign Sales Corporation and Extraterritorial Income Exclusion (FSC/ETI) bill
- The Intelligence Reform bill
- A bill to raise the debt ceiling.

Besides the continuing resolution, it appears an omnibus spending bill will be necessary to pass all of the appropriations bills before the end of the fiscal year. To date, the House has passed 12 bills, and the Senate, only six. Only one bill -- the defense appropriations bill -- has made it through conference committee.

House Appropriations Chairman Don Young (R-AK) and Senate Appropriations Chairman Ted Stevens (R-AK) would each like to report out of committee four of the FY 2005 appropriations measures as stand-alone bills. This would leave eight, instead of 12, to be passed through an omnibus. The four they are considering are Foreign Operations, Homeland Security, Military Construction, and Washington, DC.

The House is expected to officially appoint conferees to the Homeland Security measure (H.R. 4567) sometime this week. Movement on that bill has been stalled because of continuing negotiations concerning hurricane and drought relief. While Senate Majority leaders are pushing to make sure there is drought aid, Minority Leader Tom Daschle and other Democrats are accusing the Bush administration of ignoring the needs of farm states.

Congressional Report on Data Quality Act Supports OMB Watch Findings

The Congressional Research Service (CRS) recently updated a report on the Data Quality Act (DQA) entitled The Information Quality Act: OMB's Guidance and Initial Implementation." The report summarizes the history of the DQA from its passage as an appropriations rider, through development of information quality guidelines, to the Office of Management and Budget's (OMB) annual report to Congress. Several of the report's conclusions coincide with observations and recommendations made by OMB Watch in an analysis of OMB's annual DQA report to Congress.

The CRS report strongly implies that the DQA, passed without debate or hearing as an appropriations rider, was duplicative and unnecessary. The Paperwork Reduction Act (PRA), amended in 1995, already required OMB to oversee agencies' policies on dissemination of information to the public. The PRA also already required agencies to manage their information to improve the quality of the data. Therefore it is unclear exactly what Congress meant to accomplish with the DQA.

The CRS report points out that because the DQA lacked any significant legislative history OMB, not Congress, played the definitive role shaping this program. OMB defined the key terms, established the scope of the guidelines and instructed agencies on how the administrative mechanism for correction process should operate.

The report also summarizes OMB's report to Congress on the first year of DQA implementation, focusing on the data correction requests federal agencies received under the Act during that period and how the requests were resolved.

A short section of the CRS report describes OMB Watch's analysis of OMB's annual report to Congress, summarizing our complaints of flaws, inaccuracies, and bias. CRS's observations and suggestions for possible improvements in the DQA support many of the conclusions and recommendations from OMB Watch's analysis.

Mirroring a recommendation from OMB Watch's analysis, the CRS report recommends more reliable data be collected regarding the DQA's effect on rulemaking or agencies' resources. CRS concluded the DQA can have "a significant impact on federal agencies and their information dissemination activities." For example, OMB's recent annual report on the DQA provided "numerous examples of agencies changing their policies and publications in response to administrative requests for correction from affected parties." The authors also note such policy changes have continued after the time period covered by OMB's report.

It is unknown which member or committee of Congress requested the CRS report on the DQA or for what purpose.

Perhaps the issues raised in the CRS report will prompt Congress to further investigate the DQA's impact on agency activities. To take action on this and ask Congress for an independent investigation of the costs and impacts of the DQA click here.

Court Strikes Down Part of the Patriot Act

Federal District Judge Victor Marrero ruled Sept. 29 that surveillance powers under the USA PATRIOT Act were unconstitutional, marking a significant victory for civil liberties groups.

The American Civil Liberties Union (ACLU) filed suit against the Department of Justice, challenging Section 505 of the Patriot Act, which gives the government unchecked authority to issue "National Security Letters" to obtain consumer records from Internet providers, booksellers, libraries, and other businesses without judicial oversight. The provision also prevents anyone that receives such a letter from disclosing the request -- essentially a gag order. The ACLU was forced to file the suit itself under seal, so it did not violate this gag order.

Marrero ruled that the gag order of Section 505 violates the right to freedom of speech under the First Amendment, and that the unchecked collection of records violates the right to be free from unreasonable searches under the Fourth Amendment. ACLU's Executive Director, Anthony D. Romero cited the case as "a landmark victory against the Ashcroft Justice Department's misguided attempt to intrude into the lives of innocent Americans in the name of national security."

A 90-day stay for enforcement of the ruling is in effect to allow time for an appeal. Attorney General John Ashcroft, an outspoken advocate of the law enforcement provisions in the Patriot Act, told reporters, "Without knowing the specifics, I wouldn't be able to assure that the case would be appealed, but it is almost a certainty that it would be appealed."

See the related *OMB Watcher* article, "Kyl Proposes Expanding the Patriot Act."

Kyl Proposes Expanding the Patriot Act

Sen. Jon Kyl (R-AZ) introduced an amendment to the Senate intelligence reform bill that would heighten government secrecy and threaten civil liberties. The amendment seeks to build upon the secret surveillance powers granted to the government under the Patriot Act.

Kyl Amendment

Kyl's amendment, added Sept. 28, would expand law enforcement's authority to operate in secrecy and weaken checks and balances that safeguard civil liberties. The amendment uses some provisions from the Patriot Act II, failed legislation that was never introduced to Congress after a leaked draft in 2003 resulted in strong public backlash. The House version of the intelligence reform legislation already incorporates Patriot Act II provisions.

Among other things, the Kyl amendment would:

- Expand secret eavesdropping and search powers
- Infringe on the right to privacy for library, medical and other personal records
- Enable the government to present secret requests for the deletion of classified information from information given to the defense in certain court cases
- Allow for the secret use of information gathered through intelligence intercepts and searches in immigration cases
- Make any crimes resulting in fatalities a death-eligible offense if it meets the USA PATRIOT Act's overbroad definition of terrorism.

Outside of the obvious threats to civil liberties, some public interest groups feel that such sweeping changes proposed in the Kyl amendment go beyond the scope of the 9/11 Commission's recommendations and are not appropriate to be considered for the intelligence reform bill.

House Version of Intelligence Reform

Similar to provisions in the Kyl amendment, the House is considering law enforcement provisions in its intelligence reform bill. H.R. 5150 contains a number of controversial provisions that mimic the Patriot Act II, such as deportation of aliens who assist terrorist groups, and greater penalties for attempted chemical or nuclear attacks against the United States.

Because the House and Senate versions of the bill are so different, it is unclear whether Congress will be able to reconcile the differences before adjournment at the end of this week.

Stalled Patriot Act Legislation

Congress is currently sitting on several other Patriot Act related bills that could restore civil liberties that were stripped away by the Patriot Act. The Security and Freedom Ensured (SAFE) Act is a bipartisan bill that would amend the Patriot Act to limit some of the egregious secret surveillance provisions, as well as those governing search warrants, authorized under the Patriot Act. The Senate Judiciary Committee held hearings on the SAFE Act Sept. 22, but it is unclear whether the legislation will move forward.

The Civil Liberties Restoration Act 2004 (S. 2528) also would "fix" some of the problems with the Patriot Act by ending secret hearings, ensuring due process for detained individuals, limiting secret seizures of records, and restricting the use

of secret evidence. This bill has been sitting in both the House and Senate Committee on Judiciary since June.

Fox Guarding the Clearinghouse on Contracts Data

On October 1, a downsized government office turned over key data on roughly $290 billion worth of government contracts to a private company to provide online access. Critics on the left and right predict this move could raise barriers to public disclosure and undermine the public's ability to hold federal contractors and government officials accountable for the way taxpayer dollars are spent.

The Federal Procurement Data System (FPDS) holds data on all federal contracts worth more than $25,000. Over seventy federal agencies report contracts to the General Services Administration, which until last week operated the database.

For a quarter century the federal government has collected and managed the data, although the public has found the data less than easy to work with. The solution was to downsize the federal workforce for FPDS and outsource the work to Global Computer Enterprises.

The critics, including the Project On Government Oversight (POGO), are most concerned that the public will face more fees to access the data in the system. Global has committed to provide free public access to analytic reports. The pre-canned reports break down federal expenditures on outsourced activities by agency, identify the top federal contractors and give other summary analyses. Under the new system, users interested in drilling down further than the reports must buy additional custom analyses. To run queries on the database itself, users are asked to pay a $2,500 fee for lifetime access to the data.

As POGO notes in an op-ed, Halliburton and other federal contractors avoid public scrutiny when the public is left in the dark about key figures in their contracting deals. Halliburton recently noted it could not account for $1.8 billion on a military support contract.

GSA still supports free public access to data on federal contracts for fiscal year 2003 and all prior years at www.fpdc.gov/fpdc/fpdc_home.htm. Data for fiscal year 2004 will be available through the new system at https://www.fpds.gov.

Wyden Targets Over-Classification

Sen. Ron Wyden (D-OR) has successfully attached an amendment aimed at curbing excessive government secrecy to the Senate's intelligence reform legislation. Wyden proposes creating an independent review to provide periodic oversight to the system and limit excessive classification of documents.

The government's over-classification of documents was among several issues highlighted by the 9/11 commission as contributing the country's inability to prevent the terrorist attacks. The commission recommended several changes to the intelligence system including establishing a National Intelligence Director position, creating a National Counterterrorism Center, and limiting the excessive use of classification. When information is inappropriately classified, it prevents officials from sharing and capitalizing on that data in a timely manner.

Wyden's amendment would create an Independent National Security Classification Board to review contested classification decisions and, when appropriate, recommend declassification to the President. While the President would not be obligated to accept the board's recommendations, the President would have to provide written justification to Congress for any rejected board decision.

Ironically, four years ago Congress approved a Public Interest Declassification Board comprised of nine members selected by the White House and congressional leadership to increase oversight for declassification. However, the members have never been selected, nor has the committee been convened.

Senate Declines to Act on Corzine's Chemical Security Amendment

In an effort to break the congressional logjam on chemical security, Sen. Jon Corzine (D-NJ) has offered a piece of compromise legislation as an amendment to the intelligence reform bill. Unfortunately, the amendment was ruled non-germane to the bill and rejected from consideration.

More than three years after the 9/11 attacks, there are still no federal security standards for chemical plants. Corzine has offered strong chemical security legislation in the last two sessions of Congress, but each time the bill has stalled because of stiff resistance from the chemical industry. This past session, Sen. James Inhofe (R-OK), Chairmen of the Environment and Public Works Committee, introduced an alternative chemical security bill that effectively stalemated Corzine's proposal.

In an effort to move legislation on the important issue of chemical security, Corzine proposed a limited version of his own bill as an amendment to 9/11 legislation. The narrowed amendment had support from environmentalists and labor groups who believed the narrowed proposal still retained the crucial elements needed for a successful chemical security program.

Corzine's amendment retained requirements that chemical facilities perform vulnerability and security assessments that consider safer alternatives and submit the reports to the Department of Homeland Security for approval. Under the amendment the highest threat facilities -- 123 plants that each put a million or more people at risk -- would have had to implement all cost-effective methods of reducing risk.

The amendment exempted agricultural facilities, such as fertilizer users, that endanger less than 10,000 people. However increased security would have still been required at those locations to prevent theft. Corzine's proposal would also have allowed industry assessment programs to substitute for the government's requirement so long as the programs met minimum standards outlined in the statute, including mandatory consideration of safer alternative technologies. Approval of the industry programs would have required a public rulemaking process.

While the Corzine amendment represented a much narrower effort than his original bill, it remained superior to Inhofe's proposal, which does not require consideration of safer alternatives, submission of plans to the government, implementation of cost-effective risk reduction, or public evaluation of industry programs. Inhofe offered his legislation as an alternative amendment but it, too, was ruled non-germane.

USAID Withholds Whistleblower Information, Legislation Moves Forward

The U.S. Agency for International Development (USAID) is accused of firing a whistleblower and withholding from Congress his information on environmental noncompliance in multi-national development bank projects.

The employee, John M. Fitzgerald, was the only environmental analyst at USAID examining U.S. supported international development projects' compliance with environmental standards. He alleges that USAID gave in to pressure from the U.S. Treasury to hide information about projects in Africa, South America and Eastern Europe that were not complying with environmental rules. Projects not properly reviewed for environmental consequences may not receive U.S. support under the Pelosi amendment, which also requires biannual reporting to Congress. Fitzgerald found that nearly half the projects receiving money from multilateral development banks received no environmental review, and the reviews that were conducted were often incomplete. His allegations about USAID's noncompliance were removed from a report to Congress. Since his dismissal in 2002, there have been no reports sent to Congress.

Public Employees for Environmental Responsibility (PEER) filed a whistleblower complaint on behalf of Fitzgerald. The federal civil service court that heard the case ruled in favor of Fitzgerald Sept. 1, saying that his disclosures are protected under the Whistleblower Protection Act (WPA), that his disclosures contributed to his dismissal, and that he is now entitled to a full hearing.

While the WPA is shielding a federal employee in this case, it is well know that the law does not provide enough protections for all whistleblowers. Since Congress unanimously strengthened the law in 1994, the courts have defied statutory language and congressional intent by drastically limiting the circumstances under which an employee is even eligible for whistleblower protection. Court rulings now prevent the WPA from protecting whistleblowers if they disclose wrongdoing to a co-worker, act in connection with job duties, or if someone else has already exposed the same conduct.

Legislation to strengthen the WPA is currently before Congress. S. 2628, the "Federal Employee Protection of Disclosures Act," is the first stand-alone whistleblower protection bill to be approved by the Senate Committee on Government Affairs in ten years. The House Government Reform Committee approved similar legislation Sept. 29, but H.R. 3281 lacks the structural reforms of the Senate bill to prevent the current frustrations from continuing. This includes allowing whistleblowers normal access to appeals courts and closing the loophole in which security clearances can be revoked from national security whistleblowers.

Visit OMB Watch's action alert to tell your representatives to pass the stronger Senate version of whistleblower protection legislation during the House-Senate conference. For more information on whistleblowers, see the Government Accountability Project.

FEC Appeals Decision Overturning Reform Rules

The Federal Election Commission moved Oct. 1 in the U.S. District Court for a stay of the court's ruling holding unlawful various FEC implementing regulations for the Bipartisan Campaign Reform Act of 2002 (BCRA). The FEC's motion is the latest development in the ongoing legal battle over campaign finance reform, aspects of which could have profound implications for nonprofits.

The move comes after the congressional sponsors of BCRA, unhappy with many of the rules the FEC wrote to implement the legislation, filed a lawsuit challenging the rules. On Sept. 19, U.S. District Court judge Colleen Kollar-Kotelly ruled that FEC should rewrite 15 of the 19 challenged regulations because they are not consistent with the intent of BCRA. The judge's 157-page opinion devotes most of its attention to rules relating to coordination between campaigns and independent groups and to solicitation of soft money by national political parties and federal candidates.

In requesting the stay, the FEC is seeking a clear statement that the rules under review will remain in effect pending appeal and that the agency is not required to initiate rulemaking proceedings under the Sept. 19 order. The FEC noted that the Court's order remanded the rules without vacating them. The plaintiffs in the lawsuit challenging the rules will file a response by close of business Oct. 5.

The ruling on electioneering communications could have the most impact on nonprofits. The opinion found the exemption for 501(c)(3) organizations was not adequately justified, questioning assumptions about IRS enforcement of the prohibition on partisan activities. The court also overturned the exemption for unpaid broadcasts without addressing any of the substantive issues that had been raised, including the absence of threat of corruption when no money is involved.

Finally, the court overturned the exemption for Internet communications from the definition of coordinated public communications. As with unpaid advertising, the court did not consider the low cost and wide availability of Internet communications in making its ruling.

For more background on these exemptions and their implications for nonprofits, see the Sept. 30, 2002 OMB Watcher article summarizing the theme.

Senate Finance Committee Considers Nonprofit Accountability

The Senate Finance Committee has sent a letter to Independent Sector (IS), a coalition of 600 member organizations and foundations, asking IS to convene a national panel of nonprofit representatives to recommend legislative options to increase nonprofit accountability. The Sept. 22 letter follows Finance Committee hearings on nonprofit practices held in July that examined allegations of excessive compensation, tax shelters, and Internal Revenue Service (IRS) noncompliance. Committee staff released draft proposals for reform during the summer, and nonprofit groups provided input and responses.

Based on the hearings and the comments, the committee is now considering various types of reforms. The committee has been concerned with this issue after scandals surfaced last year involving a small number of large nonprofits, including the Nature Conservancy.

Independent Sector plans to convene representatives from two dozen charity and foundation organizations and create working groups to discuss various issues that the Senate has proposed. IS and other participants at the Senate hearings championed increased transparency and enforcement through extensive changes to nonprofit tax reports (IRS Form 990).

Lawmakers are considering extensive oversight of nonprofits, including the size of an organization's board of directors and the amount of employee compensation allowed.

Although the committee asked IS for input from nonprofits, organizations that disagree with the Senate's proposed course of action may not be asked to participate. The committee wrote in a letter to IS, "We encourage you to work with those committed to reform and not let a potential minority prevent substantive improvements by requiring unanimity on proposals."

Increased oversight and enforcement, if not carefully crafted, could lead to unnecessary administrative burdens for small nonprofits. Seventy percent of charities have annual budgets under $500,000, and tougher regulations and enforcement could be overly burdensome to them. Nonprofits of all types are urged to give input to the committee, because any new regulations will affect the entire sector.

Conferees Consider Rights, Restrictions on Electioneering

Opponents of church electioneering are breathing a tentative sigh of relief. On Sept. 29, Rep. Bill Thomas told the first meeting of conferees that he would not consider amendments to a discussion draft of his proposed version of the corporate tax bill. The chair of the conference committee on is opposing any amendments to that bill that were not provisions or modifications to the previous already-passed Senate or House versions. However, there is still concern that the conferees could include language similar to H.R. 235 , the "Free Speech Restoration Act" which would allow religious organizations to support or oppose candidates for public office without losing their tax-exempt status.

The House conferees filed approximately 41 amendments and the Senate conferees filed about 300 amendments to the discussion draft. Thomas is expected to unveil his Chairman's mark at the next meeting of conferees Oct. 4.

H.R. 235 discriminates against nonreligious nonprofits by giving religious organizations rights that other 501(c)(3) groups would not have. It would also permit considerable expenditures of tax-deductible funds to publicize endorsement-sermons and other election-related presentations made during religious services or gatherings through television, radio, and other media. This soft-money loophole would hurt all nonprofits.

Please see our action alert and let the conferees know this provision is a bad idea for nonprofits.

The House conferees are: Bill Thomas (R-CA), Tom Delay (R-TX), Jim McCrery (R-LA), Phil Crane (R-IL), Bob Goodlatte (R-VA), John Boehner (R-OH), Jim Sensenbrenner (R-WI), Lamar Smith (R-TX), Sam Johnson (R-TX), Joe Barton (R-TX), Richard Burr (R-NC),Charles Rangel (D-NY), Sander Levin (D-MI), Charles Stenholm (D-TX), George Miller (D-CA), Henry Waxman (D-CA), John Conyers, (D-MI)

The Senate conferees are: Chuck Grassley (R-IA), Orrin Hatch (R-UT), Don Nickles (R-OK), Trent Lott (R-MS), Olympia Snowe (R-ME), Jon Kyl (R-AZ), Craig Thomas (R-WY), Rick Santorum (R-PA), Gordon Smith (R-OR), Jim Bunning (R-MO), Mitch McConnell (R-KY), Judd Gregg (R-NH), Max Baucus (D-MT), Jay Rockefeller (D-WV), Tom Daschle (D-SD), John Breaux (D-LA), Kent Conrad (D-ND), Bob Graham (D-FL), Jim Jeffords (I-VT), Jeff Bingaman (D-NM), Blanche Lincoln (D-AR), Edward M. Kennedy (D-MA), and Tom Harkin (D-IA).

Letter to the Editor and Response Regarding Aug. 9 Article on New CFC Rules

To the Editor:

During my last few years on active duty service, I watched the number of charities registered with CFC [the Combined Federal Campaign] grow dramatically. And many of them sounded dubious. Yet we were encouraged to donate, even at our meager wages. This applied to federal civil service employees as well. However, I fully support the new CFC rule that charities have to certify that they don't support terrorism or organizations that do. It's already been proven in the national media that many benign-sounding charities were actually funding groups that continue terrorism worldwide. This has been forced on Corporate CEOs and was the same policy forced on South Africa. The policy is *not* misguided, but long overdue.

But the most specious and false comment made was trying to continue the myth of Sen. McCarthy's search for communists and traitors in federal government agencies as some kind of witch-hunt. Even in the late 20th Century, the truth had come out that McCarthy was absolutely right; even President Truman agreed with him, and started the fight from the Executive Office, as Rep. Nixon had done from the House. The declassification of the Venona Papers, and reviews of documents in the former Soviet Union archives proved there were Communist spies giving away top-secret data.

I have alerted former active duty friends, as well as many military organizations about this new rule and your wrong-headed reaction to it. Additionally, I have passed it on to active duty personnel who can complain directly to elected officials and get some immediate results. Your position is egregious and anti-American.

Kevin Dwyer Orlando Florida
Retired Air Force NCO

OMB Watch Response to CFC Letter

Dear Mr. Dwyer,

Thank you for sending your feedback on OMB Watch's position on the CFC's new requirement that participating organizations check employees' names against government terrorist watch lists. Your letter raises a few issues that need clarification and further explanation.

There has been confusion in the press about what exactly CFC is asking nonprofits to do. The new rule is not a certification that a charity is opposed to terrorism and does not support it. If that were so we would not have the fight we are having. Charities strongly oppose terrorism and the good works of many international nonprofits help reduce the tensions and despair that make people susceptible to the appeals of terrorists.

This rule has both practical and philosophical problems. Charities would have to check, using their own limited staff time and revenue, multiple lists that are often full of errors, inconsistent, and out of date. The lists also do not have enough information to verify whether an employee whose name matches one on a list is in fact the same person. For example, Sen. Edward Kennedy has repeatedly been stopped from boarding airplanes because the name Edward Kennedy appears on the list, referring to someone else.

Even if the practical problems were resolved, there is still a philosophical problem with requiring charities to do the work of government investigators. It is not an appropriate role for us, and could lead to serious harm to innocent people, as has already happened to thousands.

We are aware of no evidence showing that list checking by charities makes our country any safer. However, we respect your right to disagree with us. Discussion over disagreements, aimed at reasonable resolution of issues, and exercising our freedom of expression, are fundamental to democracy and patriotism. It is not "anti-American" as your letter states.

Yours truly,
Kay Guinane

See Aug. 9 Article.

States Take Lead on Emissions Standards

Fearing the Environmental Protection Agency (EPA) may stall or weaken federal regulation on diesel emissions, 11 states and the District of Columbia announced on Sept. 29 plans to implement California's standards for diesel fuel emissions as a backup to the federal regulation promulgated by EPA.

EPA promulgated regulations in January 2001 to mandate dramatic decreases in harmful emissions, most notably particulate matter and nitrogen oxide. These standards, known as the "Federal 2007 Rule," are scheduled to take effect in 2007. However, according to state and local pollution control officials, EPA has received pressure from the trucking industry to weaken the rule.

In order to ensure truck drivers in California will be forced to comply with the original federal standard, California passed its own diesel fuel standards in October 2001 that are identical to the federal standard and scheduled to take effect at the same time.

Unwilling to rely on EPA to fully implement the rule, other state and local leaders worked with the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO) to create a

Model Rule, based on the California standard, that states could adopt to ensure diesel emissions would still be regulated in the event that the federal standard is not implemented or is weakened. STAPPA and ALAPCO are comprised of air pollution control officials from the states, territories, and major metropolitan areas.

Though industry representatives deny any attempts to delay or weaken the rule, EPA officials have met repeatedly with industry representatives to discuss the rule, according to the BNA Daily Report for Executives. Charles Drevna, spokesman for the National Petrochemical & Refiners Association told BNA that meetings were only to "outline where we see potential problems in implementation and then work out the kinks that will minimize or avoid the potential problems such as cross-contamination in storage tanks and pipelines."

According to the Executive Summary, "The Model Rule sets out a basic set of provisions for the purpose of adopting the California 2007 Rule by establishing a requirement that heavy-duty diesel trucks sold, leased, or registered for use in the adopting state must have a Certificate of Conformity issued by the California Air Resources Board ('CARB')." The Model Rule also includes optional provisions for enforcement and record keeping as well as additional regulatory documents to help guide state lawmakers in adopting the rules.

Like the federal regulation, the model rule, if implemented, will reduce emission levels by 90 percent for particulate matter and 95 percent for nitrogen oxide. According to a STAPPA/ALAPCO press release, the adoption of these regulations by these 12 jurisdictions will affect about one-third of truck sales. To date, the states that have implemented or plan to implement the California standard are Connecticut, Delaware, the District of Columbia, Georgia, Maine, Maryland, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania and Rhode Island.

House Committee Blasts FDA for Delay on Antidepressant Warnings

Food and Drug Administration officials were forced before a House committee to defend their choice not to respond with precautionary measures despite mounting evidence from as early as 1996 that antidepressants could be causing increases in suicidality (both suicidal ideation and suicide attempts) in children.

Rebukes for the FDA's failures came from both sides of the aisle at the Sept. 23 hearing as lawmakers reprimanded the FDA officials for failing to protect the public health. According to testimony given by senior officials from the FDA's Office of Drug Evaluation before the House Committee on Energy and Commerce, the FDA had been on notice since the mid 1990s most clinical trials have shown that antidepressants are no more effective than placebos in treating child depression but decided nonetheless forestall strong warnings on the use of antidepressants in children.

Testimony also revealed FDA senior officials may have suppressed and softened the conclusions of one of their senior medical investigators, Dr. Andrew Mosholder, who last year found a connection between antidepressants and suicidality in children. The FDA did not let the doctor present his findings in front of an advisory committee meeting in February but, rather, had another doctor present the results of the clinical trials without Dr. Mosholder's conclusions.

FDA officials rationalized their decision to suppress the information by saying they did not want the advisory committee to think the findings were the FDA's official conclusions. "We thought it was potentially dangerous to the public to present a premature conclusion to the public," stated Dr. Robert Temple, director of FDA's Office of Drug Evaluation I. FDA did not allow Dr. Mosholder to present his results until September, after his findings were corroborated by outside experts at Columbia University and by an FDA medical examiner.

Several House members questioned why the advisory committee, comprised of medical professionals, would not be able to understand the complexities and uncertainties of the study even if the general public could not. "What was the harm in allowing Mosholder an opportunity to present his data?" asked Committee Chairman Joe Barton.

After seeing the full results this September, the advisory committee voted 15-8 in favor of recommending strong "black-box" warnings on antidepressants. The House committee repeatedly accused the FDA of weakening past recommendations of the advisory committee and questioned whether the FDA would actually follow the most recent recommendations. Though Dr. Temple promised a decision on the warning label within a few days, the committee members certainly did not get the reassurance that they were looking for. "I'm not predicting that we won't go with the black-box warning," Temple responded. At the same time, he also indicated that he did not believe that the 15-8 vote was a clear majority and promised only that the FDA would look at the rationales of the votes when weighing the decision.

In response to the findings of the clinical trials on children, the FDA is now planning to look at thousands of adult clinical trials to see if the same increased risk of suicidality exists in the adult population.

Industry Influence Weakens USDA Dietary Guidelines

The Dietary Guidelines Advisory Committee, which includes seven members with strong industry connections, recently released its recommendations for an update of *Dietary Guidelines for Americans*. Not surprisingly, the committee's recommendations for controlling intake of carbohydrates, sugars and fats were vague and weak, prompting 25 nutritionists to send a letter to HHS calling for stronger, clearer language.

The 13-member committee, appointed by USDA and HHS in August 2003 has strong ties to food, drug, dietary supplement and other related industries. According to a Center for Science in the Public Interest article, the members of the advisory committee include:

- **Fergus M. Clydesdale** has held stock in and consulted for several food-related companies. His pilot food plant at the University of Massachusetts at Amherst receives corporate support. He has worked closely with the American Council on Science and Health (ACSH), an industry-supported group that downplays practically every food-related

health concern, including trans fat. He is chairman of the board of directors of the industry-funded International Life Sciences Institute (ILSI) and been a director of the industry-funded International Food Information Council (IFIC).
- **Vay Liang W. Go** is an associate director of a University of California at Los Angeles nutrition center that has received funding from numerous drug companies.
- **Penny M. Kris-Etherton** has consulted for Campbell Soup and Procter & Gamble, served on an American Egg Board advisory committee, and received research funding from the American Cocoa Research Institute, the Peanut Institute, Abbott Laboratories, and the Campbell Soup Company.
- **Theresa A. Nicklas** has conducted research funded by the Sugar Association (the trade association for the cane and beet sugar industry) and the Kellogg Company. She has urged the Food and Drug Administration (FDA) not to list refined sugars on food labels.
- **Russell Pate** has received at least $200,000 from ILSI and is an advisor to an IFIC project.
- **Xavier Pi-Sunyer**, of Columbia University College of Physicians and Surgeons, has been a paid consultant or advisor to numerous drug companies and received research support from Campbell Soup and Warner-Lambert.
- **Connie M. Weaver** has conducted research for the National Dairy Council, National Dairy Board, Wisconsin Milk Marketing Board, Mead-Johnson Company, and Procter & Gamble. She was a "Kraft Research Fellow" in 1998. Weaver has also served on the ILSI board of directors.

In response to the committee recommendations, 25 nutrition experts sent a letter to HHS calling for stronger, clearer language. While praising the underlying science used by the advisory board, the letter criticized the weakness of the committee's conclusions. "The scientific fine print in the advisory committee's report makes it clear that Americans should be eating much less saturated fat, trans fat, cholesterol, and added sugars," the Center for Science in the Public Interest's Margo G. Wootan said in a press release

As reported in an earlier Watcher article, the dietary guidelines have also been the subject of a Data Quality challenge filed by the industry-funded think tank Center for Regulatory Effectiveness.

In an attempt to free health guidelines from the influence of industry, Sen. Peter Fitzgerald (R-IL) offered a bill last year that would assign the responsibility of writing dietary guidelines to the Institute of Medicine. "Putting the USDA in charge of dietary advice is in some respects is like putting the fox in charge of the henhouse," Fitzgerald told *CongressDaily*.

However, many charge that Congress itself is too easily bullied by the powerful food industry. When Fitzgerald held a hearing last year on the issue, he was forced to hold the meeting in "the Commerce Committee instead of the Agriculture Committee subcommittee, which he also chairs, because the Agriculture Department and food companies had pressured Agriculture Committee not to hold the hearing," according to the *Congress Daily*.

With Fitzgerald set to retire next year, the issue will likely get swept under the rug.

Court Declines to Bar Regionally Restricted Vehicle Recalls

The agency charged with keeping motor vehicles safe and reliable has been allowing automakers to restrict vehicle defect recalls to selected states rather than conduct recalls nationwide. Now a federal court has declined to bar such regionally restricted recalls.

Regional Recalls

The National Highway Traffic Safety Administration (NHTSA) regulates motor vehicle defect recalls to serve the goals of the National Traffic and Motor Vehicle Safety Act. Under the Safety Act, NHTSA has broad investigative powers that allow the agency to identify defects, to declare the need for defect recalls, and to supervise any recalls whether initiated by the agency or voluntarily by automakers. *See* 49 U.S.C. §§ 30166, 30118-20. The identification of a safety defect triggers two important responsibilities: notice and remedy.

- NHTSA must require the manufacturer to notify all dealers and registered owners of the defective vehicles to inform them of the defect and encourage them to have the vehicles repaired as quickly as possible. *See* 49 C.F.R. §§ 577.2 & 577.5.
- For vehicles subject to safety defect recalls, automakers must promptly repair or replace the defective part or refund the owner's purchase price. *See* 49 U.S.C. § 30120.

Since the mid 1980s, NHTSA has been permitting a type of recall not contemplated by the Safety Act: a non-nationwide, regionally restricted recall. In such recalls, NHTSA allows automakers to restrict both notice of defects and the repair/ refund remedies to a few states rather than the entire nation. Auto safety groups have compiled several examples:

- Automakers conducted several safety recalls between 1992 and 1998 to repair vehicle parts that corroded when exposed to salt. NHTSA permitted the automakers in these cases to conduct the recalls in selected states rather than the entire country. Even though the corrosion occurred for all the affected cars when exposed to salt, NHTSA permitted the automakers to limit their recalls to the states that, in the automakers' judgment, used the most salt on their roads (and in which, therefore, the unsafe corrosion would occur most quickly). The various regional recalls for salt corrosion were inconsistent in identifying the states privileged to benefit from the recalls: some corrosion recalls included Missouri and Minnesota, for example, whereas other corrosion recalls simply ignored the same states. Moreover, even though California uses more salt in its mountain areas than many of the states that were included in these corrosion recalls, none of the corrosion recalls included any part of California.

- Ford Escorts were recalled to fix cracked fuel tanks that could leak, causing deadly fires. NHTSA actually permitted Ford to limit its recall to 12 states, in one of which --California -- Ford was allowed to limit the recall to ten counties. Although Ford apparently claimed to have selected for the recall only those parts of the country that experienced more than 2,500 "cooling degree days" (a measurement used to anticipate energy demand) in a

given year, NHTSA did not force Ford to justify choosing the "cooling degree day" measurement, the 2,500 days cutoff, or the exclusion of some areas that met or exceeded the criterion (such as Death Valley, the hottest location in the country, that logs more than 5,000 cooling degree days on average every year).

- A later recall also involved the risk of fuel tank fires. The Ford Windstar was recalled in 1999 because a fuel tank defect created a risk of stress fractures, which in turn created a serious risk of deadly fuel tank fires. Because the fuel tank's propensity to crack seemed partially related to hot temperatures, Ford restricted the Windstar recall to 11 states along with ten southern California counties and Nevada's Clark County. NHTSA permitted Ford to limit the recall to these areas even though they excluded New Mexico, North Carolina, Tennessee, Virginia, and the California county that includes Death Valley -- all of which have high monthly average temperatures equal or greater than the states included in the recall.

NHTSA codified the practice of regional recalls in an August 1998 letter to automakers that specified criteria for permitting regional recalls. NHTSA first distinguished two kinds of weather-related defects: (1) those that manifest after a single or short-term exposure to certain weather conditions, and (2) those that manifest only after longer periods of exposure. NHTSA declared that regional recalls would henceforth be inappropriate for the former category, but the agency permitted regionally restricted recalls for the latter whenever the manufacturer could demonstrate that "the relevant environmental factor ... is significantly more likely to exist in the area proposed for inclusion than in the rest of the United States."

Additionally, NHTSA stated in the letter that notice requirements in the case of regional recalls would apply to vehicles originally sold in covered states and vehicles currently registered in recall states at the time of the recall. The letter suggested that automakers would also need to conduct follow-up notifications two to three years later in order to reach owners who moved into covered states after the original recall notice. The letter did not, however, extend notice requirements to owners of vehicles that were purchased in the recall states but moved to a non-covered state before the recall. Further, the letter did not contemplate vehicles purchased and registered in non-covered states that nonetheless regularly enter the covered states (as, for example, in the case of vehicles purchased and registered by someone whose domicile is a non-covered state but whose occupation requires travel to a covered state).

Moreover, the August 1998 letter was styled as a set of "policy guidelines" rather than regulatory requirements. As such, the letter was never published in the Federal Register with an opportunity for public comments, and its actual policy content was apparently not applied rigorously across the board. For example, auto safety groups that challenged regional recalls in court could not identify any regional recalls in which NHTSA actually required the automaker to conduct the follow-up notice described in the August 1998 letter.

About the Court Challenge

Two auto safety groups, the Center for Auto Safety and Public Citizen, challenged the practice of regional recalls in federal court. They argued that the practice of regional recalls denies owners of defective cars in excluded states the notice and remedy they need and thus violates the Safety Act. They also charged that NHTSA's policy and practice of permitting regional recalls constitute rulemaking without notice and comment and are arbitrary and capricious, thus violating the Administrative Procedure Act (APA). The court's decision, entered Sept. 30, denied the APA claims, finding that the August 1998 letter was merely informal guidance rather than a prospectively binding rule.

More surprisingly, the court upheld the regional recall policy. The pivot of the court's rationale is the meaning of the key terms "defect" and "motor vehicle safety." On one level, the court decision differs from the plaintiffs' position because of a straightforward application of legal canons of statutory interpretation, albeit one which shifts the focus from notice and remedy to the defect itself. On another level, however, is a more complicated policy dispute about safety, risk, and equity. The text of the court decision manages the latter dispute by burying it in the former, resolving it without addressing it by recasting a philosophical disagreement as a semiotic one.

The major divergence between the plaintiffs and the court on the matter of statutory interpretation is which section of the statute needs to be interpreted. For the plaintiffs, the most relevant parts of the Safety Act at stake in the case were the notice and remedy sections. For the court, the case turned on the parts of the Safety Act that define which defects are subject to recall.

The plaintiffs stressed that the notice and remedy provisions of the Safety Act do not contemplate regional recalls but instead insist that notice and remedies will be provided to "each person registered under State law as the owner" of an affected vehicle. 49 U.S.C. § 30119(d)(1)(A). In fact, the Safety Act also explicitly provides for exemptions from the general notice and remedy requirements, but it limits those exemptions to a number of criteria, chief among which is whether the exemption would serve the public interest. *See id*. §§ 30118(d) (notice) & 30120(h) (remedy). NHTSA further cannot allow any such exemptions without first publishing a notice in the *Federal Register* and allowing the public to comment on possible exemptions. See id. These specifications of NHTSA's authority to grant any exemptions from notice and remedy requirements notably do not include exemptions of defective vehicles or vehicle parts located in areas in which the defect presents a comparatively lower risk of manifesting.

For the court, the Safety Act provisions that matter most are those that define the defects subject to notice and remedy provisions. The Safety Act defines two key terms as follows:

> "[D]efect" includes any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment.
>
> "[M]otor vehicle safety" means the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes non-operational safety of a motor vehicle.

Id. § 30102(a)(2), (8). According to the court, that "performance" is embedded in each definition "clearly implies that consideration must be given to the manner in which the vehicle is used." *Center for Auto Safety v. NHTSA*, No. 04-392 (ESH) (D.D.C. Sept. 30, 2004), at 20. For the court, the possibility that "defect" can mean a "defect in performance"

compels this conclusion:

> With this in mind, it becomes readily apparent that the statute does not outlaw regional recalls; rather, it envisions that the agency will exercise its discretion to determine whether a safety-related defect exists in a given scenario. To this end, it is logical to include a vehicle's locale of operation when considering its "use" and "normal operation." In other words, a motor vehicle may contain a safety-related defect when used in some states but not in others, and so if a vehicle experiences a significant number of failures in a specific climate, it is fair to conclude that the vehicle has a safety-related defect related to performance.

Id. at 21. In other words, the court concluded that vehicles with climate-induced defects are not inherently defective but, instead, are only defective in locales with the given climate conditions.

Accordingly, the court concluded that defect recalls need only apply to vehicles with the climate-related or condition-specific defects, which in the court's interpretation are vehicles in states with the given climates or conditions.

By shifting terrain and focusing on the interpretation of the terms that define defects subject to recall, the court construed the meaning of "defect" so broadly that it effectively allows NHTSA to designate a given defect with so many conditions and caveats that limitations on the scope of notice and remedy get built into the very definition of a defect. The court essentially allowed "defect" to permit geographically limited conditions so that it need not spend any time interpreting the seemingly universal language of the notice and recall provisions of the Safety Act.

In so doing, the court ignored one of the central canons of statutory construction: that the interpretation of any one clause of a statute must be read in light of its related terms, so as to recognize the larger coherence of any body of statutory law. Among other things, the Supreme Court has repeatedly held that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). The Safety Act does not permit any geographic exclusions from its notice and remedy obligations except insofar as any contemplated exclusions (whether geographically limited or total nationwide exclusions -- the statute does not distinguish between them) meet specified criteria and are subject to formal public notice and comment procedures.

Further, the Safety Act grants NHTSA largely unreviewable discretion in the determination of the existence of a defect, although it does not grant the same degree of discretion in the mandatory notice and recall provisions. The court's decision ignores this aspect of the Safety Act's structure as well, and it grants the agency far more discretion over the scope of notice and recall than the Safety Act itself intended.

By interpreting the terms defining defects as permitting the designation of geographically exclusive or otherwise condition-specific criteria, the court eviscerates these exclusion clauses. The court decision effectively permits two tiers of notice and remedy exclusions: total exclusions, still subject to the Safety Act, and partial exclusions, which could dodge the Safety Act's exclusion clauses by being embedded in the designation of the defect itself. The court did not consider the frightening prospect of NHTSA being so captured by industry influence that it designates a defect so specifically that an automaker would not need to provide notice or comment to a single person.

Consequences

Buried in the opinion's seeming logic and (as the court put it) "common sense" is any recognition of the consequences of these regionally limited recalls. Consider the court's easy elision of climate conditions with political jurisdictions as when, discussing climate-specific defects, the court observed, "In other words, a motor vehicle may contain a safety-related defect when used *in some states* but not in others." Climate conditions do not respect strict boundaries of county or state lines; a record heat wave, or a sudden winter storm requiring larger-than-normal use of salt to de-ice roads, could hasten the manifestation of a latent defect in a state excluded from a regional recall.

Moreover, people do not live their lives confined by state lines. Some metropolitan areas -- for example, Chattanooga, Kansas City, and New York City -- are sited right along their respective state lines, and people who live in Georgia, Kansas, and New Jersey often cross their state lines every day to work or shop in those cities. Those people could well be experiencing the same climate-hastened defects as citizens of the states they visit, but the arbitrariness of regional recalls could mean that these out-of-state citizens are excluded from notification or the free recall remedy of their defects.

In fact, the climate aspect of some of these defects does not necessarily mean, as the court would have it, that the defect does not manifest itself at all in other climes. In the cases of salt corrosion, for example, the climates of northern or mountainous states did not themselves induce corrosion; rather, the climate required heavy and regular use of roadway salts that caused the corrosion. The same car is vulnerable to salt-induced corrosion whether it is registered in Minnesota or Tennessee; the relative climate differences may mean only that the Minnesota car will corrode *more quickly* than the Tennessee car. Regional recalls create the inequitable result that the Minnesota driver could obtain the free remedy whereas the Tennessee driver would be forced to pay for replacement parts out-of-pocket. The court decision creates the absurd consequence that the Minnesota car has a "defect" whereas the Tennessee car, experiencing the same corrosion for the same reason, does not.

The court decision does not mean the NHTSA must pursue a practice of regionally limited recalls; it only permits NHTSA to continue along the course it set back in the mid-1980s. Whatever the possibilities for further court challenges of the practice, the ultimate problem is that NHTSA believes these arbitrary and nonsensical regional recalls are sound policy. They are only the latest example of NHTSA's unfortunate tendency in recent years to shortchange the public interest in favor of corporate special interests.

1742 Connecticut Avenue, N.W., Washington, D.C. 20009
202-234-8494 (phone)
202-234-8584 (fax)

In This Issue

Senate Pushes Through Corporate Tax Bill Over Holiday Weekend

The Senate commemorated the Columbus holiday Oct. 11 by holding a special session to pass the corporate tax bill, also known as the FSC/ETI bill. The previous week the House had passed the bill, which was designed to remove certain corporate tax subsidies on exports which had been ruled illegal by the World Trade Organization two years ago. The new tax breaks hit the nation at a time when corporate tax revenue has dropped to a historic low -- and the federal deficit has climbed to an all-time high. Last week, the Congressional Budget Office reported the FY 2004 federal deficit hit a record $413 billion.

Despite this deficit (see deficit article this issue), the Senate passed the 650-page corporate tax bill by a vote of 69-17. It includes $143 worth of tax breaks for companies over 10 years and is supposedly offset by loophole closures and other revenue measures.

Critics, however, see the bill as nothing more than billions of dollars worth of giveaways, passed right after the President signed into law a $176 billion unpaid-for extension of several tax cuts for individuals (see previous Watcher article for more). Ted Kennedy (D-MA), one of 17 senators who voted against the bill, said the bill "puts the interest of the big corporations above the public interests, above the hopes and dreams and everyday needs of the American middle class." It is easy to see why Kennedy and others took this position. And according to a *Washington Post* articleabout the bill, the $76.5 billion centerpiece tax cut, provides "tax deductions that would lower the corporate income tax rate from 35 percent to 32 percent for U.S. 'producers.'" These producers, though, are defined very broadly, and they include manufacturers, Hollywood studios, architectural and engineering firms, homebuilders, and oil and gas drillers, among others.

And although an official cost estimate shows that the bill is deficit neutral, many critics argue the measures laid out in the bill will actually lead to higher deficits in the future. A report by the Center on Budget and Policy Priorities contends that the bill includes a number of temporary tax cuts that will routinely be extended (also called "extenders"). As the report states, if the new tax cuts not really intended to be temporary are extended, "the bill's deficit neutrality will evaporate unless the costs of extending these provisions are offset. If these costs are not offset, extending these provisions would reduce revenues by *nearly $80 billion* through 2014."

One of the more contentious aspects of the bill concerned a provision to grant the Food and Drug Administration authority to regulate tobacco. Senators originally saw the corporate tax bill as their best chance to pass this type of legislation, however it was not included in the final conference report, as enough senators supported a measure that didn't include the FDA provision.

There's speculation President Bush may wait until after the election to sign the bill, although his administration supports it.

One thing is clear -- as columnist David Broder noted in a recent column in the *Washington Post* -- Congress recessed without having passed an FY 2005 budget resolution, nine of the appropriations bills, and a needed increase on the national debt limit. They were however, able to push through excessive tax relief in a special holiday session. Congress should be as focused -- if not more -- on completing their budget priorities as they have been on making sure they push through tax relief.

Federal Spending Hits Ceiling Forcing Treasury to Act

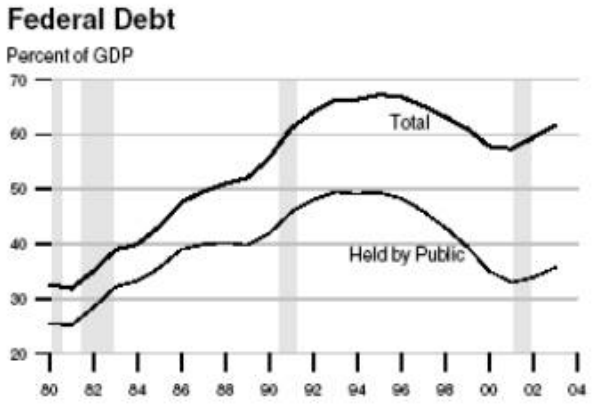
Last week, federal spending again reached the debt limit put in place by Congress -- the legal amount, above which the federal government cannot borrow. If borrowing exceeds this ceiling, currently set at roughly $7.4 trillion, immediate action is necessary. Treasury Secretary John Snow was recently forced to take action to ensure that normal monetary transactions can continue.

Citing his "commitment to maintaining the full faith and credit of the U.S. Government," Snow sent a letter to Congress Oct. 14 informing members they must increase the debt limit by mid-November, at which point all temporary steps, accounting gimmicks, and borrowing activities the Treasury is capable of will have been exhausted. Officials predict this will happen by Nov. 24, the week Congress reconvenes for its lame duck session.

Meanwhile, Snow has suspended payments into certain government pension funds, including the Government Securities Fund of the Federal Employees Retirement System. Once Congress raises the debt ceiling, all funds affected by this temporary action will be restored.

Since the establishment of the debt ceiling in 1917, the Treasury has had to act, on five separate occasions, to briefly suspend pension funds in order to delay hitting the borrowing limit. Three of those have occurred under President Bush -- in 2002, 2003, and now 2004 -- according to the *Washington Post*. At the start of this administration, the debt ceiling was $5.95 trillion, and had been last raised in 1997. In May 2003 Congress raised the debt ceiling to its current level, and when they raise it again next month as expected, it will mark the second consecutive year the debt limit has needed to be amended.

The frequency with which Congress has been reaching their spending limit is no coincidence. Excessive tax cuts, which have not been offset, as well as increased spending and general fiscal mismanagement, have led to a deficit situation that is rapidly spinning out of control. As the chart below indicates, such actions by Congress and the administration over the past four years have caused the federal debt as a percentage of GDP to rise again, after it had consistently dropped during the period 1996 to 2000. Clearly new, responsible fiscal management policies are urgently needed to regain control of current record federal deficits and debt before further and deeper damage is done to our economy and future.



A Tale of Two Deficits -- Trade and Budget

In the past few days, the government released separately two numbers showing record deficits:

- The final fiscal year 2004 federal budget deficit of $413 billion -- the highest dollar value on record
- A monthly trade gap in August rising to $54 billion -- the second highest on record.

Federal Budget Deficit

The final numbers show that the deficit has increased by $38 billion over the previous year's $375 billion. A recent report from the Center for American Progress documents the 2000-2004 period as having the largest deterioration in the deficit situation in the last 50 years, with the size of the swing from surplus to deficit in the amount of 6.1 percent of GDP (including the Social Security surplus).

Meanwhile, the government has reached its own statutory limit on the national debt and Treasury Secretary Snow is undertaking accounting tricks to prevent breaching it until after the elections (see debt ceiling article this issue).

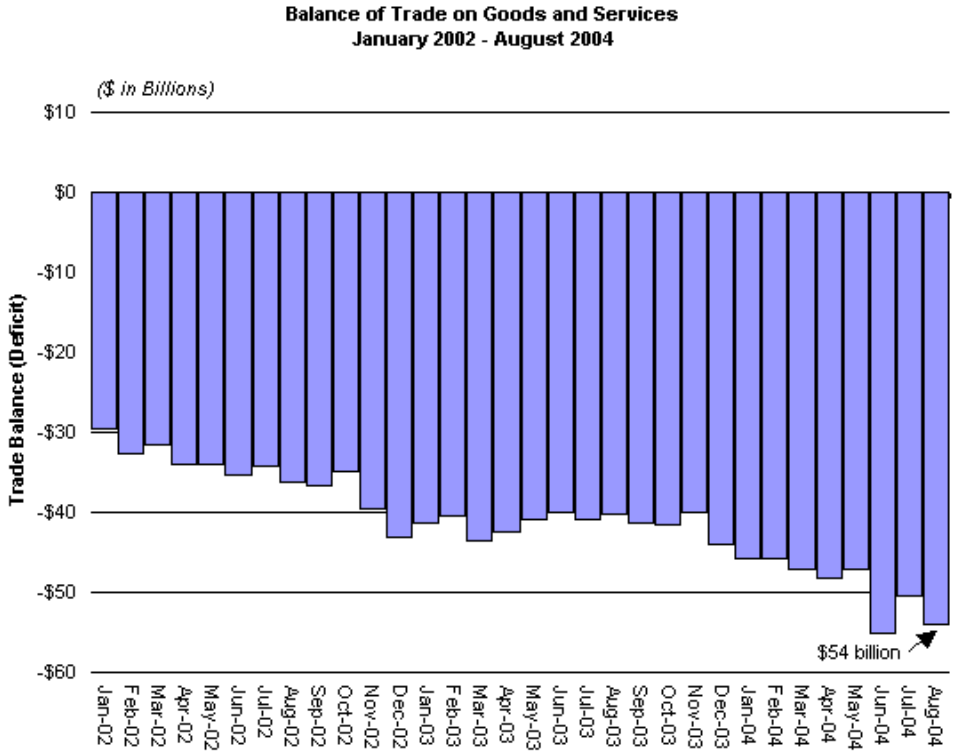
Trade Deficit

The trade deficit has continued to grow. The monthly trade deficit that stood at just $10 billion in 1998 is more than five times that today. While a trade deficit may not be harmful in the short run, in the long run a large trade deficit carries greater risk of financial turmoil -- and the possibility of economic crisis.

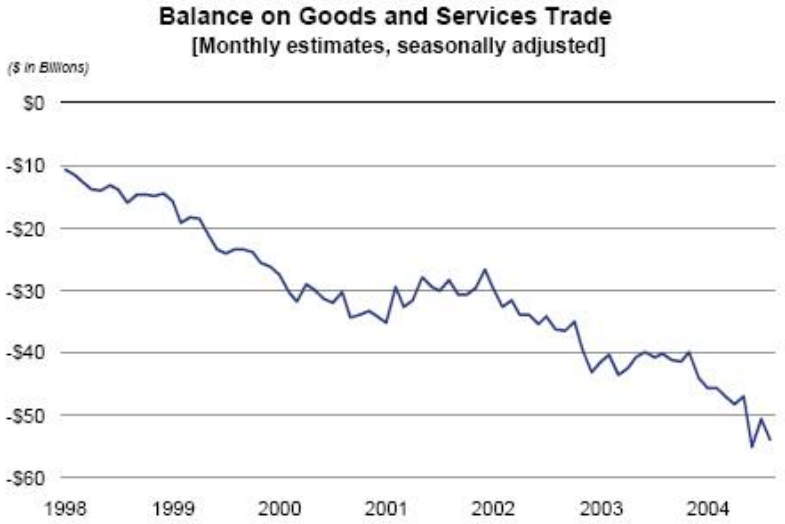
The relation between budget and trade deficits is very complex. For an overview see *Budget and Trade Deficits: Linked, Both Worrisome in the Long Run, but not Twins*

This recent speech by the Federal Reserve Governor highlighted this risk:

"In the long run, however, both deficits could become much more worrisome. ... At some point, continued large-scale trade deficits could trigger equilibrating, and possibly dislocating, changes in prices, interest rates, and exchange rates. Continued budget deficits will steadily detract from the growth of the U.S. capital stock and may also trigger dislocating changes."



Source data: Bureau of Economic Analysis



Source: Bureau of Economic Analysis

Senate Recesses, Completes Only 4 of 13 Spending Bills

After passing the Corporate Tax Bill on Columbus Day, the Senate approved with little debate measures to fund both the Military Construction and Homeland Security appropriations bills for FY 2005, which began Oct. 1. Together with the Defense and the District of Columbia appropriations bills Congress recently approved, these bring the total passed to only four of the thirteen bills needed to fund discretionary spending for FY 2005.

Thomas E. Mann of the Brookings Institution summarized this failure for the Washington Post saying, "This [congressional] session ranks among the least productive and most contentious in modern legislative history."

The $10 billion Military Construction bill appropriated $5.5 billion towards military construction, $4 billion towards family housing, and roughly $500 million towards other programs, including a Naval Security Investment Program and Chemical Demilitarization Construction. The bill was a $687 million increase over the FY 2004 appropriation, and a $450 million increase above President Bush's request.

The Homeland Security appropriations bill provides $32 billion for the operations and activities of the Department of Homeland Security. This is a $1.1 billion increase from FY 2004 levels, and almost $500 million above the President's request. The bill's major expenses include $9.8 billion appropriated towards border protection, and $5.5 billion appropriated towards transportation security. The $32 billion total excludes both the $2 billion spent for the recovery from hurricanes Charley and Frances, as well as $6.5 billion in pending supplemental funds that will go towards relief for hurricanes Ivan and Jeanne.

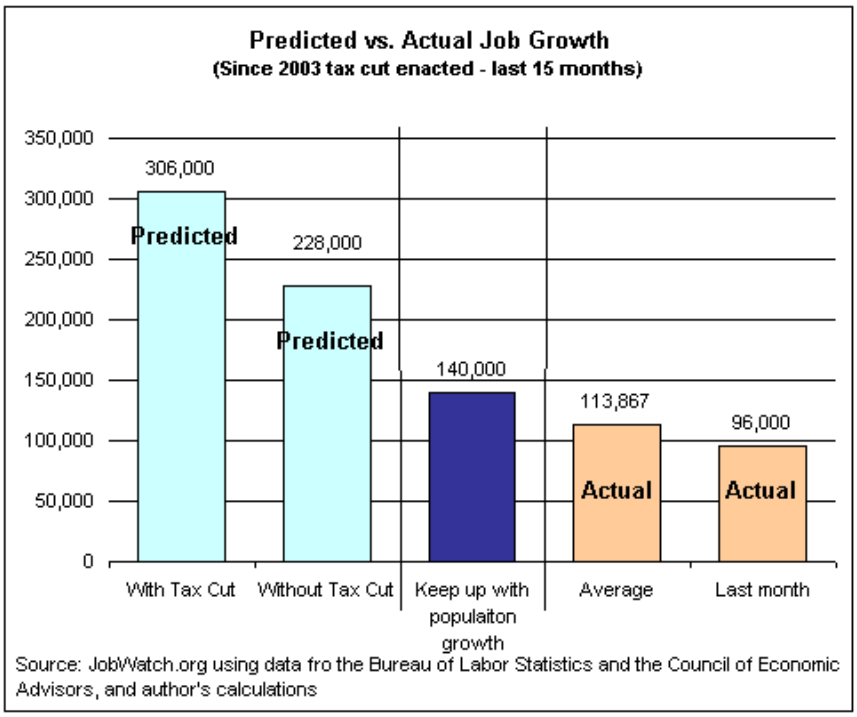
In lieu of completing its fiscal business, Congress passed a CR (continuing resolution) to fund all other programs at FY 2004 levels until the remaining nine bills can be addressed in the post-election lame duck session. Those will almost certainly be inserted into a massive omnibus spending bill, which, because it would contain the vital appropriations bills, will give members the opportunity to attach all sorts of measures to benefit their own constituents. Keep an eye out for excessive pork barrel spending when legislators reconvene.

Economy and Jobs Watch: Employment Report Again Shows Weakness

The U.S. employment situation remains weak as the Bureau of Labor Statistics September report showed an increase of just 96,000 jobs. That figure is far below the level needed to keep pace with overall population growth.

So is the monthly average of 114,000 new jobs created since the administration's 2003 tax cuts were enacted. This average also falls well short of the 306,000 new jobs the White House Council of Economic Advisors predicted would be created each month if those tax cuts took effect. (See graph below.)

The evidence clearly shows the administration's economic policies have not worked as advertised. We now have a long way to go to make-up for lost time and must replace current ineffective policies with ones that would create the strong labor market this nation needs and deserves.



Delaware Professor Sues Pentagon for Coffin Photos

A University of Delaware professor of communications is suing the Pentagon to make public the photos of returning soldiers' coffins to American soil.

The lawsuit challenges a 1991 ban on media coverage of fallen soldiers' coffins flown to Dover Air Force Base in Delaware before being returned to their hometowns around the country. Former network television correspondent Ralph Begleiter, together with the National Security Archive, had filed requests under the Freedom of Information Act to obtain photos and moving recordings of all coffins passing through Dover since October 2001.

Earlier this year, Russ Kick, an Arizona resident, started a firestorm of controversy after he posted on his website The Memory Hole hundreds of such photos obtained from the Pentagon through a FOIA request. The photos ran on the front pages of major newspapers the next day and prompted a national discussion about what the public should know about the human cost of war.

The Pentagon claims the ban protects the privacy rights of the fallen soldiers and their families, although they have made exceptions to the ban in several instances. None of the photos released to Mr. Kick, which the Pentagon called a mistake, gave away the identities of the soldiers. Instead, they were pictures of coffins draped in the American flag, some inside the shimmering stark holds of military aircraft. The photographs demonstrate the care with which the military handles the remains of the fallen soldiers. For some, the pictures honor the price paid by those individuals. For others, they show the true cost of war and should be public. And for a few, the photos document a side of war they would rather keep hidden from the public.

Senate Chairman Refuses to Release Richard Clarke's Testimony

For almost four months Sen. Pat Roberts (R-KS), Chairman of the Senate Intelligence Committee, has refused to release declassified testimony related to the 9/11 investigation from former White House Counterterrorism Chief Richard Clarke. Given the critical nature of Clarke's public statements and the proximity of elections, political motivations for the repression are strongly suspected.

Clarke testified behind closed doors in June 2002 to the joint House-Senate inquiry into 9/11. Then last March Clarke testified publicly before the 9/11 Commission strongly criticizing the actions of President Bush and officials in his administration for not taking adequate steps to address terrorist risks.

Many Republican leaders claimed that Clarke's public testimony was inconsistent with the earlier classified statements. However, since the earlier testimony could not be released, the general public could neither confirm nor deny these charges. Clarke strongly denied the accusations of inconsistency, asserting that the earlier hearing simply never covered the certain material.

Ironically, Roberts was among several congressional leaders who had called for declassifying Clarke's testimony so it could be made public. However, since June 25 this year, when the National Security Council did declassify Clarke's testimony, Roberts has repeatedly refused to make it publicly available -- despite numerous requests by Sen. Jay Rockefeller (D-WV), the vice chairman of the Intelligence Committee.

Critical Habitat Proposed for Endangered Species Challenged Under Data Quality Act

The Fish and Wildlife Service (FWS) proposed designating 376,095 acres essential to the survival of the southwestern willow flycatcher. The southwestern willow flycatcher is an endangered bird whose habitat covers the southwestern portion of the United States. Information related to this endangered species was challenged under the Data Quality Act in 2003 and may have helped shape the habitat designation.

In March 2003, an Arizona rancher challenged guidance criteria that calculate the effect grazing has on the species. The Forest Service had used that criteria to produce an environmental assessment alternative to prohibiting the rancher's livestock from grazing in potential flycatcher habitats. For more information on the challenge see OMB Watch's analysis.

Based on the Federal Register notice, the FWS puts little stock in the critical habitat designation. FWS stated, "In 30 years of implementing the ESA, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species." Apparently, only 36 percent of species listed as endangered have designated critical habitat. The majority of designations, including the willow flycatcher's, result from litigation.

The FWS has had to respond to several lawsuits about the willow flycatcher's habitat designation. While this most recent adjustment to the designations is in response to an environmental group's complaint, concerns emerge about the other influences the proposal might reflect.

Even though the designation plan proposes almost 400,000 acres of critical habitat there are significant portions excluded from the mandatory protections of the Endangered Species Act. FWS makes it clear only lands currently occupied by the southwestern willow flycatcher are being proposed as critical habitat. Considering the rancher's complaint focused on restrictions placed on potential habitat, the proposed rule's emphasis on inhabited areas could ease requirements enough to allow grazing.

Apparently FWS is more interested in clarifying the exemptions than the protections. For instance the proposed rule would exempt several military bases from critical habitat designation because of the benefits of unimpeded national security training outweighed the benefits of protecting this species of bird. Other proposed exemptions include 19,000 acres in Arizona and 10,000 acres in California.

Congress Passes Limited FOIA Exemption for Satellite Imagery

The House and Senate adopted a new Freedom of Information Act (FOIA) exemption without the overly broad language originally proposed by the Senate, which would have provided a blanket prohibition on disseminating any commercial satellite imagery or derived products. The exemption was part of the 2005 Defense Authorization Act passed Oct. 9.

Clarifications were made in the language during the House-Senate conference on the bill after public interest and access organizations pointed out concerns with the new exemption. The original Senate language properly stated that commercial data is prohibited from sale under the Land Remote Sensing Policy Act of 1992. However, it would have prohibited the release of "any imagery and other product that is derived from such data." That broad statement could have cover information usually provided to the public regarding disasters, international incidents, wars, and other news items. Not only would the information have been exempt from disclosure, it would have been prohibited from release even if government officials believed it should be released.

The new adopted language clarifies that only information that is protected "for reasons of national security" and is under license pursuant to the Land Remote Sensing Policy Act qualifies for exemption. This properly limits the exemption to data and products that are currently protected under law. The new language also clarifies that any of the exempted information cannot be withheld from Congress.

Related OMB Watch article: "Senate Approves FOIA Exemption for Satellite Images"

Justice Asks to Submit Secret Evidence on Transportation Rule

The Justice Department has requested permission to submit evidence to the court under seal in a case about a secret security rule. The case involves a secret transportation security rule that requires airline passengers to show identification in order to fly.

A private citizen, John Gilmore, challenged the requirement and sued the government claiming the rule infringes on citizens' right to travel freely. While airline security claimed that the requirement for ID existed they could not cite a specific rule. Initially, government officials claimed that they could not even confirm the existence of the security rule. Then after realizing that an obscure maritime security rule published in May 2004 mentioned the rule, the government acknowledged the rule's existence but has still refused to disclose its contents.

The Justice Department claims that the rule cannot be publicly discussed because it qualifies as Security Sensitive Information (SSI), which is a new category of information that allows the Transportation Security Administration (TSA) to withhold unclassified information from the public except on a need to know basis.

The rule apparently derives from a temporary secret security directive issued during the mid 1990s that instructed airlines to request photo identification from passengers. Soon after the 9/11 attacks the TSA issued a new order upgrading the

request to a requirement.

The 9th Circuit Court of Appeals ruled against the government's motion to file documents under seal. Officials have appealed the decision and the court is expected to make a decision soon.

OpenTheGovernment.org Targets Secrecy in Post Ad

OpenThegovernment.org, a broad-based coalition of more than 30 groups dedicated to fighting government secrecy and strengthening open government, placed a quarter-page **ad in the *Washington Post*** Oct. 13. The primary message states, "Our Safety Depends on the Free Flow of Information ... Let's Turn the Tide on Secrecy." The coalition placed the ad as part of its campaign to raise awareness about the problems of unnecessary government secrecy, which undermines public health and security. Learn more.

New Corporate Tax Bill Limits Charitable Deductions

While conferees rejected last minute efforts to attach provisions of both the CARE Act and the Houses of Worship bill to the corporate tax bill, the legislation sent to the president does contain three provisions of particular interest to the nonprofit sector.

The final bill:

- Limits charitable deductions for vehicle donations to the sale price obtained by the charity
- Limits the value that taxpayers can claim on the donation of a patent or intellectual property to a charity
- Requires increased reporting for non-cash charitable contributions such as property.

Vehicle Donations

Beginning Jan. 1, 2005, when a person donates a vehicle and claims the value is $500 or more, the exact deduction will depend on how the charity plans to use the vehicle. If the nonprofit sells the vehicle, the donor will only be able to deduct the amount that the organization got from the sale, if the charity notifies the donor of the final amount. If the nonprofit uses the car for "significant" tax-approved charitable work, the donor can claim the fair market value of the donated vehicle. Nonprofits will be penalized for providing fraudulent acknowledgments to donors.

Sen. Charles Grassley (R-IA) calls the changes "commonsense reforms [that] will go a long way toward ending the abuses in car donations" documented by the Government Accountability Office. The GAO found wide discrepancies between the values that some auto donors claim on their tax returns and the actual worth of the cars they give. A November 2003 GAO report notes that excessive tax valuations of donated vehicles cost the U.S. Treasury $654 million in tax revenue in 2000.

In a letter sent to Treasury Secretary John Snow during consideration of the changes, representatives of two dozen charitable groups argued, "Under such a proposal, a taxpayer's actual deduction amount would be uncertain at the time of a contribution, and potential donors would not be able to compare the relative benefits obtained by donating their vehicles, trading them in to a car dealer, or selling the vehicles themselves. ... We believe this approach would greatly discourage and reduce future vehicle donations to charities and increase the cost of administering such programs, and we would respectfully ask that the Treasury join us in opposing any such proposal."

Lawmakers, however, believe that the current problems with vehicle donations necessitate the changes and that the new law will not be overly burdensome. The U.S. Treasury will develop rules implementing the new law in the coming months, and lawmakers and charities will be watching closely.

Contributions of Patents or Intellectual Property

In December 2003, the Internal Revenue Service (IRS) issued a notice that states the IRS "is aware some taxpayers, who transfer patents or other intellectual property to charitable organizations, are claiming charitable contribution deductions in excess of the amounts to which they are entitled under §170 of the Internal Revenue Code." Congress decided to act to remedy this problem.

HR 4520 provides that if a donor contributes a patent or other intellectual property to a charitable organization, the donor's initial charitable deduction is limited to the lesser of the donor's basis in the contributed property or the fair market value of the property. The donor is allowed to deduct additional amounts in subsequent years based on a percentage of the income received by the charity with respect to the contributed property. The charity must report income received or accrued with respect to the contributed property to the IRS. The donor must obtain written confirmation from the charity regarding any income from the donated property. It will be effective for contributions made after June 3, 2004.

Non-Cash Donations

Current law requires individual donors to obtain a qualified appraisal of the property being donated for deductions over $5000. HR 4520 will extend this requirement to C corporations. It will be effective for contributions made after June 3, 2004. It also requires donors to attach the appraisal to their tax return if the contribution exceeds $500,000.

Charities acknowledge that there are problems with the current system of monkish and in-kind donations, but many feel that the burden of policing tax breaks should not be on recipient organizations. There is also concern that the new rules will chill these types of contributions.

The charitable deduction provisions in the bill could be just the beginning of a series of tax changes affecting charities. The Finance Committee is currently considering proposals to curb what they call "a wide range of abuses" in the charitable arena, including "charities used as tax shelters for corporations and charitable board members steering business to their private firms."

Independent Sector Names Accountability Panel

Congress recessed without taking action on Senate Finance Committee staff proposals outlined in a July discussion draft. However, the Finance Committee is pursuing the nonprofit accountability issues. It has asked Independent Sector (IS) to form a panel to recommend measures that would increase accountability and good governance in the sector. Independent Sector recently announced its panel, comprised of 25 nonprofit and philanthropic leaders from both public charities and private foundations. Independent Sector's president, Diana Aviv, will serve as executive director, and Patricia Read, IS's senior vice president for public policy and government affairs, is the project's director.

The panel will establish two advisory groups, one of prominent community leaders, including those from other sectors. The second advisory group will include a range of academic and legal advisors. The Panel will also create five working groups to study and provide recommendations on issues involved in governance, transparency and financial accountability.

Specifically, the five working groups are:

- Governance
- Legal analysis
- Oversight (IRS, state issues, self-governance issues)
- Transparency
- Small organizations.

Independent Sector is currently raising money from community and private foundations, as well as public charities, to fund this endeavor. The funds, exclusively managed by IS, will be devoted entirely to the project.

FEC To File Response to BCRA Court Ruling

The Federal Election Commission (FEC) has told an appeals court it will file a statement noting which rules it will defend from a lower court ruling overturning regulations implementing the Bipartisan Campaign Reform Act of 2002 (BCRA) by Nov. 8. Rules that are not appealed will have to be reconsidered by the agency. In a recent meeting FEC Vice-Chair Ellen Weintraub indicated that its exemption for Internet communications may need to be reconsidered. The FEC must also decide whether to defend its exemptions to the electioneering communications rule for 501(c)(3) organizations and unpaid broadcasts.

Update on Church Electioneering

The corporate tax bill has been sent out of conference without provisions from the "Free Speech Restoration Act," which would have allowed churches to endorse candidates and fund partisan electioneering activities. However, that has not stopped a rash of churches from directly or indirectly endorsing candidates this election season.

Under the Internal Revenue Code, all organizations exempt under section 501(c)(3), including religious organizations, are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of, or in opposition to, any candidate for elective public office. Clergy, members of congregations, and others can endorse candidates on their own behalf, volunteer for campaigns, or even run for public office, so long as they do not use the resources of a 501(c)(3) organization.

However, there are no regulations that clearly define what activities are allowable and what are not. Consequently, some religious organizations have pushed the boundaries of the law, even directly endorsing candidates from the pulpit. Campaigns and candidates have also sought support from religious organizations, and this year has seen a new push in that direction.

Nonprofits are calling upon the Internal Revenue Service (IRS) to investigate violations. Americans United for Separation of Church and State filed complaints regarding churches such as the First Baptist Church of Springdale, AR, and Friendship Missionary Baptist Church of Miami, FL.

The current fight over the right to endorse candidates from the pulpit is not new. This year has seen complaints ranging from charges against Jerry Falwell for using his ministry to support Republicans to African-American churches endorsing Democrats.

Current laws allow unlimited 501(c)(3) time and money to address issues, including comment on public issues from the pulpit, in newsletters, etc.; engage in public education campaigns; publish pamphlets, research, newsletters and analysis; litigate; comment on proposed regulations; participate in agency and commission proceedings and nonpartisan voter education, registration and get out the vote activities.

Comments Needed on Alternative Guidelines to Prevent Terrorist Financing

A group of charitable and philanthropic organizations has released a draft "Principles of International Charity" that can be used to prevent diversion of charitable funds to terrorists. Both domestic and international nonprofits are being asked to comment on the draft, which is an alternative to the Dept. of Treasury's November 2002 guidelines. OMB Watch and other groups have called on Treasury to withdraw their guidelines .

In April 2004 the Treasury Department invited a group of charitable sector organizations which had been critical of its "Voluntary Best Practice Guidelines" to engage in a dialog about revising them. In response, representatives of more than 25 organizations, including OMB Watch, and umbrella groups like the Council on Foundations and Grantmakers Without Borders, set up a working group independent of Treasury. Over the past several months, the working group drafted the "Principles of International Charity" as an alternative to the Treasury Guidelines.

The "Principles" briefly describes the history of U.S. nongovernmental organizations supporting responsible international charitable activities and lists eight fundamental principles of accountability that guide international work. A commentary section fleshes out the principles with specific issues and examples.

The working group will meet with representatives of the Treasury Dept. in the next few months to discuss using the "Principles" as the basis for revisions to Treasury's guidelines.

Comments on the "Principles" can be sent to Kay Guinane at OMB Watch online or by faxing to 202/234-5150. Please submit comments by Oct. 29, 2004. See the full text of the draft Principles.

Gaps in Homeland Security Benefit Bush Campaign Funders

The Bush administration has weakened, opposed, or failed to initiate proposals to address security gaps that leave chemical and nuclear plants, hazardous material carriers, shipping ports, and drinking water facilities vulnerable to terrorist attacks, according to a new report that links these failures to Bush campaign funding from the very industries that oppose needed regulation.

According to the new Public Citizen report *Homeland Unsecured: The Bush Administration's Hostility to Regulation and Ties to Industry Leave America Vulnerable*, the Bush administration "has abdicated its responsibility to protect the American homeland from the risk of potentially catastrophic terrorist attacks upon chemical plants, nuclear reactors, hazardous materials transport, seaports and water systems."

"In many cases, the administration and its Republican allies in Congress have either opposed security reforms or obstinately refused to act even though ready solutions are obvious," the report maintains.

Five Critical Infrastructure Vulnerabilities

Chemical Plants

Terrorist attacks on any of the nation's 15,000 chemical plants could kill millions. The Army concluded in a 2001 study that an attack on a single plant could kill or injure 2.4 million people, and the Environmental Protection Agency has identified 123 plants that could, in the event of accident or attack, endanger one million people or more.

In fact, terrorists have already entertained these deadly possibilities, according to the report. Evidence from the trial of the 1993 World Trade Center bombers revealed that the terrorists had stolen cyanide from a chemical plant and planned to release it in the WTC ventilation system. The FBI learned that Mohammed Atta, ringleader of the 9/11 attacks, landed a plane in Tennessee in March 2001 and asked a local man what chemicals were contained in the storage tanks he had flown over. Those tanks, it turns out, held more than 250 tons of sulfur dioxide.

Despite the obvious threat, the Bush administration has not begun to secure chemical plant facilities and has in fact opposed measures to require security improvements:

- The administration joined forces with the chemical industry to pressure Congress to reject the Chemical Security Act (S.157), which would have phased out unsafe technologies and required chemical plants to use safer chemicals and technologies when available and feasible.
- The administration scrapped an EPA effort to use its Clean Air Act authority to increase security at chemical plants. The administration "totally overruled EPA's fledgling initiative by allocating responsibility for chemical security to the new Department of Homeland Security (DHS), even though DHS has no authority to enforce the Clean Air Act or to establish and enforce new plant security standards," the report added.
- DHS has subsequently failed to issue mandatory security

From the Report
***Homeland Unsecured: The Bush Administration's Hostility to Regulation and Ties to Industry Leave America Vulnerable*:**

Eight-five percent of the nation's critical infrastructure is controlled by the private sector. "Homeland security and national preparedness therefore often begins with the private sector," the 9/11 Commission's report says. Security expert Stephen Flynn, director of the Hart-Rudman commission that concluded prior to 9/11 that America's greatest security challenge was the threat of a catastrophic terrorist attack, states flatly that "without standards, or even the threat of standards, the private sector will not secure itself."

Yet the administration has failed to use its executive powers or support legislation to mandate regulatory steps that can and should be taken without large taxpayer expenditures. In some cases, it has played a leading role in blocking critical measures.

This reflects the administration's hostility toward the reasonable regulation of industry, even where the safety and security of

regulations. Instead, it has promoted voluntary industry standards, despite its earlier admission in October 2002 that voluntary guidelines are insufficient.

Nuclear Power Plants

Although the phrases "dirty bomb" and "radiological device" began to achieve wide circulation after 9/11, the administration has not addressed the over 100 potential dirty bombs already in the United States: the 103 nuclear reactors in 65 power plants across the country. In fact, according to the 9/11 Commission staff, nuclear power plants were among the ten targets originally planned by al Qaeda for the terrorist attacks of Sept. 11, 2001.

The safety gaps in nuclear power facilities are frightening, as are the administration failures cited by the report:

- Security guards failed to protect nuclear power plants nearly half the time in mock terrorist attacks conducted from 1991 to 2001. The Nuclear Regulatory Commission has subsequently allowed the nuclear power plants' own lobby to control terrorism preparedness tests, and the lobby has in turn contracted the tests to the same company that provides, in most nuclear facilities, the very security forces that must be tested.
- The NRC proposed in March of this year to weaken, not strengthen, fire safety regulations for nuclear power plants.
- The Government Accountability Office identified three major security flaws that remained unaddressed one year later. Among the flaws: the NRC assesses power plant security plans in an inadequate paper review without on-site visits, and it has no plan to conduct follow-up reviews of plants which the commission has cited for violating security requirements.

Hazardous Materials

The report also concentrates on the dangers that crisscross the country every day on the highways and the rails: toxic chemicals and other hazardous materials (hazmats) that are routinely transported without post-9/11 security improvements, *even through major metropolitan areas*.

The numbers are staggering, as are their implications. Over a million carloads of hazardous material traverse the rails annually, and over 75,000 trucks transport hazardous materials every day on the nation's roadways. These dangerous materials regularly pass through major population centers, including the nation's capital. "Ninety-ton rail cars that regularly pass within four blocks of the U.S. Capitol building in Washington, DC, contain enough chlorine to kill 100,000 people within 30 minutes and could endanger 2.4 million people," the report adds.

The administration has squandered several opportunities for addressing the security gaps in these areas, according to the report, especially in the area of hazmat truck transportation. The administration has failed to conduct a comprehensive assessment of the dangers in this area and has instead weakened or delayed regulations to improve hazmat truck security. The administration issued a final rule that exempted hazmat carriers from providing drivers with written routes and conducting pre-trip inspections to ensure the integrity of the truck itself. Further, the administration has not mandated immediate background checks of hazmat drivers but, instead, delayed a proposal for fingerprint-based background checks until 2005.

Moreover, although Washington, DC obviously remains a prime target for terrorist attack, the administration recently informed Congress that it intends to allow the 8,500 hazmat rail cars that pass through Washington every year to continue to do so. The report notes that a Transportation Security Agency official told Congress that "efforts to reroute trains away from major cities would be 'quite limited.'"

Ports

Long before ABC News exposed post-9/11 weaknesses in port security by shipping a load of depleted uranium into the United States undetected, the lack of security in the country's 361 sea and river ports has been well known. The administration can verify the contents of only four to six percent of all containers, even three years after 9/11. Moreover, as revealed in a recent letter from Rep. Jim Turner (D-TX) to Homeland Security Secretary Tom Ridge, the administration has not satisfactorily implemented "key recommendations for correcting the identified deficiencies in inspections. In light of the fact that [a report by the DHS Inspector General] deals with the grave threat of a nuclear attack, and the Department has cited the interest of al-Qaeda in such an attack, the report requires immediate action by the Department."

The Public Citizen report identifies other administration failures that keep ports unsecured. Among other things, the administration has failed to push for the funding needed to secure ports, and its 2005 budget proposal actually would zero out a pilot program for testing the security of containers entering the country.

Americans is at grave risk. Within days of taking office, the Bush administration began setting up hurdles in the regulatory process and installing industry executives and their allies in the government. A particularly telling appointment was that of John Graham, a well-known industry-backed academic hostile to regulation, who was given the job of regulatory czar within the White House Office of Management and Budget. The administration has hired more than 100 industry lobbyists, lawyers or company executives to fill high-level government jobs during Bush's tenure in office.

While business lobbyists work within the administration to block regulatory initiatives and dismantle existing ones, industries that would be affected by new security measures have lobbied hard against such proposals -- and found much success. And, as this report shows, these same industries have provided strong financial support for the Bush presidential campaigns and the Republican Party.

The chemical, nuclear, hazardous materials transport, ports and shipping, and water utility industries have contributed $19.9 million to Bush and the Republican National Committee since the 2000 election cycle. Thirty of Bush's top fundraisers — 10 so-called "Rangers" and 20 "Pioneers," who each raise at least $200,000 and $100,000, respectively — hail from those industries. In addition, these industries have spent more than $201 million to lobby the administration and Congress since 2002. . . .

The Bush administration and many experts believe that terrorists will attempt to strike again at the United States. Success in thwarting such an attack may well depend on whether the government *requires and helps* the private sector to adopt strong defenses. Thus far, however, the administration has shunned mandatory protective regulation, legislation and supportive federal funding, professing instead its faith in "voluntary" efforts by industry. Blinded by its anti-regulation ideology and its allegiance to political contributors, the administration has been unwilling to use its executive powers or clout when a Congress led by [its] own party has refused to enact necessary legislation or provide essential funding. This is a tragic mistake that must be confronted if the United States is going to secure our highly vulnerable vital infrastructure against terrorism.

Water Systems

Water systems are important, obviously for drinking water and use in agriculture and the food industry, but water systems across the country also hold chemicals such as chlorine that are used to remove contaminants. Not only could water systems be threatened by contamination of the water itself, but there is also the deadly possibility that an attack on the stored chemicals would release toxic clouds into populated areas.

The administration is not adequately addressing the security of water systems, according to the report. The president himself has opposed increased federal funding for water infrastructure, and the administration has tried to cut funding for the revolving loan funds that states need to upgrade water systems. The administration appears to have concentrated its efforts instead on measures to force local governments to sell off public water systems to private companies.

Follow the Money

Aside from compiling and documenting the administration's failures to secure these five areas of critical infrastructure, the new report also makes the link between these failures and industry money flowing into Bush and Republican campaigns. The industries seeking to avoid security regulation -- chemical, nuclear, hazmat transport, ports and shipping, and water utility industries -- are major contributors to Bush and GOP campaign funds, number among the "Ranger" and "Pioneer" elite bundlers of campaign contributions, and have spent millions during the last two years on vigorous and successful lobbying.

Recent Studies Show Lack of Enforcement of Environmental Laws

Enforcement of federal environmental law has declined significantly during the Bush years, according to several recent studies, even as the 30-year trend of environmental improvement has begun to reverse course.

Declining Enforcement

A recent report by the Environmental Integrity Project (EIP) indicates that the Bush Department of Justice has filed 75 percent fewer lawsuits against polluters than the previous administration. Whereas Clinton launched 152 lawsuits against polluters in the first three years of his administration, Bush has filed only 36. The decline is even starker when the focus shifts to power plants: the Bush administration has pursued only three lawsuits against energy companies, in a 90 percent drop from the 28 filed by the Clinton administration.

Though EPA did issue large penalties to petroleum refineries this year, settlements would have been larger and reached more quickly if the Justice Department had pursued litigation, according to the EIP report. Even in high profile cases, such as the recently reported evidence that industry attempted to cover up data showing high levels of lead in the nation's drinking water, the Justice Department has turned a blind eye. A study by the Transactional Records Access Clearinghouse (TRAC), which has compiled all manner of government data, including environmental enforcement data, also found that criminal prosecution of environmental violations has declined across the board during the Bush administration

The study examined alleged criminal violations of more than 1,400 federal environmental statutes and found that "federal prosecutors have filed environmental charges against substantially fewer defendants during the administration of President Bush than during either of President Clinton's two terms." During the last four years, environmental prosecutions have dropped 23 percent from the second Clinton term.

Another TRAC analysis found that criminal prosecution of environmental violations varied wildly across the nation. According to the report, "[T]he U.S. Attorneys and their assistants throughout the country declined to prosecute well over half (922) of [the 1,600 polluting companies and individuals referred, from the beginning of FY 2001 to the first quarter of FY 2004] -- or 58 percent. On each of these, however, investigative agencies had referred the matter to federal prosecutors believing the evidence indicated they were criminal violators." U.S. Attorneys often cited "weak evidence, lack of criminal intent, and agency request or office policy" in deciding not to prosecute.

TRAC also found that the lack of enforcement varied by statute. For instance, the most frequently cited law in pollution cases during both the Clinton and Bush years was 33 U.S.C. § 1319, a water pollution statute. While charges citing this law increased by 54 percent from Clinton's first to second term, filings dropped by 28 percent during the Bush years. Filings under the hazardous waste management law likewise dropped 39 percent under Bush, and filings under the Air Pollution Prevention and Control Act dropped by 41 percent.

"A few environmental areas showed different trends. Prosecutions under Atomic Energy statutes were down across all three presidential administrations. In contrast, prosecutions for Title 49 offenses on the transport of hazardous wastes rose. Numbers of cases in these categories were, however, modest," the report added.

A fourth TRAC report released Monday tracks enforcement of wildlife protection laws under the Bush administration. As it turns out, "enforcement of the federal laws designed to protect migratory birds, endangered species, marine mammals and other kinds of wild life has slumped during the Bush Administration, according to authoritative Justice Department data." Filings of felony charges for violations of wildlife protection laws fell by 20 percent during the Bush years and filings of misdemeanors fell by 40 percent. The trend in legal filings varied depending on the statute. The wildlife protection law that is most often used in criminal prosecutions, a law protecting wildlife against the taking, killing, or possessing of migratory birds, has witnessed the greatest decline in filings; filings under that law dropped by 47 percent under the Bush administration.

Though criminal prosecution is certainly not the only way to decrease pollution and environmental hazards, the results of

these studies contradict public statements by EPA Mark Leavitt citing the vigor with which EPA pursues those who disobey the law. In January of this year, during his inaugural speech, Mike Leavitt told EPA employees, "[A]nyone who evades the law should feel the full weight of the law until compliance is met."

Declining Environmental Improvement

Though the air and water quality have improved over the last 30 years, the lack of enforcement of environmental laws coincides with a slackening and reversal of the rate of improvement during the Bush administration. A recent Knight-Ridder study looked at 14 indicators of pollution and found that nine had worsened while three zigzagged and only two improved:

- Superfund cleanups of toxic waste fell 52 percent.
- Fish-consumption warnings for rivers doubled.
- Fish-consumption advisories for lakes increased 39 percent.
- The number of beach closings rose 26 percent.
- Civil citations issued to polluters fell 57 percent.
- Criminal pollution prosecutions dropped 17 percent.
- Asthma attacks increased 6 percent.
- Global temperatures and unhealthy air days increased slightly.

Knight-Ridder also found "record-low additions to national parks, wilderness, wildlife refuges and the endangered species list. The Bush administration also approved 74 percent more permits to drill for oil and gas on public lands in its first three years than were granted in the previous three years."

At the same time, more Americans are living in cities with unhealthy air. "The number of times that air in U.S. cities was declared unhealthy increased from 1,535 in 2000 to 1,656 in 2001 and 2,035 in 2002. And the EPA's inspector general issued a report last month saying that national air-emission reductions don't accurately reflect the stagnating pollution levels in metropolitan areas," according to the report.

Partisan Patterns Detected in Civil Rights, Environment Decisions

Federal judges appointed by Republican administrations -- and the Bush administration in particular -- are expressing, through decisions and dissents, a marked bias against civil rights, environmental, and other public interest litigation, according to two new reports.

A recent report and new update by the People for the American Way Foundation contrasts the rhetoric and reality of President Bush's claim he would appoint to the federal bench only judges who would interpret the law rather than "make it." According to the PFAWF analysis of split decisions by the federal appeals courts, Bush appointees regularly express hostility to civil rights and other public interest litigation as well as to Congress's power to legislate broadly in the public interest.

Through their votes and opinions, primarily dissenting opinions, Bush appointees have advocated changing the law in ways that make it more difficult for aggrieved parties to vindicate their rights and for Congress to legislate in areas such as environmental protection. Bush appointees to the circuit courts have sought to do the following:

- Question the constitutionality of the Endangered Species Act;
- Overturn National Labor Relations Board rulings against anti-union discrimination and unfair labor practices;
- Allow the Bush administration to refuse to disclose its secret contacts with industry in Vice President Cheney's energy task force;
- Make it more difficult to prevent possibly irreparable harm to the environment pending the resolution of legal issues in environmental litigation;
- Toss the legal claims of a woman downstream from a sewage treatment plant that frequently overflowed and discharged raw sewage into a nearby creek, thus contaminating the downstream property owner's private well drinking water; and
- Reject challenges to a panel under the Federal Advisory Committee Act and the Federal Land Policy and Management Act.

The Environmental Law Institute focused in its new report on the National Environmental Policy Act, which is the backbone of environmental law. According to the ELI report, the percentage success rate for environmental petitioners in NEPA cases before the federal appeals courts declines significantly when moving from three-judge panels with Democratic-appointed judges to panels with Republican-appointed judges:

	3 Dem. Appointees	2 Dem. + 1 Rep.	2 Rep. + 1 Dem.	3 Rep. Appointees
Success Rate Percentage	75%	51.5%	9.7%	11.1%

The ELI concludes, "Simply put, the fact that an environmental plaintiff's chances of winning a NEPA case before the circuit courts varies by a factor of nearly six-to-one depending on the party of the judges' nominating president runs counter to our notion of impartial justice."

The differences become even starker when shifting to the success rates of environmental plaintiffs pursuing NEPA claims before district court judges. The success rates decline sharply when moving from Democratic-appointed district court judges to judges appointed by any Republican president to, finally, district court judges appointed by this administration:

	Dem. Appointees	Rep. Appointees.	Bush II Appointees

Success Rate Percentage	59%	28%	17%

The ELI report concludes that NEPA itself is under attack:

> Although it is difficult to predict how the trends revealed in this report will play out, the current direction is troubling. More environmental plaintiffs today feel it necessary to bring legal action under NEPA than at any time over the last 25 years, and recent judicial appointees may be more likely to reject environmentalists' claims in their NEPA decision-making. Judicial polarization over NEPA is acute, and may be growing. The fact that party affiliations of judges appear to influence NEPA cases is cause for concern about the objectivity of adjudications under the Act. The issue merits further research and discussion in both the judiciary and other branches to protect the integrity and effectiveness of our nation's bedrock environmental statute.

Ultimately, neither the PFAWF nor ELI analysis yields particularly surprising conclusions; the partisan affiliation of an administration always is reflected broadly in the actual decisions of the judges appointed by a given White House, even if there are often individual appointees who are exceptions to the rule. Given the lifetime tenure of judicial appointments, however, these analyses do underscore the long-term effects of any administration on civil rights, environmental, labor, consumer, and other public interest policies beyond the term of the administration itself. For those who follow regulatory policy in particular, these reports serve as ugly reminders that all three branches of government are equally relevant to protections of the public health, safety, civil rights, and environment.

Administration Continues to Suppress, Weaken Science

In three separate cases in the past month, agency scientists have claimed that government agency officials have suppressed or softened their scientific findings, allowing policies harmful to public health and the environment to be carried out despite scientific evidence of their potential harm.

Antidepressants and Vioxx

As reported in the last issue of the *Watcher*, Food and Drug Administration scientist Andrew Mosholder told a congressional committee that FDA higher-ups asked him to rewrite conclusions to a study he conducted suggesting that antidepressants led to an increased risk of suicidality in children. Now another agency scientist has come forward and claimed that FDA officials also asked him to soften his conclusions on the harmful effects of Vioxx, a COX-2 inhibitor that was recently pulled by maker Merck after studies revealed an increased risk of cardiovascular disorder associated with the drug. According to the *Washington Post*,

> [Sen. Charles] Grassley [(R-IA)] said in a news release that David Graham, associate science director of the Office of Drug Safety, told him that agency officials "ostracized" him and subjected him to "veiled threats" as he tried to have his study cleared for publication. When a top FDA official suggested "watering down" the report, Graham responded in an e-mail: "I've gone about as far as I can without compromising my deeply-held conclusions about this safety question."

Though studies dating as far back as 2000 pointed to increased risk of cardiovascular disease and stroke for users of Vioxx, FDA has stood quietly on the sidelines while more than 27,000 users of the drug experienced serious side effects.

Endangered Salmon

Federal biologists at the National Oceanic and Atmospheric Administration told the *Sacramento Bee* that NOAA officials forced them to rewrite conclusions that a new California water plan to shift millions of gallons of water to Southern California from rivers in the north would harm the endangered salmon population. Senate Democrats have called for an investigation.

RegWatch Roundup

If you haven't been reading **RegWatch**, our new regulatory policy weblog, here's a look at what you've been missing.

Regulatory Policy Failures

So what's the federal government doing to protect us from **bio-terrorism**?

- Weakening needed rules, after meeting with the food industry!
- Promoting a Bioshield program that is inadequate to the task!

But surely our **nuclear facilities** are being secured against terrorism threats. Right?

- Well, the Nuclear Regulatory Commission maintains that it is not necessary to safeguard nuclear facilities from attacks by planes, even though a leaked study reveals that nuclear facilities may be more vulnerable to such attacks than the NRC or the nuclear industry would like the public to believe.
- And the NRC allowed the nuclear power industry's own lobby to conduct terrorism preparedness tests!

Well, then, what's the government doing to protect the **environment**?

- Reducing the amount of habitat needed to protect a threatened species, the bull trout -- first by deleting all benefits from the cost-benefit analysis, then by concluding that the benefits don't outweigh the costs of protecting all the proposed habitat!
- Letting industry write its own rules in the regulations that are supposed to protect us from mercury, a powerful neurotoxin that is particularly harmful to children and pregnant women!
- Moving to weaken rules intended to prevent overfishing even though a new report reveals that overfishing is imperiling the oceans!
- Remaining idle as species after species of amphibians becomes extinct and *male* fish in the Potomac River have begun to produce *eggs*!
- Reversing a 30-year trend of environmental improvements!

And it doesn't stop there. There have been several high-profile retrospective reviews of the **Bush administration regulatory record**:

- Documenting how the administration leans in favor of oil and gas interests when making land use decisions,
- Revealing that agencies are "slow-rolling" needed regulatory protections in order to avoid alienating business interests during the election season, and
- Comparing this administration's track record of putting foxes in the henhouse against the Clinton record of hiring academics and public interest experts in regulatory agencies, in particular the Environmental Protection Agency.

What's the missing link between the power industry and the Bush administration's **"energy policy"** -- that is, its habit of distorting environmental and other regulatory policies to favor polluting power companies? Campaign contributions!

The Heritage Foundation, of all places, has actually quantified the Bush administration's rollback of regulatory protections.

Unsound Science

The NIH finally addressed unseemly conflicts of interest, while the FDA seemed to move heaven and earth to suppress scientific conclusions unfavorable to the pharmaceutical industry in the cases of Vioxx and youth using antidepressants.

Consumer Issues

Consumer groups have joined together for a new agenda for consumer rights.

The new agenda is a timely initiative. *Consumer Reports* released two reports on the failures of federal government agencies to ensure that unsafe products are removed from the market.

Provocative Ideas

Scholars continue to develop interesting ideas with relevance for regulatory policy.

- If current cost-benefit analysis policies had been applied in the 1970s to major environmental decisions -- like removing lead from gasoline -- that we now know have been unequivocally beneficial to us all, cost-benefit would have led us in the wrong direction.

- Some authors of now discredited anti-regulatory screeds have replied to critics of their flawed arguments, but a law professor analyzing those responses reveals that the replies only raise yet more questions of the dubious basis for the claim that regulation is irrational.

- What is biopharming? Imagine field after field of plants that have been genetically engineered as mini-factories. They should not enter the food chain, but a professor reveals that we are at great risk of contamination of the food supply because the government is failing to regulate.

- Is the current practice of recess appointments unconstitutional? A legal scholar argues that the Recess Appointments Clause permits appointments only for vacancies that arise *during* a recess -- and only *inter*session recesses, not the shorter *intra*session breaks.

- The Defense Department's many contracts -- and lax supervision of them -- have been linked to the Abu Ghraib prison torture scandal.

1742 Connecticut Avenue, N.W., Washington, D.C. 20009
202-234-8494 (phone)
202-234-8584 (fax)

In This Issue

Election Day Ballot Initiatives Could Affect State and Local Tax Policy

Citizens across the country have been gearing up for this election week for an untold number of months. And while much of the attention has been focused on the too-close-to-call presidential election and the key House and Senate races, when voters hit the polls on Nov. 2 they will also be deciding on a number of different ballot initiatives that potentially could have significant impacts on state and local tax policy.

There are at least 30 initiatives in 13 states that deal with state tax policies. Several raise new revenue and dedicate the money to specific programs. Others shift revenue from one source to another.

While state tax policy differs from federal tax policy, they are similar in that policy adjustments can significantly impact how much revenue is brought in, and how that revenue is allocated. As the growing federal deficit threatens to squeeze the amount of federal support that can be given to states, it becomes more important for states to have tax policies that will ensure responsible revenue-raising and revenue allocation practices. If states become victim to ballot measures that contain disguised reductions in funds for health, education, the nonprofit sector, and various other services, the results could be destructive for the people who rely on funding from state budgets.

The Center on Budget and Policy Priorities has provided a helpful compendium of state initiatives with fiscal implications. Many of these measures are misleading in the level of fiscal impact they will impose on states. Amendment 3 in Missouri, for example, would shift $187 million per year for four years from the state sales tax on motor vehicles out of general revenue funds and into a dedicated road bond fund that would be used to pay back state highway construction bonds. Official literature describes the initiative as having "no net fiscal impact," yet this shift in funds means less money in the general revenue fund. According to the Missouri Budget Project, this will mean less money for activities such as education, health care, nursing home oversight, mental health care and foster care. Too often voters do not understand the implications of such initiatives -- in this case, that some programs will get squeezed in this reallocation.

On the other side of the spectrum, in California voters have the opportunity to reform their tax structure to make it slightly more progressive. Proposition 63 would increase by one percent the state tax on taxable income over $1 million. The additional revenue would provide dedicated funding to expand mental health services. Such popular earmarking of revenue for specific programs has been hotly debated in the state, and raises the concerns that such efforts could reduce public officials' spending flexibility, or lead to a situation in which only politically popular programs with electoral clout are insured dedicated resources. But with continued federal and state cutbacks, this appears to be the more common approaches states are taking.

Completing Appropriations to Dominate Lame Duck Session

Only twice in the last 15 years has Congress been able to complete all 13 of the annual appropriations bills by the end of the fiscal year, and this year is no exception. To address this uncompleted business, the 108th Congress will reconvene Nov. 16 to begin a post-election lame-duck session.

Completing the annual appropriations bills -- required to fund the federal government -- may be Congress's most important constitutional duty. Yet year after year members fail to complete work on these bills, even though they prove over and over that they are capable of acting quickly and reaching agreement when they want to. This was demonstrated earlier this fall when the House and Senate took only one day to pass a supplemental spending bill to help hurricane victims in Florida.

We can expect to see the following development shortly after Congress reconvenes:

- **Debt Ceiling**. Treasury Department officials are predicting that federal spending will hit the spending ceiling some time around the week of Nov. 24, at which point Congress will need to act to increase the debt limit. Increasing the debt limit increases the amount of money that Congress is able to borrow, and thus, spend. This action will be one of the top priorities in the lame duck session. For more information, click here.
- **Finish Appropriations Bills**. Another priority will be passing the remaining appropriations bills, as the president has signed only the Department of Defense bill into law. Four out of 13 appropriations bills have made it through Congress; the other nine will likely be passed in a massive omnibus bill. See recent *Washington Post* and *OMB Watcher* articles for more information.
- **Intelligence Reform Legislation**. As of late last week, House and Senate conferees on the intelligence reform legislation were still deadlocked in trying to reach agreement on implementation of the recommendations from the 9/11 Commission. House Intelligence Chairman Pete Hoekstra (R-MI) said the four conferees were "committed to do whatever we can to try to make this bill a reality." The Senate leaders on the bill, Susan Collins (R-ME) and Joe Lieberman (D-CT), echoed the same message, making it likely for lame duck action and ensuring the bill will not have to start over with the next Congress.

Upcoming 2006 Budget Process Portends Deep Discretionary Cuts

The FY 2006 federal budge, scheduled to be released in February 2005, is important now because federal agencies are already making decisions prior to submitting their individual budgets to the Office of Management and Budget (OMB) in September. The Bush administration has proposed cutting the budget deficit in half over the next five years, while John Kerry has proposed that he will do the same in four years. Because neither presidential candidate seems willing to cut funds from the Defense or Homeland Security programs, there is going to be considerable pressure for them to cut non-defense discretionary spending.

In August, GalleryWatch.com published a report concluding that the FY 2006 budget could very well impose actual dollar cuts in non-defense discretionary spending. The report outlines who the winners and losers will be as the FY 2006 budget will most likely create an unprecedented squeeze.

Congress is also looking ahead to the FY 2006 budget. House GOP leaders will take an annual retreat more than a month early this year, heading to St. Michaels, MD, in early December. The point of this retreat is to give the House leaders a chance to strategize and lay out their priorities for the 109th Congress. They are meeting early so that they will have a chance to figure out their priorities before the new administration, whether it is Republican or Democratic, can map out their agenda.

GOP leaders are expected to spend a significant amount of time discussing priorities for the FY 2006 budget process, especially regarding fiscal responsibility and spending restraints, in light of the $413 billion record high deficit. One Congressman expressed an interest in "staying in budget, doing PayGos, building an emergency fund for emergency supplementals, or a rainy day fund, and just being sensible in how we spend money." Such movement toward greater fiscal responsibility is certainly a wise and valid goal, and one which stands in stark contrast to the 108th Congress's propensity for tax cuts severely skewed toward the wealthy.

NRC Removes All Nuclear Information from Its Public Website

The Nuclear Regulatory Commission (NRC) pulled its entire public reading room offline last week after stories broke about possibly sensitive material on the website. They agency defended its action by saying it is trying its best to balance security and right-to-know.

A Pennsylvania citizen and a national watchdog group recently discovered documents on the NRC website that they believed could aid terrorists. Scott Portzline, an activist, found floor plans and inventories from four university nuclear laboratories, which he thought terrorists could use to acquire nuclear materials. He reported the discovery to a Harrisburg newspaper, which contacted NRC. David Lockbaum, an engineer at the Union of Concerned Scientists, also found nuclear power station diagrams that detailed toxic chemicals and pipelines in the plant. He contacted the NRC directly and suggested they remove the document.

While NRC asserted that portions of these documents should not be publicly available, David Albright from the Institute for Science and International Security disagrees. He told CNN that while NRC's web information might aid terrorists a little, "if someone is determined to do this, it won't help them much. If someone wanted to find this out, they can."

In response to these isolated concerns, NRC pulled all of the roughly 700,000 documents from its site, the second time it has done so, instead of selectively removing the handful of documents thought to be too sensitive for public distribution.

The agency's response to 9/11 was to immediately shut down its entire website, not just the public reading room, and then slowly repopulated the site with selective content. While this time the agency says the public reading room information will be reposted quickly, critics see the move as excessive. Removing its entire library of materials severely hinders the public right-to-know.

EPA Plans for TRI Burden Reduction

The Environmental Protection Agency (EPA) recently held a public meeting to announce two plans for reducing the burden of reporting for the Toxic Release Inventory (TRI). The first, scheduled for sometime in December, would propose simple changes to the TRI reporting forms in an effort to streamline the process. The second rulemaking, scheduled for June 2005, would contain a more substantial programmatic change, although EPA has not yet determined the exact nature of the change.

Previously EPA produced a white paper on TRI burden reduction, which outlined five options for programmatic change. The options include exempting more small businesses, raising reporting thresholds for certain facilities or chemicals, allowing more submitters to use the simpler but less informative form, allowing facilities to report "no significant change" rather than actual numerical data, and switching to reporting toxic releases in ranges rather than specific amounts. For more on EPA's white paper read OMB Watch's previous article.

Based on EPA's presentation of the options at the meeting, as well as previous statements by EPA officials, the "no significant change" option appears to be the option EPA is most seriously considering. Unfortunately this option, along with others considered by EPA, will reduce the reporting burden by sacrificing the quantity or quality of information reported. An option to establish a more aggressive electronic reporting program and harness technology to lighten the reporting burden without reducing the information was noticeably absent from EPA's considerations.

EPA also announced that TRI burden reduction would likely be discussed at the TRI National Conference being held in Washington, DC, Feb. 8-10. The annual meeting is open to the public and anyone interested in attending may register online.

Bush Campaign Restricts Access to Election Website

Last week the Bush-Cheney reelection campaign barred people outside the United States from accessing its website. The restriction was apparently in response to an electronic attack that shut down the both campaign and Republican National Committee (RNC) websites the week before.

The new restrictions prevent anyone trying to access the website except for users in the United States and Canada. All other users only see a message "Access denied: You don't have permission to access www.georgewbush.com on this server."

The campaign and RNC websites were unavailable for six hours after a "distributed denial-of-service attack" flooded the sites with digital data from tens of thousands of computers. Computer security experts report that while blocking individual users or specific countries known for unreliable Internet practices is not unusual, a blanket restriction on all but two countries is unprecedented.

The restriction does not just prevent foreigners, possibly interested in the democratic process, but also blocks American citizens living and traveling abroad from important information during a critical campaign.

Indiana Open Records Audit Finds Improvement but Still Trouble

A recent open records audit by eight Indiana newspapers found the state still needs to make significant improvements in order to comply with its own open records laws. Journalists found mixed results to inquiries in all of Indiana's 92 counties.

Journalists involved in the audit asked for four types of documents -- crime logs and incident reports, a list of public employees' salaries, and court files of sex offenders. Under Indiana's open records law each document must be released. The law only allows officials to deny requests for trade secrets, university research and certain educational and medical records are exempt. Additionally, when individuals request records, they are not required to disclose their name, motives for the request or any other personal information.

During the audit, journalists found that sheriffs complied with requests the least -- they provided 60 percent of crime logs and 43 percent of incident reports. County court clerks were better, disclosing the sex offenders' files in 87 of 92 counties. County auditors released public salaries in 66 percent of counties, although not in the requested electronic format. This is an improvement over a similar audit that occurred in 1997, after which an Office of Public Access Counselor was created. Unfortunately, there are no civil or criminal penalties for public officials who repeatedly violate the law. A denied requestor's only recourse is filing a lawsuit.

Julia Vaughn of Common Cause Indiana explains, "The public shouldn't have to jump through multiple hoops to get information." Although it appears that access in Indiana is improving, there is still much to be done so that the public receives equal access to all information that is required to be public. More information.

IRS 'Examination' of NAACP Exempt Status Based on Criticism of Bush Policies

On Oct. 28 the National Association for the Advancement of Colored People (NAACP) announced that the Internal Revenue Service (IRS) is investigating their tax-exempt status because Chairman Julian Bond criticized the Bush administration's policies in his speech to the group's July convention. The NAACP is a 501(c)(3) organization, and as such is barred from intervening in elections. The nation's oldest and largest civil rights organization questioned the timing of the IRS action, calling it a politically motivated attempt to silence the organization and discourage blacks from voting. The IRS denied political motivation.

The NAACP's problems began Oct. 8 when it received a notice from the IRS that an examination is underway, focused on "whether or not your organization has intervened in a political campaign...." Initially the NAACP response was due Oct. 23, but the IRS granted an extension until Nov. 5.

The IRS notice said, "We have received information that during your 2004 convention in Philadelphia, your organization distributed statements in opposition of George W. Bush for the office of presidency. Specifically in a speech made by Chairman Julian Bond, Mr. Bond condemned the administration policies of George W. Bush on education, the economy and the war in Iraq."

The IRS appears to have equated criticism of policies and actions of office holders with partisan electioneering. This breaks with the long-standing legal distinction between prohibited intervention in a campaign and the constitutionally protected right of 501(c)(3) organizations to speak out on the issues of the day.

Frances Hill, a University of Miami law professor, told Knight-Ridder News Service that she read the speech, and although it criticizes Bush, it appeared to be on safe legal ground because it did not focus solely on the election and had a broad focus, including issues of long standing concern to the NAACP, such as equality and justice. Hill said, "You can be passionate and still have a tax-exempt status. If the IRS thinks that this speech is sufficient to trigger an audit, then I think we have quite a new standard, and they must be planning to audit hundreds of other groups." The IRS is requiring the NAACP to supply a wide range of information, including:

- Who authorized Chairman Bond's speech
- How much the convention cost
- The names, addresses of each person on the board in July
- Copies of minutes of board meetings where the speech was discussed and voted on
- Supportive documentation if they believe the speech was not prohibited campaign intervention.

These information requests imply sanctions beyond loss of tax-exempt status, since the letter notes a tax of 10 percent can be imposed on the group for "political" expenditures and a tax of 2.5 percent on any manager who agreed to it. This is a direct threat of personal sanctions for the NAACP's 64-person board.

A Republican tax and election law lawyer, Jan Baran, told the Washington Post that he could not think of a similar recent IRS action, but that cautionary letters have been sent to churches. On Oct. 29 an IRS announcement said 60 charities are currently being examined, including 20 religious organizations. Tax law prohibits the IRS from releasing names of the groups being investigated. The statement said the investigations are based on decisions made by civil servants following strict procedures, which the statement did not describe. IRS Commissioner Mark Everson said. "Any suggestion that the IRS has tilted its audit activities for political purposes is repugnant and groundless."

Reaction to the IRS examination was swift. Bond said, "I think what's at issue is our right to criticize the president of the United States." He also noted, "We have always been nonpartisan, but we are not non-critical." Rep. Charles Rangel (D-NY) issued a statement on Oct. 28 saying, "This is a tactic of a police state if I've ever seen one."

As the ranking Democrat on the House Ways and Means Committee, Rangel joined Reps. Fortney "Pete" Stark (D-CA), and John Conyers (D-MI) in an Oct. 29 letter to Everson, saying, "It is not against the tax law for the NAACP, or any tax-exempt organization, to discuss or oppose various aspects of the Bush administration's policies. We demand to know why the current administration, through the IRS, is attacking the NAACP."

The same day Senate Finance Committee ranking Democrat Max Baucus (MT) also wrote to Everson asking several questions, including whether the "political activity" limitation imposed on 501(c)(3) organizations has been broadened, what steps lead to the decision to examine the NAACP and if groups critical of Bush's opponent have also been examined. He said, "Mere criticism of an administration's policies is clearly a proper activity for an organization with 501(c)(3) designation." Baucus also noted former President Richard Nixon used the IRS to intimidate groups that disagreed with him and, "As a result, many taxpayers lost confidence in the IRS's ability to enforce the law judiciously, and the agency's reputation suffered immensely." Bush's opponent in the presidential election, Sen. John Kerry (D-MA) requested an investigation by the Department of Justice Civil Rights Division.

In an Oct. 29 statement Ralph Neas of People for the American Way said, "The people running this administration are bullies." OMB Watch posted a statement Oct. 29 that said, "The election-eve IRS investigation regarding the nonprofit status of NAACP, the nation's oldest and largest civil rights organization, is part of a growing pattern of intimidation and suppression of free-speech and advocacy rights of charities and other nonprofits." The NAACP case was announced just days after OMB Watch published Continuing Attacks on Nonprofit Speech: Death by a Thousand Cuts II , which documents retaliatory action by the administration and its conservative allies against nonprofits that publicly disagree with their policies and action.

However, the IRS action against the NAACP goes far beyond any of the abuses cited in our report, attacking the fundamental right of nonprofits to comment on issues of the day. This is exactly what the sector was concerned about in the spring when the 527 rules were proposed to the Federal Election Commission.

Report Finds Growing Pattern of Attacks on Nonprofit Speech

Government agencies and officials and conservative allies are increasingly targeting nonprofit organizations for their free speech activities, as OMB Watch documents in a report published Oct. 26, *Continuing Attacks on Nonprofit Speech: Death by a Thousand Cuts II*. (See press release and statements from the audio news conference.) The analysis found:

- Retaliatory action against government grantees that engage in controversial policy discussions or active advocacy that includes points of view different from the administration, regardless of how well those views are supported by science
- Aggressive application of the global gag rule, and signs of a back-door "domestic gag rule" that illegally imposes government rules on private funds of grantees
- Selective enforcement of laws against nonprofits engaged in direct action
- Overbroad implementation of homeland security policy that chills the nonprofit policy voice.

"Charities should be encouraged to speak out on policy issues even when dissenting from the President's policies," said Gary D. Bass, OMB Watch executive director. Kay Guinane, co-author of the OMB Watch report cited the latest prominent example. "Election eve political intimidation of the NAACP is wrong and a misuse of government funds," she said. (See NAACP story this issue.)

OMB Watch's report describes the experience of a dozen other nonprofit organizations with what appear to be retaliatory audits, funding cuts and similar actions, by IRS and other federal agencies.

One example is IRS's auditing of the National Education Association (NEA) for political activities it is legally allowed to engage in, as the nation's largest teachers union, when paid for from a segregated fund. IRS also audited the Land Stewardship Project in Minnesota last year after it supported a referendum on the "pork checkoff" which favors factory farms to the detriment of small, family farms.

Treasury Department Shuts Down Muslim Charity

On Oct. 13, the Treasury Department designated the Islamic American Relief Agency (IARA), along with five senior officials, as supporters of terrorism. This action froze all accounts, funds and assets of IARA in the United States and criminalizes the provision or donation of money to any of its offices. IARA has no right to appeal or learn of the evidence against it. This effectively allows the government to treat organizations as guilty without the opportunity to demonstrate innocence.

During a search of IARA's Columbia, MO, office building, the FBI seized boxes, computers and file cabinets. Thursday, the search expanded to storage lockers and the home of Mubarak Hamed, who served four years as the charity's executive director. He also worked as the charity's president from 1992 through 1998.

According to the Treasury Department, the charity and five of its senior officials funneled hundreds of thousands of dollars to Osama Bin Laden and al-Qaeda in 1999, and that one of bin Ladin's lieutenants directed the group's operations in Afghanistan. The Islamic American Relief Agency (IARA) is a 501(c)(3) that is focused on charitable work for orphans, disaster and famine relief, and aid to refugees. A spokesman for InterAction, the U.S. coordinating and policy body for more than 160 international charities, said that IARA was a member in good standing and was in compliance with the organization's voluntary standards for administration and procedures.

Federal officials state that the charity belongs to a larger network, with headquarters in Sudan. In a four-page fact sheet on its website, the Treasury Department draws connections between terrorists and some of the charity's many offices and officials. However, no links were made between the Columbia office and terrorism.

The organization's attorney, Shereef Akeel, said IARA-USA is a completely different organization than IARA-Sudan. IARA-USA is legally registered as an independent agency (not as a branch of any other organization) with its own board of directors, administrative structure, executive decision-making process, and legal and financial accountability obligations (for example, the IRS, to whom IARA-USA is subject to review and audit as an independent agency). None of these functions and responsibilities is shared with any other organization.

Since 2001, federal authorities have raided and shut down 25 charities, freezing the assets of the organization and arresting or deporting its staff. Yet, not one staff member has been convicted on a terrorism-related charge.

These recent developments have made American Muslim charities feel that they are in constant danger of ending up on a government watch list for aiding terrorism. This threatens donations to Muslim charities, especially during Ramadan, when giving is required by the Muslim faith. Muslim organizations say members are afraid to give money to Muslim charities -- and those who do are opting to give cash instead of checks.

To make giving easier during Ramadan, Muslim charities requested the federal government draw up a list of Islamic charities to which they could donate without being suspected of terrorist ties. The request was denied by the Justice Department, which said it was impossible to fulfill. "Our role is to prosecute violations of criminal law," a Justice Department spokesman said. "We're not in a position to put out lists of any kind, particularly of any organizations that are good or bad."

In a recent statement, Treasury Secretary John Snow encouraged American Muslims to continue to give to charities, but to educate themselves about the groups to which they donate to make sure the funds are not being used to support terrorism. Yet IARA was not on any government watch list before its assets were frozen. Muslims have no way of knowing which groups the government suspects of ties to terrorism. Consequently, donations to Muslim charities have declined

significantly since last Ramadan.

New Rules, Empty Pockets: Funding Faith-Based Services in a Time of Fiscal Uncertainty

Three executive orders have created centers for the Faith-Based and Community Initiatives in many federal agencies. Booklets have been published which provide guidance to faith-based groups on how to get federal funding, and the government has held a series of educational conferences and a catalog of grant opportunities. Recently, both USAID and HUD published final rules implementing a policy ensuring that faith-based organizations are able to compete on equal footing with other organizations for funding. So why has funding for faith-based organizations in the social service system at the state and local levels deteriorated recently? A new report by the Roundtable on Religion and Social Welfare Policy details the funding problems of the "Faith-Based Initiative."

The report addresses the question of how underlying, long-term fiscal trends are affecting the availability of public funding of services delivered primarily by congregations and congregation-based social service organizations.

State and local governments currently lack adequate resources to expand their social service programs to include new grantees that traditionally do not provide social services. It is possible that some states will reduce contracts with secular nonprofits and transfer funding to the faith-based organization.

Successful funding of faith-based organizations requires both substantial and sustainable growth in fiscal resources at the state and local levels and a desire to fund social service programs.

It may be some time before state and local funding levels rebound to what they were before the economic slowdown. At the federal level, funding cuts and other programs and issues are making the environment for funding more competitive. With the economy still struggling, a continued decline in domestic discretionary funding and social service programs in general will continue to plague the Faith-Based Initiative. Additionally, current military obligations and a growing federal deficit will make it less likely spending on social service programs will increase in the near future.

However, it is not just funding priorities that suggest a de-emphasis on the Faith-Based Initiative. The Bush administration stated, "The federal government must restrain the growth of any spending not directly associated with the security of the nation." The majority of the nation's social service programs are not involved in the physical security of our nation -- but instead the personal security of individuals -- providing much needed food, shelter and childcare services.

Most of these programs are low priority for the Bush administration, which has proposed policies to push responsibility for them onto the states through conversion of funding to block grants or vouchers.

The Bush administration exalts the Faith-Based and Community Initiative as a "bold new approach to government's role in helping those in need," and that "government has ignored or impeded the efforts of faith-based and community organizations." Many Americans find arguments in favor of faith-based funding to be compelling, and a strong majority acknowledges the contributions churches, synagogues and other religious groups make to society. Nearly three-quarters (72 percent) cite the care and compassion of religious workers as an important reason for supporting the concept of faith-based groups receiving government funding. This reflects a public recognition of the strong connection between religious practice and social service.

However, from the beginning, the president's program contained little, if any, new money. The administration aggressively pushes a faith-based agenda, but as corporate tax cuts grow larger and the war in Iraq drags on, the funding of social service programs -- federal, state and local -- declines. This pits the current providers against a raft of new faith-based providers for the crumbs from an increasingly small sliver of federal funding for human needs.

Read more.

Independent Sector Names Members of Expert Advisory Panel

Independent Sector announced the formation of an eight-member Expert Advisory Group that will advise the "Panel on the Nonprofit Sector" formed in response to a request by the Finance Committee to make recommendations to Congress to improve the oversight and governance of charitable organizations. The Expert Advisory Group will provide knowledge and support to the Panel on such issues as government regulation, financial accountability, and tax policy. They will also provide perspective on recommendations from the working groups that will also support the panel.

Joel Fleishman, director of the Samuel and Ronnie Heyman Center for Ethics, Public Policy and the Professions at Duke University and Marion Fremont-Smith, senior research fellow at the Hauser Center for Nonprofit Organizations at Harvard University, will serve as co-conveners. Additional members are Victoria B. Bjorkland, head of the Exempt Organizations Group at the New York law firm of Simpson Thacher & Barlett; Evelyn Brody, professor of law at the Chicago-Kent College of Law at the Illinois Institute of Technology; William Josephson, former assistant attorney general-in-charge of the New York State Law Department's Charities Bureau; Lester M. Salamon, director of the Center for Civil Society Studies at the Johns Hopkins Institute for Policy Studies; C. Eugene Steuerle, senior fellow at the Urban Institute; and Eugene R. Tempel, executive director of the Center on Philanthropy at Indiana University. The advisory group is expected to be one of two advisory groups that will be established to assist the Independent Sector Panel address governance and oversight issues affecting nonprofit organizations. Independent Sector also plans to announce work groups in the near future that will play a central role in the process of developing recommendations for the Senate Finance Committee. For more information on the Independent Sector Panel

FEC Regulations to Stay in Effect Past the Election, Unpaid Broadcast Ban Appealed

Although a federal court judge refused to grant the Federal Election Commission (FEC) a stay of a September decision overturning 15 regulations implementing the Bipartisan Campaign Reform Act of 2002, the rules will remain in effect until after the election on Nov. 2. The FEC has appealed the case to the U.S. Court of Appeals for the District of Columbia, challenging the standing of Reps. Chris Shays (R-CT) and Marty Meehan (D-MA) to bring the suit and defending five of the 15 regulations.

In an Oct. 29 statement the agency said its appeal will include an exemption to the electioneering communications ban on unpaid broadcasts and the definition of what constitutes illegal coordination between federal campaigns and other groups. The other rules will be rewritten in regulatory proceedings. These include a general exemption for Internet communications and the electioneering communications exemption for 501(c)(3) organizations. If the appeals court rules in the FEC's favor on the standing issue, all of the regulations challenged would stand. However, the FEC is likely to begin re-writing the rules before the appeal is concluded, since it did not win a stay from the lower court. A schedule for further regulatory action is likely to be set by the end of the year.

The new rules may not be substantially different from the original rules, since the FEC noted that the court dismissed several of them on procedural grounds. The exemption for 501(c)(3) organizations is among those. FEC Chairman Bradley Smith said: "The Commission will present a strong case to the Court of Appeals that its rules reflect a proper exercise of agency discretion. It is also worth noting that none of the problems the plaintiffs predicted would be caused by the regulations have come to pass."

Dreier Pushes Amendment to Place DHS Above Law

Rep. David Dreier (R-CA) is promoting an amendment to pending intelligence overhaul legislation that would exempt the Department of Homeland Security from all federal law in the course of securing the nation's borders.

Dreier is championing this amendment in the conference committee that is working to resolve differences in the House and Senate versions of a bill to implement reforms suggested by the 9/11 Commission.

The Department of Homeland Security (which now has border control responsibilities formerly granted to the Department of Justice) is already exempted from the National Environmental Policy Act and the Endangered Species Act "to the extent the [DHS Secretary] determines necessary to ensure expeditious construction" of additional physical barriers and roads along the U.S. border "in areas of high illegal entry into the United States" by section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), P.L. 104-208, 110 Stat. 3009-546 Div. C (codified at 8 U.S.C. § 1103 note). The Dreier amendment would expand this waiver to cover all laws in the U.S. Code short of the Constitution itself. It is also drafted to make the Secretary's decision unreviewable in court challenges.

The original iteration of this amendment, as proposed in the House by Rep. Doug Ose (R-CA), would have expanded IIRIRA § 102 by listing a catalogue of environmental laws in addition to NEPA and the ESA. The version pushed by Dreier expands this exemption even further, beyond environmental laws, to put the DHS Secretary above all federal laws, environmental or otherwise, such as the following:

- Child labor laws
- Davis-Bacon wage determinations
- Ethics laws
- Age discrimination laws (which exceed constitutional guarantees)
- Whistleblower laws
- Employee protections
- Procurement and contracting laws designed to assist small businesses

Text of the Dreier Amendment

Sec. 3131. Waiver of Laws Necessary for Improvement of Barriers at Borders

Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 * * * is amended to read as follows:

"(c) Waiver -- Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive, and shall waive, all laws such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section."

It is unclear what limits, if any, would be placed on the DHS Secretary's power to waive federal law. Although subsection (b) of IIRIRA § 102 specifically charges DHS with building second and third fences along a 14-mile stretch of the southern border, that provision is only a specific instance of the larger charge in subsection (a) to "take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border." The Dreier amendment, which would replace the NEPA and ESA waiver in subsection (c), would permit the expanded waiver power whenever DHS deems it necessary "to ensure expeditious construction of the barriers and roads under this section." The words "this section" apparently apply the waiver power to all of IIRIRA § 102, not just § 102(b) in particular. The Dreier amendment would thus place DHS above the law -- above all law -- whenever it acts to secure the borders and remove "obstacles to detection of illegal entrants."

Mercury Emissions Adversely Affect Minorities

The cap-and-trade method for curbing mercury emissions will greatly harm those from the Great Lakes region, particularly American Indians, according to a new white paper released by the Center for Progressive Regulation (CPR).

The report takes aim at the cap-and-trade mercury rule proposed by EPA, which plans to control mercury emissions from coal-fired power plants by setting an emission standard for mercury and then allowing plants to trade emissions up to a certain cap. Mercury emissions from coal-fired power plants are most dangerous to humans when they deposit in bodies of water. In an aquatic environment, mercury is converted to the toxin methylmercury, which is then absorbed by living tissue, particularly in fish. Humans generally absorb mercury into their bloodstreams through consuming fish.

High levels of mercury in the blood can cause irreversible neurological damage. It is particularly dangerous for pregnant women and children. According to the U.S. Centers for Disease Control and Prevention (CDC), 15.7 percent, or one in six, women of child-bearing age has an unacceptably high level of methylmercury in their blood. EPA predicts that about 630,000 children are born each year with unsafe levels of mercury in their blood. The CDC study also found greater levels of mercury in the bloodstreams of black and Mexican Americans than in non-Hispanic white Americans.

Problems of the Cap-and-Trade Approach

Though EPA has denied that the cap-and-trade strategy will cause "hot spots," concentrated areas of higher or even increased emissions, the CPR report claims that it will in fact create areas of high mercury emission, in particular around the Great Lakes region. CPR relies on EPA's own data to show that, even though mercury emissions will be decreased nationally due to the regulation, emissions will increase locally in specific areas of the Great Lakes region. That region will see total mercury emissions fall by 27 percent, but emissions will increase locally in "20 out of 44 sources in the region. Further, in 2020, emissions are projected to be higher under cap-and-trade than under MACT [maximum achievable control technology] best case for every source in the upper Great Lakes states of Michigan, Minnesota, and Wisconsin but one," according to the report.

An increase in emissions in that region is particularly harmful to the local population. The Great Lakes region geography is 23 percent water bodies, compared to a national average of 7 percent. Thus, mercury emissions in the Great Lakes region are more likely to be deposited in bodies of water where they can more easily be absorbed by the fish. Furthermore, people of the Great Lakes region eat a much greater amount of fish than the rest of the country, and Native Americans in the region eat ten times more fish per day than the average American and four times more than others in the Great Lakes region. Whereas the typical American eats 17 grams of fish per day, those in the Great Lakes regions eat 42 grams of fish per day and Great Lakes Indian tribes eat 190 grams per day. Indian women in the region already have an average of ten times EPA's reference dose of mercury, which is considered the maximum amount that can be ingested over a lifetime without adverse health effects.

An Alternative to Cap-and-Trade

Cap-and-Trade v. MACT

According to the CPR study, "by 2010, the administration's cap-and-trade approach would permit eleven times the mercury emissions in the upper Great Lakes states than the standard maximum achievable control technology [MACT] approach would have achieved in a best-case scenario." Whereas the cap-and-trade strategy would reduce emissions by 61 percent by 2020, according to EPA analysis, the MACT project would reduce emissions by 90 percent by 2007. Compared to cap-and-trade, MACT technology would not only have a greater impact on the overall reduction of mercury emissions, but it would also require that all power plants meet the same standards, thus distributing the burden of pollution fairly and avoiding the potential for hot spots.

Cap-and-trade, however, is the method currently favored by EPA and the administration because it imposes fewer burdens on industry. Rather than enacting a policy that would reduce emissions to an acceptable level, EPA plans to rely on advisories to protect fish consumers. "EPA thus moves to make fish consumption advisories a permanent feature, rather than a stop-gap measure as in the past," CPR notes, adding that this method also entails a significant reversal in responsibility for mitigating the harms of mercury. The EPA plan seeks to have consumers avoid risk by reducing or eliminating their fish intake rather than removing the risk through regulation; in essence, it shifts the burden of reducing risk from the polluters to the consumers:

> Those people who rely on fish as a major part of their diet, especially subsistence fishers and their families, would be warned to reduce their fish intake or to stop eating fish altogether. This approach effectively shifts the burden of addressing mercury pollution from the polluting industries to the people who depend on fish for food.

The EPA strategy is representative of a larger administration approach to regulation that prefers, as CPR says, "risk avoidance over risk reduction."

MACT: Available and Affordable

EPA has claimed that a MACT approach would be too costly and would put undue hardship on industry. A recent report by the National Wildlife Federation (NWF) uses EPA's own data to show that a 90 percent reduction in mercury emissions is achievable by 2010 for the added burden to consumers of only a few dollars per month. Using estimates prepared by EPA, NWF looked at states that rely most heavily on coal-fired power plants and projected the costs of using technology that has already been tested and in some cases is already even in use. In Getting the Job Done: Affordable Mercury Control at Coal-Burning Plants, NWF claims that using existing technology could reduce mercury emissions 90 percent by the end of the decade for the added cost to consumers of only $1 to $3 per month. Costs would be even lower in other states that are less dependent on coal. This claim counters that of EPA administrator Mike Leavitt, who recently sent a letter to Pennsylvania Gov. Ed Rendell saying that reducing emissions by 90 percent would be extremely expensive.

NWF's assertions are backed by several industry groups. In June, the Institute for Clean Air Companies told EPA that control levels of 50 percent to 70 percent were feasible between 2008 and 2010 using currently available technology, and that combinations of technology could reduce mercury by up to 90 percent at low cost. In August, an engineer with Southern Co. told the Merge Symposium on air pollution technology that "tests of activated carbon combined with fabric filters have resulted in the removal of toxic mercury from coal-fired power plan emissions as much as 94 percent, but more testing is necessary before the technology is commercially applicable," according to another report in BNA's *Daily Report for Executives*.

Fish Advisories on the Rise

As the debate rages, national fish advisories for unsafe mercury levels have steadily increased across the country. A report published by PIRG found that 32 percent of fish caught in all U.S. lakes and 22 percent of all river miles were subject to mercury advisories in 2003. According to *Fishing for Trouble: How Toxic Mercury Contaminates the Fish in U.S. Waterways*, 44 states issued warnings in 2003, up from 27 in 1993.

Though the warnings have increased, the levels of mercury emissions have steadily decreased over the past several decades. EPA asserts that the increased advisories are due to increased reporting and testing rather than an increase in mercury levels in fish. That being the case, the rising level of fish advisories indicates that even more Americans may be impacted by mercury pollution than previously suspected.

EPA plans to finalize a regulation to control mercury emissions from coal-fired power plants by March 15, 2005.

Court Rejects Ban on Snowmobiles in Yellowstone

Rejecting a National Park Service ban on recreational snowmobile use in the Yellowstone area as a "predetermined political decision," a federal court in Wyoming found that the Clinton-era snowmobile ban violates the National Environmental Policy Act and the Administrative Procedure Act.

Although early news reports suggested that the new decision conflicts directly with a decision by the district court in Washington, DC, that also addressed snowmobiles in the parks, the two decisions actually covered different rulemakings, and each focused on the propriety of the rulemaking processes rather than snowmobiles as such. In essence, the Wyoming litigation challenged a decision in 2001 to phase out snowmobiles and ultimately ban them entirely in favor of snowcoaches, which are quieter and less polluting, and the DC litigation challenged a subsequent decision in 2003 to reverse the Clinton-era snowmobile ban.

Our accompanying analysis reveals a number of gaps and weaknesses in the reasoning used by the court to justify rejecting the snowcoach rule under NEPA and the APA. These faults in the reasoning are particularly worth noting in light of recent evidence that the partisan affiliation of the president who appointed a judge correlates with a judge's tendency to rule in NEPA cases. True to form, Judge Clarence Brimmer, an appointee of a Republican president, Gerald Ford, made this NEPA ruling against the environmentalists' position. The same judge rejected the Clinton administration's roadless rule in a NEPA challenge.

Click here for details on the ruling, the background of the snowmobile rules, and analysis of the decision.

Interior Gives Exclusive Appeal Rights to Industry

A proposed rule from the Department of Interior would grant those in the hydroelectric industry the exclusive right to appeal rulings about how dams are licensed and operated.

The rule could save the hydroelectric industry hundreds of millions of dollars in settlements while effectively cutting Indian tribes, states, federal agencies and environmental groups out of the appeals process.

The rule comes at a pivotal time for the industry; more than half of licenses for dams on American rivers will come up for renewal during the next 15 years. Many of these licenses were issued before federal environmental laws that required the protection of fish and wildlife. In order to renew their licenses dam owners are now forced to pay large settlements to mitigate environmental harm caused by the dams. These settlements average $10 million and can be as high as $200 million. "By allowing the industry the exclusive right to present alternative settlement ideas, the proposed appeal rule could substantially reduce the cost of renewing a dam license," according to a *Washington Post* article.

The rule is similar to provisions in the Energy Policy Act of 2003 H.R. 6 and S. 2095), which has repeatedly been shut down by the Democrats. By implementing the policy through the rulemaking process rather than through statute, the Bush administration is able to circumvent the Democratic blockade in Congress. According to the *Washington Post*, some DOI lawyers believe the rule violates due process and equal protection. The *Washington Post* quoted one senior Interior Department official who is involved in the dispute:

> It is not legal because one party is being treated very differently than another, and that is very much the opposite of what we have been trying to do for years .... Suddenly, a licensee can walk away from everybody else and have a private meeting with the assistant secretary and bring in new conditions that haven't been reviewed by anybody before.

John Dingell (D-MI), ranking Democrat on the House Energy and Commerce Committee, sent a letter Oct. 25 to Department of Interior Secretary Gale Norton requesting information on the rule and on the process by which the Department of Interior developed the rule. "While I am concerned about the negative consequences that could result from

the adoption of this proposed rule, specifically the one-sided appeals process that effectively eliminates certain parties from participating," Dingell wrote. "I am also very concerned about the process for recommendations that led to its development." In his questions, Dingell requested information about the relationship between the proposed rule to Cheney's National Energy Policy Development Group, questioned the statutory authority of the DOI to promulgate such a rule, and inquired whether the rule would conflict with DOI's responsibility to American Indians, asking, "how can the Department adequately meet its tribal trust responsibility when it grants a dam owner an appeal right for a condition but fails to do so for a tribe?"

Responses to Dingell's questions are due Nov. 15. The proposed rule is open for public comment until Nov. 8.

1742 Connecticut Avenue, N.W., Washington, D.C. 20009
202-234-8494 (phone)
202-234-8584 (fax)

In This Issue

Lame-Duck Work Begins This Week

Today, Nov. 16, the 535 members of the 108th Congress reconvened to begin a post-election lame-duck session and complete their unfinished business. Their goal is to keep the session short and productive, yet this may be difficult as Republican leaders have failed to reach an agreement with the White House on a package that could bring the fiscal 2005 appropriations process to a quick conclusion.

Senate and House leaders hope to end the lame-duck session by the end of this week, so they will likely limit their work to completing the nine remaining FY 2005 appropriations bills, and increasing the debt limit. If there is a breakthrough between the House-Senate conferees on implementing the recommendations of the 9/11 Commission, that too will be taken up. And there remains a possibility of working on other items that could be completed if there is unanimous consent or broad agreement. Some of these might be riders on the appropriations bill, and there has been discussion about passing the reauthorization of the Individuals with Disabilities Education Act.

Congressional leaders, who failed to complete work on the appropriations bills by the end of the fiscal year, plan to package the nine remaining bills into one massive omnibus spending bill, which they hope lawmakers will approve early this week. Most of the work has been done behind closed doors over the past weeks by staff. One snag, however, is how to pay for additional programs -- the Senate wanted $8 billion more in spending -- and still remain within the overall $821.9 billion spending cap for the fiscal year. The White House and Republican leaders are trying to work out a deal, which will likely include an across-the-board spending cut. If such an agreement is not reached, Congress could instead pass a large continuing resolution (CR) to provide funding for the rest of the year for all agencies and programs that fall under the nine remaining bills. This strategy -- which in essence would provide funding for each program and agency -- is inefficient in that it runs the risk of not providing adequate resources to fully fund the necessary services. Ideally, each appropriations bill would have made it through conference separately before the fiscal year ended Sept. 30, avoiding the need for an omnibus spending bill or a CR. As congressional leaders scramble to finish business this week, keep in mind that countless programs and agencies are not receiving the debate and attention that is necessary when it comes to making key decisions on program funding levels.

Opposition Seen on Second Term Tax, Social Security Goals

With the election two weeks behind us, attention has shifted to what this administration plans to do in its second term. President Bush has specifically cited two major objectives: to make his tax cuts permanent, and to make significant changes in both the federal tax code and Social Security.

During his first term, Bush signed into law $1.9 trillion worth of tax cuts, to take place over a 10-year period. Many analysts cite these the tax cuts -- far more than increased domestic spending or the war on terror -- for the federal budget's dramatic shift from a significant surplus to a record high $413 billion deficit. If they are correct, making the tax cuts permanent could prove the biggest impediment to meeting the president's promise to cut the deficit in half over the next five years, a target that itself falls woefully short of solving the current fiscal crisis.

This shift is detailed in a report by the Center for American Progress. Another analysis by William G. Gale and Peter Orszag of the Tax Policy Center explains the relationship between fundamental tax reform and the proposed and enacted tax cuts.

Bush's other primary tax initiative is to overhaul and "simplify" the federal tax code. It is uncertain what the President will propose, although there is speculation that he will continue the trend to taxing wages, moving away from taxing investments. This will put greater burden on middle- and lower-income families that may not have the capital that wealthy families have. The administration may also propose to shift federal taxation away from income and more toward consumption. This would constitute a more regressive policy because it would increase the proportion of taxes paid by middle and lower income Americans, and reduce the proportion paid by those with higher incomes, who spend a smaller percentage of their income on consumption. Plans to overhaul the tax code would likely face great opposition, and it is unclear whether the president will pursue this "reform." A *Washington Post* article reported "many Republicans on Capitol Hill are worried about the political ramifications of overhauling the tax system." Pete du Pont, former Republican Governor of Delaware, said tax reform is difficult because "every group wants to protect what it has in the tax code."

The administration can also expect to face determined opposition if it pursues reforms to the Social Security system. While Bush has never been specific about his plans for Social Security, he has expressed interest in pursuing a plan to give workers the option of investing part of their Social Security payroll tax into private accounts. Rep. Robert Matsui (D-CA) echoed widespread skepticism for such a plan, saying, "privatizing Social Security will divert trillions of dollars from the trust funds and force significant benefit cuts." It is also likely such a proposal will increase the deficit unless additional revenue is raised or spending cuts are made.

Florida, Nevada Vote to Raise Minimum Wage by $1

Although both states went to President Bush on Nov. 2, voters in Florida and Nevada approved state initiatives significantly raising the minimum wage by one whole dollar.

In Florida, 72 percent of voters supported raising the state minimum wage by one dollar an hour, bringing wage levels to $6.15 per hour. Perhaps even more importantly for workers, this amount will be indexed for inflation every year, which makes it more progressive than wage policies in many other states. The Association of Community Organizations for Reform Now (ACORN), along with a coalition of unions and other liberal groups, sponsored and promoted the measure.

For more information on how the wage hike will positively impact Floridians, especially those with lower incomes, see a new report by the Center for American Progress.

Nevada voters also passed an initiative to raise the minimum wage by one dollar an hour, and to increase the level annually with increases in the cost of living. The measure passed with 68 percent approval.

Florida and Nevada join twelve other states that mandate a minimum wage above the level set by the federal government ($5.15). These victories will help millions of workers achieve a greater quality of life by giving them greater resources with which to face the rising costs of living. They also serve to bolster the economies of these two states and serve as a model to inspire other states to take similar action.

Nuclear Commission Restores Portions of Online Library

The Nuclear Regulatory Commission (NRC) restored portions of its online reading room earlier this month shortly after security concerns prompted the agency to block public access. Only selected documents have been restored, although NRC asserts that the majority will be accessible within several weeks.

As reported in the last *OMB Watcher*, NRC discontinued public access to its entire online reading room Oct. 25 after media sources revealed the site might contain several documents useful to terrorists. This included floor plans and locations of nuclear materials. Instead of simply removing the "sensitive" documents, the agency blocked all public access to that portion of the site.

Although NRC quickly restored some documents, a press release explained that the remaining documents would be reviewed and reposted according to a schedule. The agency did not provide specific timeframes, although NRC prioritized the process to review hearing-related documents first, time-sensitive documents that need public review or comments second, and other nuclear reactor documents and non facility-specific documents third. NRC also reported that any information relating to nuclear materials "is expected to take longer."

There is no guarantee that all the information will be restored. NRC Chairman Nils J. Diaz stated that the agency "will withhold any information that could be useful, or could reasonably be expected to be useful, to a terrorist." It is unclear what standards the agency is using to determine what information could be useful to a terrorist. The agency also fails to explain the legal justification for withholding large amounts of information from the public.

California Passes Prop. 59 in Win for Open Government

California citizens passed a new open government proposal on Nov. 2 that embeds requirements for open records and meetings into the state constitution. The measure, Proposition 59, passed with 83 percent supporting it.

Although California has state open records and meetings laws, they have been weakened by court decisions, agency interpretations, and other actions to the point that adequate access to government information is not guaranteed. Both the California House and Senate unanimously passed the measure earlier this year. Specifically, the amendment will:

- provide public access to government meetings and records;
- assume a broad interpretation for furthering public access and a narrow interpretation for limiting it;
- require any future laws and rules that limit access to justify the limitation; and
- preserve constitutional rights including limitations that restrict access to certain government meetings and records, and rights to privacy, due process and equal protection.

The amendment does exempt the state legislature's records and meetings.

Proposition 59 received support from news and journalist organizations, academics and unions. Access organizations had been trying to get such a measure on the state ballot for several years. Florida, Louisiana, Montana and New Hampshire already have similar constitutional amendments. For more information visit the California First Amendment Coalition website.

Minnesota Legislature Restricts Media Access to Polling Sites

The Minnesota Legislature passed a law that greatly restricts media access to polling sites on election days. The law passed with bipartisan support just hours before the close of the 2004 legislative session. The law has been widely regarded as a "housekeeping" elections bill for Minnesota Secretary of State Mary Kiffmeyer, who requested the restrictions.

The law requires that the media obtain letters of prior approval from city election clerks or from county auditors before entering a polling site, where they can stay for no longer than 15 minutes.

Journalists argue that the new law is dangerous and restricts public access to the election process. State law still allows political parties to closely monitor elections and raise objections to voter qualifications. Journalists claim that partisan officials pose greater threats to the election process, especially when the media is barred from reporting such problems.

"It's an example of a law that's both mystifying and counterproductive if what we want is a system that is open and aboveboard," *Star-Tribune* editor Anders Gyllenhaal stated.

Critics of the new law assert that Minnesota's polling site restrictions are among the strictest in the nation. In contrast, neighboring Wisconsin permits any individual access to all polling places during the election process for observation.

The law created problems on Nov. 2 as cities and counties struggled to properly interpret the new restrictions. For instance, the city of Minneapolis allowed blanket media access in every precinct. Hennepin County officials, on the other hand, granted local election judges control over the process. Cass County officials requested the advice of the Minnesota Attorney General's office in how to implement the new law.

Halliburton Whistleblower Cut Out of Contract Procedures

The Army Corps of Engineers violated procurement rules in negotiating its contract with the Halliburton Corporation in early 2003, according to the Corps's chief contracting officer -- Bunnatine Greenhouse. She asserts that after expressing numerous objections to Halliburton contracts, she was threatened with demotion and was pressured to approve the contracts by her superior.

Headed by Dick Cheney until he was elected U.S. vice president in 2000, Halliburton was initially awarded a five-year contract to protect Iraq's oil assets. The Corps granted the $7-billion contract to Halliburton without competition, claiming the war necessitated an expedited process. A public outcry forced the Pentagon to cut this contract short after nearly a year had elapsed and $2.4 billion of the contract had been executed. The remaining work was put up for bid.

Greenhouse objected to Halliburton's role in both planning and implementing the 2003 contract, tasks usually distributed to two separate firms. Greenhouse also opposed the presence of Halliburton subsidiary Kellogg Brown & Root (KBR) officials at the meeting where the decision to award KBR the no-bid contract was made. Traditionally, the government uses bidding to ensure fair prices and to avoid waste. In addition to criticism from contracting officials, U.S. Army Corps of Engineers' dealings with Halliburton have drawn scrutiny from the Federal Bureau of Investigation (FBI). After Halliburton entered into Iraq and discovered minimal damage to oil wells, the Army shifted the contract from protecting oil assets to covering the transport of gasoline, kerosene and other fuels into the country for daily use by the Iraqi people. The Pentagon's inspector general and the FBI are conducting criminal investigations into allegations Halliburton overcharged the Army by as much as $61 million by refusing to use cheaper fuel suppliers.

Another Halliburton contract has drawn the FBI's attention after the abrupt cancellation this past summer of a competitive process to award a follow-up contract to one Halliburton received competitively in 1999. Halliburton received the follow-up contract to provide food, fuel and logistics to U.S. troops in the Balkans through April 2005. The Pentagon awarded the

contract without competition, and without Greenhouse's approval.

Terrorism Case Whistleblower Sues Justice Department

Former Justice Department lawyer Jesselyn Radack filed a lawsuit Oct. 28, claiming that the Department of Justice (DOJ) forced her out after she raised objections over the interrogation of "American Taliban" John Walker Lindh.

According to Radack, the DOJ's interrogation of Lindh, the American captured while fighting with the Taliban in Afghanistan, violated federal law. Even after Lindh's father retained a lawyer for him, DOJ officials interrogated Lindh without his attorney present. Lindh eventually pled guilty to aiding the Taliban and was sentenced to 20 years in prison.

The DOJ apparently attempted to cover-up the ethics violation by omitting files, including memorandums Radack had written regarding the improper interrogation, from the case file. Radack's e-mail correspondences addressing her legal concerns were never turned over to a criminal court, despite a court order that all internal documents be submitted. The secrecy surrounding the case made it difficult for Radack to know exactly which documents the judge received.

After pressing the issue through official channels, Radack claims she was threatened with a negative review and was told to leave the DOJ. She ultimately resigned in April 2002.

Radack later released her e-mail memorandums to *Newsweek* magazine, expecting to be protected by a federal whistleblower statute that protects individuals reporting government impropriety. Instead, the DOJ opened a criminal investigation into her disclosure and notified the bar associations of Maryland and the District of Columbia of her actions. Radack claims no private law firm will hire her until the matter is resolved.

This case involves two areas where the public's ability to receive important information has been significantly weakened -- homeland security and whistleblower protections. Since 9/11, the government has instituted new broad restrictions on information, even though an independent commission has concluded that excessive information restrictions contributed to the country's vulnerability to terrorist attack. Additionally, recognition and protection of whistleblowers, who are often the public's only hope of learning about the government's most egregious errors and injustices, has been declining. Legislation to strengthen these protections is currently before Congress, although it may not make it to the floor before this session ends. Without an open government, the public has no way of holding it accountable for its actions.

Nonprofits' Suit Opposes CFC Terrorist Watch List Policy

OMB Watch and 12 other nonprofits filed suit against the Combined Federal Campaign (CFC) on Nov. 10, challenging their policy that requires participating charities to check their employees' names against government terrorist watch lists. The complaint, filed in the federal district court for the District of Columbia, charges the policy violates the First Amendment rights of participating charities and was made illegally in secret.

The controversy began in July, when a *New York Times* article quoted the head of the CFC, Mara Patermaster, saying that each of the thousands of nonprofits participating in the CFC has an affirmative obligation to check their employees against government lists. In August the American Civil Liberties Union (ACLU) withdrew from the program in protest.

OMB Watch opted to remain a participant and issued a statement calling on CFC to change its policy. The statement said,

> "This active obligation is misguided, unduly burdensome, and vulnerable to abuse for political purposes. The lists are notoriously fraught with inaccuracies and ambiguities, so there is no way to verify whether a name on the list is actually the individual encountered (they may coincidentally have the same name or may be using a different name but still be the person listed). Government watch lists change continually, so charities would have to check them continually, which they don't have time and resources to do. Compliance is simply impossible."

In September OMB Watch wrote a letter to CFC seeking clarification and asking a series of practical questions about the certification requirement. To date there has been no response and CFC has failed to issue any guidance for charities currently preparing applications for the coming year. Applications are due Jan. 31. 2005.

The ACLU is acting as lead counsel in the suit. See box at right for the full list of participating plaintiffs and their statements.

Nonprofits Came Out in Force This Election Season

Nonprofits across the spectrum came out this election season to help voters have a voice. As a result, the United States had a voter turnout of almost 60 percent, the highest since 1968. This election proved nonprofits can "help America vote."

When students at the State University College at Oswego encountered resistance from local boards of elections when they tried to register to vote, they were not surprised. In response, a number of students founded SUNY Rock the Vote Challenge, a voter registration drive involving 20 of the 64 SUNY campuses, with help from the New York Public Interest Research Group and other nonprofits.

This is one example of how nonprofits came out in force this election season, ranging from progressive election protection groups to evangelical churches. Nonprofits succeeded in getting people registered and out to vote, and serving as poll monitors. This election season nonprofits enabled people to give a voice to their beliefs. Many nonprofits offered resources to help other groups get involved. For examples see the NPAction website.

Electionprotection.org, a diverse coalition of nonprofits, gathered an unprecedented 25,000 volunteers who worked together to document thousands of voting problems around the nation and rectify many of them on election day. It remains to be seen how many of the flaws in the Nov. 2 vote were corrected in time to save legal votes, but there is no question that our election system is more robust due to the hard work and diligence of volunteers to not only "rock the vote," but to *protect the vote*.

Churches, who are tax exempt under 501(c)(3) in the tax code, also worked hard to mobilize voters before and on Election Day. There was a huge leap in the intensity and breadth of involvement by religious organizations this election season. Said the Rev. Jerry Johnson, "I am going to try to motivate the pastors to do something, to not be silent, and to become engaged in a long-term process." However, some of this activity created controversy over whether it remained nonpartisan and consistent with the tax code.

Increased nonprofit activity has led to increased IRS scrutiny. The IRS says it is currently auditing 60 groups for potential violations of the ban on partisan election activities, including 20 churches. Since March, when a church in Austin allowed the Republican Party to hold a fundraiser in its sanctuary, Americans United for the Separation of Church and State has filed complaints with the Internal Revenue Service against seven houses of worship, charging them with failing to observe the limits on political activity by a tax-exempt, nonprofit religious organization. Two of those complaints involved clergy endorsing candidates from the pulpit, with one minister backing Kerry and the other supporting Bush.

There is a bright line drawn by the IRS on electioneering by 501(c)(3)s. Groups exempt under 501(c)(3) can talk about issues in an unlimited way, but they cannot urge people to vote for or against a candidate, directly or indirectly. This has become a controversial issue for some churches that want to change the tax code to allow church electioneering. See the OMB Watch website for more background.

Muslim Charity Seeks Release of Frozen Assets

Last month, the Department of Treasury froze the assets of the Islamic American Relief Agency (IARA-USA) after a raid on its office in Columbia, MO, and the home of its executive director. Last week, Shereef Akeel, a lawyer for the Muslim charity, applied for a license from the U.S. Treasury Department to free its frozen assets for the purpose of paying rent and utility bills.

The department had accused IARA of having raised more than $5 million for terrorist causes. It did not automatically reject IARA's request, stating, "The Treasury thoroughly reviews all licensing requests to ensure that if the funds are unfrozen, they are used for legitimate purposes and serve the interests of the charity."

IARA-USA, with a nearly 20-year history of providing relief in famine- and disaster-stricken areas of Africa, Asia and Bosnia, denied the allegations. IARA in Khartoum, Sudan, issued a similar statement and denied ties to the Columbia group. Last year, the Better Business Bureau of Eastern Missouri and Southern Illinois found the group met 22 of its 23 standards for charitable solicitations.

The search warrants remain sealed, and the Treasury Department has so far refused to explain why it froze IARA's assets in the first place. (See recent *Watcher* article.)

IRS Revises Application for Tax-Exempt Status for Charities, 501(c)(3) Groups

The IRS has released an updated version of the application for tax-exempt status for charitable, education, religious and scientific organizations. The new Form 1023 and instructions are available on the Web, and the IRS will require their use after April, 2005. Page ten of the instructions describes the prohibition on partisan electioneering and the allowable legislative lobbying limits. A copy of Form 5768, the notice that a group will measure its lobbying by expenditures only, is included in the package. For more information see IRS Frequently Asked Questions About Revised Form 1023 on its website.

Americans Vote to Protect Environment in Ballot Initiatives

Voters approved ballot measures on Nov. 2 that will strengthen environmental protections in several states.

Although the Bush administration's return to power does not bode well for the future of environmental protections, the success of these state ballot initiatives indicates that citizens remain committed to protecting the environment. While only a few states voted down ballot initiatives to strengthen environmental protections, several states passed major environmental measures that will, among other things, clean up hazardous waste, limit mining with cyanide, and protect public lands.

Victories

For the fifth time, Arizona voted down a proposition that would have allowed the government to trade public lands.

Residents of Colorado supported the Renewable Energy Requirement mandating that 10 percent of electricity produced by utilities that serve at least 40,000 customers come from renewable sources by 2015. The initiative will impact 80 percent of utilities providers in the state. Colorado joins 16 other states in requiring the use of renewable energy.

In Montana, 75 percent of voters agreed "to establish and provide a funding source for a noxious weed management trust fund." According to Montana State University researchers, "Noxious weeds are a serious ecological and environmental threat to the natural resources of Montana. Noxious weeds displace native plant communities (including endangered species), alter wildlife habitat, reduce forage for wildlife and livestock, and lower biodiversity." Though the fund has existed through legislation since 1985, the initiative amends the state constitution to provide for the fund, making it difficult for lawmakers to spend the money on other matters.

Montana also voted down an initiative to allow open-pit mining using cyanide ore-processing reagents. The vote reaffirms a 1998 decision to limit the mining of gold and silver using cyanide, which can cause severe water pollution. The failure of the initiative was a major victory for environmental advocates and shows citizens refuse to tolerate such highly toxic pollution, even in a tight job market.

In the state of Washington, 68 percent of the electorate voted to clean up hazardous waste in the state and to limit future dumping "until existing contamination was cleaned up." The initiative mainly applies to the Hanford Nuclear Reservation, a 586-square-mile site along the Columbia River that was first used during World War II to produce plutonium for atomic bomb development. The state initiative sets standards for cleanup, prohibits waste disposal in unlined soil trenches, and requires cleanup of tank leaks. Fifty-three million gallons of highly radioactive liquid, sludge and saltcake are currently stored at the Hanford facilities.

Rhode Island voted to issue bonds that would provide up to $70 million to control water pollution.

Failures

An Oregon measure failed that would have required state forests to balance logging interests with environmental preservation. Another Oregon measure, which passed with 60 percent of the vote, would require that the government compensate landowners if regulation reduces the property value of the land. This "regulatory takings" measure does not apply to public health and safety regulation, but it does apply to environmental regulation that "restricts the use of the property and reduces its fair market value."

Utah voters defeated an initiative that would have generated up to $150 million in bonds to support projects that "preserve or enhance" natural resources such as lakes, rivers, streams and wildlife habitats, as well as to "build local community facilities and improve natural history and cultural museums."

NPS Fails to Address Species Impacts of Snowmobile Trails

In the aftermath of two court rulings rejecting rulemakings on winter use plans for Yellowstone, the National Park Service is once again being challenged in court for failing to consider the effects on bison populations of winter use plans that accommodate snowmobile use.

Although media attention has focused on the Clinton administration's ban on snowmobiles in the Yellowstone area parks and the Bush administration's rollback of that ban, the initial impetus for the snowmobile rulemakings was the effect on wildlife of "trail grooming." Trail grooming is the practice of packing 25-foot wide paths, in essence creating roadways for snowmobiles. Although a variety of Yellowstone wildlife has experienced adverse consequences of trail grooming, the most dramatic consequence is that bison are attracted to the groomed trails and leave the protected park areas, making them vulnerable to slaughter.

After more than 1,100 bison were slaughtered in the winter of 1996-97, the Fund for Animals and other environmental groups challenged the Yellowstone winter use plans under the National Environmental Policy Act. The NPS settled with the groups, agreeing to prepare an environmental impact statement on trail grooming practices and the related policy of allowing snowmobiles into the parks. Subsequent rulemakings -- a Clinton administration decision to ban snowmobiles in favor of snowcoaches, and a Bush administration rollback of that ban -- were subject to court challenges described here. Among other outcomes, a federal court ruled that the NPS had failed to address adequately the effects of trail grooming on bison migration patterns.

The NPS prepared a new environmental assessment and announced a continued preference for trail grooming and limited

snowmobile access. Even though a scientific assessment of trail grooming's effects on bison will not be available until March 2005, the NPS declared a finding of no significant impact (FONSI) that led to a final rule on winter use in the parks that permits continued trail grooming.

Alarmed that the new winter use policy still fails to address problems of trail grooming, the Fund for Animals filed suit on Nov. 4 challenging the new winter use plan as violating NEPA, the APA, the Organic Act, the Yellowstone Act, and previous court orders.

1742 Connecticut Avenue, N.W., Washington, D.C. 20009
202-234-8494 (phone)
202-234-8584 (fax)

In This Issue

Congress Delays Spending Bill, Tackles Tax Return Provision

Although it was widely believed Congress would pass and the President would sign the $388 billion omnibus spending bill before Thanksgiving, it appears now the must-pass legislation will remain on hold until Dec. 6 when Congress will reconvene for a second lame-duck session to work on its passage. The bill, H.R. 4818, includes the nine remaining appropriations bills Congress left unfinished when the fiscal year ended, as well as numerous other riders and provisions.

The bill was not passed as expected because of a controversial rider that threatened the privacy of U.S. taxpayers' records by allowing some Congressional staffers the power to enter Internal Revenue Service (IRS) facilities and examine taxpayers' returns. The staff of Senator Kent Conrad (D-ND) discovered the provision, and in his floor statement on the subject Conrad stated, "That is an outrage. That is absolutely beyond the pale to allow staffers here the access to tax returns of any American citizen, of any American company with absolutely no civil or criminal penalties for the release of that private information. What is going on here that we have a stack of paper that has a little nugget like that stuck in?" House Minority Leader Nancy Pelosi (D-CA) echoed Conrad's sentiments, saying "The Republican leadership forced through a so-called 'martial law' rule that required a same-day vote, preventing members of Congress from having enough time to read legislation that spent hundreds of billions of dollars and was thousands of pages long." She proposed requiring that lawmakers have a minimum of three days to read legislation before voting on it.

The House will reconvene Dec. 6 and the Senate Dec. 7 to pass a correcting bill. Meanwhile, Congress passed a continuing resolution that will fund all government programs and agencies through Dec. 8, extending the current CR, which runs through Dec. 3. It is undetermined how long the second lame-duck session will last. The spending bill process is further described in a *New York Times* article Nov. 24.

The $388 billion spending bill includes funding for thousands of faith-based and community organizations and other agencies and programs. The Compassion Capital Fund will receive $55 million to provide social service grants to charitable and religious organizations. That amount is half of what President Bush requested, but 15.3 percent more than in fiscal year 2004. The bill also funds abstinence programs, job training for the unemployed, education and substance abuse programs. For more information see *Highlights of the Conference Report*.

Congress Raises Debt Limit, Fails To Pass Intelligence Bill

While members of Congress were unable to complete work on the omnibus spending bill or the intelligence bill during the lame-duck session, they did manage to complete their work on the debt limit.

Both the House and the Senate approved measures that will raise the debt ceiling by $800 billion, bringing the debt limit to $8.18 billion dollars. This marks the third time since 2001 that Congress has had to increase the debt limit to keep up with both federal spending and tax cuts. The failure of Congress to reinstate PayGo restrictions demonstrates a severe lack of fiscal discipline; and in essence gives the president a blank check to continue running large deficits.

Raising the debt ceiling, while necessary to fund U.S. agencies and programs, has profound implications for our nation's fiscal house. A *Washington Post* article raises some concerns. Yet little is being done to address the long-range structural problems we now face.

While Congress acted to raise the debt ceiling, it was unable to reach agreement on the bill to overhaul U.S. intelligence agencies. After weeks of debate, Republican lawmakers blocked it from going to the floor on the last day of the lame-duck session, even as President Bush urged its passage. There is hope that an agreement will be reached before January, in which case the 108th Congress will reconvene one more time for a vote, possibly during the Dec. 6 lame-duck.

White House Rejects Overtime Rules Amendments

In both versions of the FY 2005 Labor-HHS spending bill, the House and Senate approved amendments intended to block the White House from implementing new and harmful overtime rules. Those amendments, sponsored by Rep. David Obey (D-WI) and Sen. Tom Harkin (D-IA), would have reinstated old overtime eligibility rules for some workers, and were seen as a major victory for labor.

Although the amendments were successfully passed in October, a conference committee deleted the language from the bill during last week's lame-duck session because the White House threatened to veto the entire omnibus spending package if it included such amendments. Read more about overtime rules and the economic effects of changing them in a briefing paper from the Economic Policy Institute.

While it can be considered a theoretical victory that both Houses supported the amendments, it is a significant loss that they were ultimately stripped from the spending bill. However, when the appropriations process is reduced to Congress passing most of the bills through an omnibus, it is not surprising important policy amendments do not receive the attention they deserve. For more on this, read this *Washington Post* article.

EPA Releases Early TRI Data, Usability Limited

On Nov. 23, the Environmental Protection Agency (EPA) began early access to the 2003 Toxics Release Inventory (TRI), but in a limited manner. This early release is seven months faster than last year's release. While this earlier access represents a step in the right direction, the data format significantly limits its use. Additionally, EPA will not make the underlying data available to the public at this time.

EPA typically releases the entire database for a new year about 18 months after that reporting year ends. For example, the 2002 data, which companies had to report to EPA by July 1, 2003, was released June 24, 2004. Public interests groups have continually pushed for earlier release of the data so the public can use the information before it is relatively out of date. As part of EPA's efforts to remedy these concerns and speed up the process, this year the agency is releasing facility data earlier, but in a special Electronic-Facility Data Release format. This earlier release is prior to several steps EPA takes to cross check the quality of the information submitted by companies, most of which is now submitted electronically.

Unfortunately, the information's format makes it difficult for users to manipulate or analyze the data. EPA usually presents the information in a database format that allows users to examine totals, averages, and trends. In other words, users can aggregate and disaggregate data in different ways. The Electronic-Facility Data Release, however, only allows users to view the individual forms facilities submitted for each chemical release. The system does not, for example, permit users to add these releases together to examine the total releases from a facility or total amount of chemicals released in a town.

Moreover, EPA has been unwilling to provide the underlying data to the public even though it is making the data available through its website in a limited format. EPA says it will continue making the underlying data available once it makes the full data set available on its website in the spring. Groups such as Environmental Defense and OMB Watch make such data available for free on Scorecard and RTK NET, respectively.

The early data release is available at http://www.epa.gov/tri-efdr/.

Court Dismisses First Data Quality Act Case

In the first Data Quality Act case to be handled by the courts, a U.S. District Court has ruled that challenges under the DQA and its subsequent guidelines to agencies are not judicially reviewable. A previous court decision addressed the issue of reviewability, but the legal claim in that case was not limited to data quality.

On Nov. 15, the U.S. District Court for the Eastern District of Virginia dismissed a case brought by the Salt Institute and the U.S. Chamber of Commerce against the National Heart, Lung and Blood Institute (NHLBI) over statements about the health benefits from lower sodium diets. In reviewing the government's motion to dismiss the suit, the judge, Gerald Bruce Lee, ruled that the Salt Institute and the U.S. Chamber of Commerce lacked legal standing to claim injury in a federal court, concluded that the DQA provides "no private right of action," and determined that the key data is not subject to judicial review under the Administrative Procedure Act.

See OMB Watch's full analysis of the court decision.

CSX Refuses to Disclose Hazardous Waste Re-Routing

Rail companies that operate in and around Washington, DC, refuse to reveal whether or not hazardous chemicals are being re-routed around the city. Rail companies may be voluntarily re-routing trains, but the public will not be informed.

During a D.C. City Council meeting last Monday, CSX Transportation, the owner of a rail line that runs near downtown D. C., refused to disclose any details in security changes including whether they are re-routing trains. Both CSX and the Department of Homeland Security (DHS) refrained from discussing plans, citing security concerns. DHS did disclose that a working group called the D.C. Rail Corridor Project has developed measures to heighten security along the rail lines. Specific information on the working group and its plans is not publicly available.

Calculations have determined that an attack on a 90-ton rail car containing chlorine inside the nation's capital could kill up to 100,000 people. While only a small number of the 8,000 cars that pass through the city each year contain such volatile chemicals, the threat remains significant. The irony is that if hazardous shipments are being re-routed then the companies and DHS are promoting secrecy for a problem that has already been fixed. Some believe that the secrecy may be an attempt to prevent or delay other major cities from pursuing similar re-routing procedures, which would cost the rail companies money.

In response to the concerns about hazardous shipments, the D.C. Council voted on an emergency bill Nov. 9 that would have banned the shipment of any hazardous materials through the city. CSX and the Department of Transportation opposed the bill. Support from D.C. Council members and the mayor shifted and the bill ultimately failed.

Jersey to Withhold Hazardous Waste Records

A proposed rule in New Jersey would keep important health and safety information secret, possibly endangering residents that live near chemical plants, or workers that are employed at a number of different facilities.

On Oct. 18, the state's Attorney General's Office published proposed regulations modifying access to records, which, according to the proposal, is intended to "strike a balance between the need to allow read access to government records and the need to deny access to government records where such access would materially diminish the State's ability to protect and defend the State and its people against sabotage and terrorism."

New Jersey's Open Public Records Act, which took effect on July 7, 2002, requires all government records be disclosed unless specifically exempted. Around the same time, former Gov. James E. McGreevey issued Executive Order No. 21 (on July 8, 2002) to provide exemptions to the new Open Public Records Act. The executive order excludes from disclosure at any level of government:

> Any government record where the inspection, examination or copying of that record would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism.

The executive order also requires the Attorney General, in consultation with the Domestic Security Preparedness Task Force, to develop more specific rules on what "government records shall be deemed to be confidential." The proposed rule issued on Oct. 18 is to implement this directive.

The proposed rule would limit access to information providing details about buildings including airports, tunnels, stadiums, and emergency-response and hazardous waste storage facilities. The information could range from security plans for existing sites to proposed development plans. The rule could also restrict workers and concerned citizens from knowing what chemicals are stored in their workplaces and neighborhoods.

The proposed rule also provides exemptions to disclosure in nine other areas, ranging from information about contagious diseases in livestock to security of computer networks to various uses of geographic information systems (GIS). Additionally, the rule proposes to exempt from disclosure sensitive but unclassified information described under Section 892 of the Homeland Security Act.

Under the proposed rule, records identified as exempt from disclosure would only be released if the head of a cabinet-level

agency and the state's Domestic Security Preparedness Task Force determine that the recipient has a "bona fide need for public access to the records and imposes appropriate limitations or conditions upon such authorized disclosure."

Rick Engler, the director of New Jersey work Environment Council, believes, "[t]he rules will do more to hurt public safety than to minimize the impact of terrorists." Many public interest groups assert that maintaining a right to know environment best ensures public safety. The government should be required to disclosure information except when information falls within clearly defined categories such as national security and privacy information. This method informs the public and allows them to participate in the effort to make their communities safer.

The proposed rule is open for public comment until Dec. 17.

Committee Releases Clarke's Declassified Testimony

The Senate Committee on Intelligence Chairman Pat Roberts (R-KS) finally released declassified testimony from former White House Counterterrorism Chief Richard Clarke regarding the 9/11 investigation. As reported in a previous *OMB Watcher* article, Roberts refused to release the testimony publicly, even though officials declassified it earlier this year. The testimony gained attention after critics asserted that Clarke made statements this past March regarding pre-9/11 intelligence that conflicted with the earlier testimony.

Several Senators called for disclosure of the declassified testimony earlier this year, but Roberts refused, leading many to speculate that the information was being withheld until after the elections for political reasons. The Intelligence Committee posted the testimony on its website on Nov. 17, just two weeks after the election. A copy of the testimony can also be found on the Project on Government Secrecy's website.

Intelligence Bill Erodes Right To Know

When House Speaker Dennis Hastert (R-IL) refused to bring the intelligence reform bill to a vote because Republicans in the House of Representatives opposed it, some open government advocates breathed a sigh of relief. As the bill moved through Congress, lawmakers dropped or severely limited the 9/11 Commission's recommendations to strengthen openness throughout the federal government.

In the last week of negotiations, Sen. Susan Collins (R-ME) acceded to pressure from the White House and other House Republicans to keep the total intelligence budget secret. Other language to encourage federal agencies to keep fewer secrets was narrowed from its already humble starting point. A proposal from several senators to let the public appeal decisions by government agencies to keep information secret was narrowed so only the chairmen of already powerful congressional committees could make such appeals. The Center for National Security Studies expressed concern that the legislation would expand intelligence agencies' ability to withhold documents from the public. And finally, congressional staff appeared unsure how to address the need for Congress to exercise stronger oversight over the way the new National Intelligence Director would control the flow of information.

While the 9/11 Commission and families of the 9/11 victims pushed for passage of the bill, in the end the bill may have enshrined bad policy into a law that could increase government secrecy for years if not decades.

It is still possible for Congress to complete work on the bill and schedule a vote next week. But it is more likely that intelligence reform will not be voted on until next year. If so, that could provide open government advocates an opportunity to regain some ground or clarify what problems really exist.

FEC Schedules New Rulemaking in 2005

Beginning in January 2005 the Federal Election Commission (FEC) will begin an intense seven-month series of proceedings to amend rules implementing the Bipartisan Campaign Reform Act of 2002 (BCRA) rejected by a federal court this fall, and take up new issues generated by this year's election. Among those with greatest impact on nonprofits will be expansion of regulation into Internet communications, reconsideration of the electioneering communications exemption for 501(c)(3) groups and party donations to nonprofits.

At its Nov. 18 meeting the FEC approved a schedule for the new rules along with a requirement for quick final action once public comment periods have closed. Nonprofits will be most impacted by consideration of:

- Party donations to tax-exempt organizations. The FEC staff have drafted a proposed rule for the Commissioners to consider at their Dec. 2 meeting. If the Notice of Proposed Rulemaking is approved, it will be published in the *Federal Register* for public comment likely in January.
- Internet exclusion from rules on coordination between campaigns and outside groups and the definition of a public communication. That proceeding will begin in March 2005.
- Electioneering communications. The FEC will consider exemptions for 501(c)(3) groups and documentary ads, as well as unpaid broadcasts. The federal district court overturned the unpaid broadcast exemption, but the FEC has appealed. This proceeding will begin in June 2005.

At the FEC meeting Vice-Chair Ellen Weintraub said substantive changes in the exemption for Internet communications are likely. Some of the other issues, such as the 501(c)(3) exemption for electioneering communications, were overturned on technical grounds and may not be radically changed.

For information on the court decision being appealed see the Oct. 4 OMB Watcher. More background is also available on the FEC webpage on rulemaking proceedings.

IRS Initiates Pay, Reporting Enforcement Effort

As part of a stepped-up enforcement effort, the Internal Revenue Service Exempt Organizations division (EO) is sending letters to approximately 2,000 charities asking them to detail their method of determining executive compensation. EO Director Martha Sullivan estimates 25 percent of organizations receiving the letter will be examined further.

In a related issue, the IRS is contacting charities that have not answered question 89B of Tax Form 990. Question 89B deals with excess benefit transactions, and is considering the use of penalties up to $50,000.

In April 2005 the IRS will open a Fraud and Financial Transaction Unit (FFTU) to scrutinize charities for possible transactions with terrorists and will begin examinations of U.S. charities that make foreign grants. A team devoted solely to examining charities that send money overseas has been created to study whether changes to current enforcement procedures are necessary. This effort appears to duplicate or conflict with the Treasury Department's Voluntary Best Practice Guidelines for U.S. Based Charities. These guidelines are inconsistent with current IRS regulations and have been criticized for being overbroad and ineffective to prevent diversion of funds to terrorists. Currently a working group of nonprofits and foundations is working on alternatives to the guidelines. See OMB Watch website for more information.

OMB Watch Launches Nonprofit Issues Blog

OMB Watch's nonprofit advocacy project is pleased to announce the launch of its new "Nonprofit Issues Blog." "Weblog," and "blog," are popular terms to denote a website (or a portion of a website) that contains short, frequent posts and Web links. The entries are usually sorted in reverse chronological order and archived by category and date. OMB Watch's new blog will cover a wide range of nonprofit issues, and will be updated throughout the week by OMB Watch staff. We are confident you will find it a valuable resource.

Court Narrows Faith-Based Suit

A law suit claiming sweeping constitutional problems with the Bush administration's faith-based initiative has been largely defanged by a court's decision that the plaintiff does not have standing to file the suit. The dismissal of all but a small portion of a lawsuit means the merits of the case remain undecided in the courts.

On June 17, the Freedom of Religion Foundation (FRF) filed suit in the United States District Court for the Western District of Wisconsin against Jim Towey, the Director of the White House Office for Faith-Based and Community Initiativesand the head of every federal agency that has a connection with the Faith-Based Initiative.

The complaint alleges the government violated the Establishment Clause of the First Amendment by: endorsing religion; favoring religious over secular organizations; directly funding services that include religious content; and funding intermediary faith-based organizations that prefer religious subgrantees to secular ones.

On Nov. 12, FRF voluntarily dropped eight of their ten claims focused on specific grants made under the initiative. On Nov. 16, the District Court also dismissed the claims against Jim Towey, all of the Faith-Based Initiative directors at various agencies, and Education Secretary Rod Paige after determining that FRF lacked standing to sue. The District Court felt that the taxpaying members of FRF are not considered injured parties eligible to file suit, leaving the merits of the claims undecided.

As a result, the complaint has been narrowed to two grants, one sponsored by the Department of Health and Human Services and the other by the Department of Labor. Further pre-trial motions on the remaining parts of the complaint were due in District Court by Nov. 23. FRF may still appeal the dismissal of their claims.

- For more on the Faith-Based Initiative, read this recent article in the *OMB Watcher*
- For a legal analysis of the court's decision see the Roundtable on Religion and Social Policy Nov. 22 Legal Update.

CFC Issues Terror List Check Guidance

After months of silence the Combined Federal Campaign has issued guidance on how charities participating in this workplace-giving program for federal employees should implement its requirement that they certify they do not knowingly employ persons on various government terrorist watch lists. The CFC Memorandum 2004-12 provides background information and clarification, but does not change the interpretation that led a dozen nonprofits to file suit to block the policy.

The CFC guidance, issued on Nov. 24, cites the Treasury Department's Voluntary Best Practice guidelines and Executive Order 13224 as authority for its action. But the Treasury guidelines themselves have been criticized for being overbroad, ineffective at combating terrorism, and inconsistent with existing law, and OMB Watch has called for their withdrawal. OMB Watch also sent a letter Sept. 7 to Mara Patermaster, the head of the CFC, asking a series of questions about how to implement the new requirements. While Patermaster did not respond, this memo provides some of the answers to questions we had. However, it does not resolve the fundamental problems with the list-checking requirement.

The memo modifies the requirements in the 2005 CFC application to only checking two government watch lists -- one operated by the Treasury Department (the Office of Foreign Assets Control Specially Designated Nationals List) and the other by the State Department (the Terrorist Exclusion List). CFC "continues to encourage" organizations to also consult a United Nations list, but it is not required.

The memorandum states that the list-checking requirement applies to employees, not volunteers, consultants or vendors. It also applies to direct contributions to any organization, but does not include non-cash contributions, and does not include tracking the regranting of such contributions. The memo indicates it "does not intend...to encompass the procurement of goods or services... unless the organization has reason to believe that a vendor of such goods or services commits or supports terrorist acts." This caveat is not described further.

If a match is found at the time of submitting the CFC application — even if it is an incorrect match — the group "may not complete the certification and will be denied participation in the CFC." If at a time subsequent to certification, the group finds a person it employs or an organization it contributes to on the watch lists, it must notify CFC "immediately." CFC will take "appropriate" steps, which could include suspension from the program, retraction of funds already disbursed, and notifying "investigative and/or enforcement authorities."

The memo does not provide information on how often to check the lists, but clearly indicates that the list must be checked when applying. The memo is less clear when it describes what it means by "knowingly" employ individuals or contribute funds to groups on the watch lists. The memo creates an ambiguous standard where CFC "determines that an organization in fact has exercised appropriate care to check the lists." CFC continues: "Intentional ignorance... is not an excuse for not knowing...."

OMB Watch is among the plaintiffs in the lawsuit challenging the policy. For more information see the Nov. 16 OMB Watcher. A full analysis of the guidance will be released soon.

Post Election Analysis of 527s, Other Issues Begins

Now that the first election since passage of the Bipartisan Campaign Reform Act of 2002 (BCRA) is over, analysis of its impact on campaigns, parties, donors and independent groups is underway. Overall, there was a huge increase in the number of small donors to both campaigns and independent groups and elimination of soft money donations to parties and federal candidates. While much more needs to be learned before further reform efforts go forward, initial reports provide an indication of long-term trends.

An Top 25 Individual Donors to Federal Oriented 527 Committees, 2004 Election Cycle that indicates $126.4 million of the total raised came from these donors. This represents 44 percent of all contributions. More research will be needed to identify characteristics of the remaining 56 percent of donors.

Democracy 21 found "The most important long-term campaign finance development of the 2004 elections may turn out be the breakthrough made in Internet fundraising", in its report Campaign Finance Successes and Problems in the 2004 Elections. The Internet helped make the significant increase in small donations possible. For example, America Coming Together (ACT) raised $3.3 million online, $7 million by direct mail and $16 million from concerts. This represents 51.5 percent of its total receipts of $51 million (based on data from October 2004).

The growth in small donors was most significant after the primaries were over. The Campaign Finance Institute's Wrap-Up Analysis of Primary Funding found that small donations quadrupled from 2000 levels. The report defines small donors as those giving under $200. However, the report found that donations of $1000 or more were the largest category of individual contributions.

The controversial independent groups spent heavily on broadcast ads, with Republican-leaning groups outspending Democratic-leaning groups near the end of the campaigns, according to the Center for Public Integrity. The *New York Times* reported that corporate political committees gave to Republican candidates over Democrats at a rate of 10-1.

The rise in small donors was a counterbalance to the breakdown of the Presidential public financing system. Both candidates rejected public financing. A task force of experts and reform advocates has called for a revamping of presidential primaries, with more realistic spending limits and a three-for-one match for donations of $100 to promote competition and participation.

Activists Assess Needs, Trends for 'Progressive Politics and Technology'

Collaboration, innovation and integration -- those were the keys to advancement for progressive advocacy groups during the recent electoral season, according to presenters at the November "Roundtable on Progressive Politics and Technology." These will no doubt remain key watchwords for progressives as they strive to keep up with evolving technologies, and use them to make their outreach strategies, programs and messaging more effective in the years ahead.

The forum packed more than 100 activists into a room at the AFL-CIO's Washington headquarters, for a program featuring prominent leaders from nearly 30 organizations and firms. In rapid-fire, panelists shared observations and lessons from their recent experiences with both national and grassroots campaigns. Each offered advice and predictions for building on their movements' accomplishments, and expressed optimism that progressives will realize significant success using the new tools and findings.

Among the technologies speakers touted were: weblogs, open source software for managing lists of supporters and donors, and digital media such as Flash and online video that take advantage of increasing broadband capabilities. Some echoed the view of Michael Warren of the firm Limbic Systems, who said, "What progressives most need now is detailed research -- focused information gathering" and the wisdom to use it for the greatest impact. Bob Fertik of Democrats.com challenged conventional political wisdom when he pronounced, "TV is the enemy [of progressives] ... money spent on TV ads is totally wasted." Other speakers expressed the related conviction that broadcast media's once dominant influence is quickly being eclipsed by the Internet. They agreed with Microsoft founder, Bill Gates, that the Internet will change history on the same scale as the invention of the printing press or the industrial revolution.

Sources for more information:

- Roundtable Series on Politics and Technology
- Pop and Politics
- MovingIdeas.org
- Democracy In Action
- Institute for Politics, Democracy and the Internet

NAS Biases Panel With Industry Interests

The National Academies biased a panel to study the risks from disposing coal wastes in abandoned mines by appointing six members with ties to the mining, coal, and electric utility industries, of whom two have subsequently stepped down after criticism from public interest groups.

Congress requested the National Academies to impanel a committee to study the health, safety, and environmental risks of disposing wastes from coal combustion wastes, millions of tons of which are stored in coal mines. These wastes, the product of coal burning power plants, can leach toxic chemicals such as mercury, arsenic, and lead when the coal ash makes its way into the water.

The Center for Science in the Public Interest and a large coalition of public interest groups sent a letter to the National Academies identifying six members of this panel who have strong ties to industries opposed to regulation of coal combustion wastes:

- **Patricia A. Buffler**, a paid consultant for the Electric Power Research Institute, has been a paid consultant for Pacific Gas & Electric Company and sits on the board of a company whose holdings link it with surface mining. Buffler's association with EPRI is particularly problematic because that company advocates the use of coal combustion wastes as backfill for mine reclamation.

- **Y. P. Chugh** holds patents related to coal combustion wastes that could mean he has a financial stake in any future regulation of the disposal of these wastes in coal mines.

- **Edward M. Green** worked for 16 years as general counsel of the mining industry's lobbying association. Green receives a substantial income from mining companies. As a lawyer at Crowell and Moring, he has litigated or filed amicus briefs in a number of cases opposing federal regulations of the mining industry.

- **Thomas O'Neil** recently retired as president and CEO of Cleveland Cliffs Iron Company and Cliffs Mining Company, and he spent years as an executive and board member of several mining industry enterprises.

- **Robin Mills Ridgeway** works for Purdue University's coal-fired electric plant, which annually generates 30,000 tons of coal combustion wastes. Purdue is currently using these wastes, among others, to reclaim a large gravel pit on university property, and one purpose of that project is to develop a commercial process converting coal combustion wastes into soil substitute products for mine reclamation and fill projects.

- **Richard Sweigard** sits on the advisory board of the University of Kentucky's Center for Applied Energy Research, which sponsors a biennial symposium to help industry work with coal combustion wastes.

After the public interest groups called for an investigation of the potential conflicts of interest and imbalance on the panel, Buffler resigned from the committee and the National Academies announced that Green "is no longer serving on the committee."

This committee is not the first National Academies panel imbalanced with pro-industry bias. In one case the National Academies stacked mining interests on a panel charged with investigating the clean-up of the Superfund site in Coeur d'Alene, Idaho. Other recent panels that the National Academies stacked with biased industry representatives include a committee to investigate the health consequences of perchlorate ingestion and one assessing plants genetically modified for pest protection.

Conclusions from the National Academies are given great weight in federal policymaking. "Highly influential scientific assessments" must be subjected to arduous peer review procedures under likely forthcoming guidance from the Office of Management and Budget -- unless they are produced by the National Academies, in which case they are deemed trustworthy, even if the assessments come from panels stacked with industry representatives.

Graham Defiant in Hearing, Dems Probe Mercury Rule

The last regulatory policy hearing of a House Government Reform subcommittee was split into two disconnected halves, as committee Republicans considered the White House's policy of inviting industry to suggest rollbacks of regulatory protections while Democrats assailed the Environmental Protection Agency's pending rulemaking for mercury pollution.

The final hearing this term of the Energy Policy, Natural Resources, and Regulatory Affairs subcommittee of the House Committee on Government Reform was marked by cheerleading from industry representatives of White House anti-regulatory policy, stonewalling from White House regulatory czar John Graham, and completely unrelated criticism from House Democrats and their witnesses of EPA's handling of its still-developing mercury policy.

Committee Republicans focused in the Nov. 17 hearing on the White House's approach to regulatory policy -- in particular Graham's use of the annual report on the cumulative costs and benefits of regulation as a vehicle for soliciting suggestions from industry for a "hit list" of regulations to be rolled back or weakened. A succession of industry groups praised the process. All witnesses ignored the embarrassment of the 2001 hit list, in which Graham sent agencies a selection of "high priority" nominations to reform -- at least two of which Graham had prompted agencies to create just months before.

Graham came under fire from Rep. Doug Ose (R-Cal.), who has consistently pushed an even more vigorously anti-regulatory position than Graham. After repeating an exchange from previous hearings -- Ose prodding Graham to identify the cost of all pre-existing regulations, and Graham demurring -- Ose pointed out that Graham failed to follow up on a specific request to submit a catalogue of all hit-list reform nominations from the current and previous regulatory accounting reports. Ose had requested that Graham list the individual nominations, identify which were screened out and which were forwarded to agencies, and chart their current status.

In response, Graham simply declared that his office had not been given sufficient time to prepare a response. In fact, two agencies had been given the same request for reform nominations submitted to them, and those agencies were able to comply with the request. Although Graham could conceivably have asked other agencies to do the same and then simply supplemented their responses with information exclusively available to his office, he offered no excuse for failing to do so.

Moreover, Graham specifically refused Ose's request for further information. Graham reminded Ose that his office is compiling information about the current hit-list solicitation for reforms to benefit the manufacturing sector in the final version of the annual regulatory accounting report, which will be published at the end of 2004. Graham declared that he would not release information about the hit list solicitation in advance of that final report, calling it "pre-decisional."

Although pre-decisional information can be excluded from Freedom of Information Act requests, it is not clear how these outside communications from industry constitute pre-decisional information, nor is it clear why Graham would cite FOIA exemptions to justify refusing to give information to Congress in response to a specific request from the committee charged with overseeing his office.

Committee Democrats, meanwhile, used the hearing not to line up witnesses with information that would counter industry cheerleading of the hit list project but, instead, to attack EPA's mishandling of pending mercury regulation. Compressed scheduling had ruled out a separate hearing on mercury, so the Democratic members essentially conducted their own one-sided hearing on mercury while the Republican members held a one-sided hearing on anti-regulatory policy.

Critics Diagnose Systemic Maladies of FDA

A Senate Finance Committee hearing on Vioxx and a series of studies by a leading medical journal reveal systematic breakdowns in FDA's evaluation of drug safety, prompting advocates to call for an independent agency to review drug safety.

Drug Researcher Testifies: The System is 'Broken'

In testimony before the Senate Finance Committee Nov. 18, FDA researcher David Graham said the current system for testing the safety of drugs is "broken" and incapable of preventing unsafe drugs from entering the marketplace. Graham's testimony came in response to an investigation into the agency's handling of Vioxx, which was pulled from the market last month after it was found that use of Vioxx led to increased risk of heart failure. Graham's research had found that users of Vioxx were 3.7 times more likely to suffer heart attack or sudden death compared to users of its competitor Celebrex. Though Graham presented these findings at a conference in France this summer, the FDA would not act on his findings here and instead asked Graham to soften his conclusions.

A Culture of Suppression

Vioxx is Not Alone

Although the Vioxx case prompted the hearing, Graham charged that the FDA's failure to serve the public extends beyond that one drug. Graham pointed to a systematic failure to warn the public about the dangers of drugs when such warnings go against the interests of the Office of New Drugs. Graham used the historical examples of Lotronex, which studies had shown caused severe constipation and ischemic colitis, and Rezulin, a diabetes drug that caused acute liver failure. In both cases, Graham stated, the FDA knew of problems with the drugs but stalled, allowing countless individuals to suffer needlessly before finally withdrawing the drugs.

Graham listed five other drugs that he believed had been proven to present a serious health risk that FDA was failing to act on:

- AstraZeneca's cholesterol drug **Crestor**, which has been linked to muscle degeneration and kidney failure;
- Abbott Laboratories' weight loss drug **Meridia**, which has been associated with high blood pressure;
- GlaxoSmithKline's **Serevent** for asthma, which can cause life-threatening lung spasms;
- Roche Pharmaceutical's **Accutane** for acne, which has been shown to cause serious birth defects; and
- Pfizer's **Bextra**, an arthritis drug similar to Vioxx, that may cause heart failure or stroke.

When questioned Graham asserted that the failure of FDA to protect the public is inherent in the current system. As Graham stated in his testimony, when FDA approves a new drug, "it is also saying the drug is 'safe and effective.' When a serious safety issue arises post-marketing, their immediate reaction is almost always one of denial, rejection and heat." Graham's charges were echoed as other news surfaced suggesting that top officials at the FDA are more concerned with industry profits and their own image than in protecting the public.

Killing the Messenger

FDA officials may have attempted to discredit Graham before the hearing took place, leading Senate Finance Committee Chairman Charles Grassley (R-IA) to call for the Department of Health and Human Services Inspector General to investigate the matter. According to the *New York Times*, when Graham realized he was potentially vulnerable to retaliation as a whistleblower, he contacted Tom Devine at the Government Accountability Project to seek protection. While considering whether to take on the case, Devine began to receive anonymous phone calls trying to discredit Graham's reputation. Devine was able to deduce through their phone numbers and documents they sent him that they were high-level FDA officials. The officials were never able to back up their claims against Graham.

Moreover, news is surfacing that FDA officials tried to discredit Graham's study before it was published in a medical journal. *USA Today* reported that Steven Galson, acting director of the agency's Center for Drug Evaluation and Research, contacted the editors of the London medical journal *The Lancet* while the editors were reviewing Graham's article for possible publication. Among other things, Galson charged Graham with manipulating the data in his study--a charge that the study itself lacks sufficient integrity to warrant publication in any serious scholarly journal. In fact, according to Graham, the basis of that charge was a "discrepancy" between an abstract of the study as published in materials for a conference and the final study itself. That "discrepancy" was the product of an error that he corrected before addressing that conference and before submitting the paper itself for publication.

The attack on Graham coincided with the FDA's decision to exclude from an advisory panel a scientist who has compiled evidence that yet another drug may, like Vioxx, be harmful to users. Curt D. Furberg, a professor at Wake Forest University, was booted from an FDA committee to review the safety of the Cox-2 inhibitors after he made public statements questioning the safety of Bextra, a Cox-2 inhibitor painkiller produced by Pfizer, Inc. Furberg, a leading expert on drug analysis, told the *New York Times* that he believed Bextra appeared to be similar to Vioxx. The statement prompted FDA to rescind his invitation to the advisory panel. Furberg told the *Wall Street Journal*, "I collected the evidence to contribute to the debate, I drew a conclusion, and I'm off."

Broader Failures in Drug Safety Evaluation

In a series of studies, the *Journal of the American Medical Association* (JAMA) illustrated the failures of FDA's current system of drug evaluation. Evidence of the failures of the current system revolved around the drug Baycol, which was pulled from the market in 2001. While one study demonstrated that the cholesterol-lowering drug had substantial risk of serious side effects, another pointed to evidence that the makers of Baycol had information in early 2000 that the drug was more dangerous than competing drugs but did not make the information known. Patients on Baycol were far more likely to be hospitalized with a rare, serious muscle disorder than those on Lipitor, Pravachol or Zocor.

Drug makers are largely responsible for evaluating the dangers of their own drugs. FDA may perform some drug evaluations, but it relies largely on the makers of the drug to evaluate the drugs safety and then report the information to the agency. The agency also relies on voluntary reporting from doctors, so the majority of cases go unreported or the reports are not thorough enough to accurately determine the potential side effects.

The editors of *JAMA* concluded that this system, too, is broken:

> For instance, it appears that fewer than half of the post-marketing studies that manufacturers have made commitments to undertake as a condition of approval have been completed and many have not even been initiated. Moreover, despite the mandatory adverse event reporting system for companies subject to the FDA's post-marketing safety reporting regulations, drug manufacturers may be tempted to conceal available data that may signal the possibility of major risks. In some cases, the FDA and drug manufacturers may fail to act on that information and fail to conduct appropriate studies to examine a potential risk rigorously and promptly.

The Agency Responds to Criticism

The day before the hearing, FDA Acting Commissioner Lester Crawford issued a statement countering Graham's testimony. Crawford responded to criticism that the agency mishandled the Vioxx case, saying, "FDA has a well-documented and longstanding commitment to openness and transparency in its review of marketed drugs." Graham had contended that he was forced to revise the conclusions of his study, but Crawford countered that all revisions to Graham's study were done by Graham with his approval and without compromising his "deeply held convictions."

Sandra Kweder at the Office of New Drugs defended FDA's actions on the Vioxx case, saying, "FDA worked actively and vigorously with Merck to inform public health professionals of what was known regarding [cardio-vascular] risk with Vioxx, and to pursue further definitive investigations to better define and quantify this risk." Kweder also said that the FDA described by Dr. Graham "was not the FDA [she] know[s]."

Crawford also responded to statements that Dr. Curt Furberg had been removed from an advisory panel for publicly questioning the safety of Bextra. Backing away from the previous FDA position, Crawford said, "The advisory committee preparation process is still under way, so it was premature for any FDA official to suggest that Dr. Furberg could not participate in the upcoming meeting."

Crawford and Kweder also pointed out that FDA has taken steps to evaluate weaknesses in their current drug evaluation system. Early this month, FDA called on the National Academies' Institute of Medicine to review the agency's drug safety system. Responding to criticism that controversial scientific opinions of the agency's top scientists were suppressed or weakened by superiors, FDA is also establishing an internal appeals process. Through the appeals process, individuals within the agency who feel that superiors have allowed an unsafe drug to enter the market may present their case before an expert committee.

Calls for Change

In response to its findings that the public/private relationship in the drug evaluation system is deeply flawed, *JAMA* called for an independent agency to look at drug safety. The editors contended that it was unreasonable to have the same agency both approve drugs and "also be committed to actively seek evidence to prove itself wrong."

Other advocates have echoed the journal's request for an independent review of drugs, including Grassley. The Vioxx hearing before the committee pointed to mounting tensions between the FDA's Office of Drug Safety and the Office of New Drugs. Though the two offices are theoretically independent of one another, testimony revealed that the Office of New Drugs exerts considerable influence over the Office of Drug Safety. Many advocates believe such influence is inevitable when the same agency both approves drugs and evaluates their post-market safety. The agency is often reticent to release criticism of drugs already on the market, leaving patients at risk for side effects that can do serious harm.

Not everyone agrees that an independent group is necessary. University of Pennsylvania School of Medicine's Brian Strom, a consultant to major pharmaceutical manufacturers, countered the editorial staff with a commentary in *JAMA*. Strom argued that pre-market clinical trials will account for common side effects but may not catch rare side effects, which may only be detected through post-marketing surveillance. The current system "reflects a deliberate societal decision to balance delays in access to new drugs with delays in information about rare adverse reactions." Senate Health Committee Chairman Judd Gregg (R-NH) also disagreed with the need for an independent group to evaluate drug safety, saying Nov. 24 that "another layer of bureaucracy at the FDA is probably the last thing we need."

Gregg is set to step down as committee chairman in January. A new chair has yet to be announced.

Public interest groups have begun to take action against the host of problems within FDA. Among them, Consumers Union has launched a national grassroots advocacy campaign, Prescription for Change, which seeks reforms to ensure safe, effective and affordable prescription drugs. Echoing recent cries from Congress and several medical journals, the group calls "for a mandatory, public registry of drug companies' clinical trials to ensure that drug safety and effectiveness information is readily available to researchers, physicians and consumers." Over 25,000 citizens have already used the website to send emails to their representatives calling for action.

Reg Round-Up

How to stay on top of appointments news and rumors • Learn about the mad cow scare — and the unaddressed weaknesses in safeguards against mad cow disease • EPA rollback killing children • And more news briefs and alerts!

Do the Cabinet Shuffle: Who will be running the agencies in the next term of the Bush administration? Stay on top of the latest news and rumors in **REG•WATCH**, our regulatory policy weblog.

Mad Cow Scare: The false positive result in the potential mad cow case that made the news is, nonetheless, a stark reminder of the need for improvements to the regulatory safeguards intended to protect us all from BSE. Learn more in this OMB Watch analysis.

Deadly EPA Rollback: Learn more about recent news that EPA's decision to reverse a Clinton-era regulatory safeguard of rat poison is proving to have deadly consequences for poor children. (from REG•WATCH)

Astroturf Group Exposed: Learn about an industry-funded nonprofit that claims to address the safety of America's railways -- with a safety message that lets the rail industry off the hook. (from REG•WATCH)

What Bush Rollbacks Mean for You: Check out this great new feature from the Center for American Progress: **My Backyard**, a source for state-by-state data underscoring the deadly consequences of Bush administration anti-regulatory policy for you and people you care about.

1742 Connecticut Avenue, N.W., Washington, D.C. 20009
202-234-8494 (phone)
202-234-8584 (fax)

In This Issue

Saving Graces on Intelligence Reform Bill

In a surprising move, congressional and White House negotiators agreed on intelligence reform legislation that created no major victories for the public interest but could have been much worse for open government and environmental protection near the nation's borders.

The final bill still keeps secret the total intelligence budget, which the *Washington Post* estimated to be approximately $40 billion. The 9/11 Commission had pushed Congress to catalyze stronger public oversight of the government's intelligence activities by disclosing the total annual budget.

Past history of secrecy and new authorities granted to federal agencies under law passed since 9/11 raise additional concern about the new powers granted the new Director of National Intelligence (DNI). Under the law creating the Department of Homeland Security, DHS is doing two things that significantly expand secrecy in ways not seen in recent times. First, the department is writing procedures for safeguarding both classified and unclassified information. Second, it is asking its 180,000 employees to sign nondisclosure agreements that could eventually extend to scientists and public health workers outside government that have contracts with DHS. (Daniel Ellsberg was criminally charged with unauthorized disclosure of classified information when he disclosed the *Pentagon Papers* to the *Washington Post*, but the case was thrown out.)

These moves added to advocates' concern when Congress proposed that the DNI would have authority over the handling of classified and unclassified information without strong congressional oversight. Journalism groups argued the bill empowered the DNI to criminalize leaks of classified material, which would hurt news reporting.

The legislation did advance, albeit in a baby-step fashion, congressional oversight in a significant way. The bill sets up a board appointed jointly by the president and Congress to resolve disputes when Congress accuses federal agencies of keeping too many secrets. Specifically, the Public Interest Declassification Board, which supercedes an existing board created by Congress that never got off the ground, could hear appeals of federal agency classification decisions. The re-vamped board can initiate reviews of agency decisions and must respond to requests from Congress to do so. While the Board clearly has the authority to take up appeals from historians or other members of the public, the legislation did not specifically mandate that the Board respond to public requests in a manner similar to those from Congress. Some members, including Sens. Trent Lott (R-MI) and Ron Wyden (D-OR), were angered by the increasing cost of secrecy and intelligence agencies' efforts to black out key sections of a Senate committee report on pre-war Iraq intelligence.

Those close to the negotiations over the legislation expect Congress will exercise greater oversight on the legislation's impact on government secrecy and the free flow of information in society. One of the Republican holdouts who needed to be appeased, according to most news accounts, was Rep. Duncan Hunter (R-CA). Hunter and Rep. David Dreier (R-CA) both led the way in the conference committee on efforts to sneak in an amendment that would have empowered the Secretary of Homeland Security to waive any federal law in the course of completing barriers and roadways along the nation's southern border.

Current law allows the DHS Secretary to waive the Endangered Species Act and National Environmental Policy Act, if necessary, to complete securing the border, but that provision has never been needed. As originally proposed in the House by Rep. Doug Ose (R-CA), the amendment would have expanded the waiver authority to a more exhaustive list of environmental laws. When Dreier and Hunter pushed this amendment in conference, they expanded the proposed waiver power to include all federal law. A number of public interest groups, including a coalition of environmental groups and Citizens for Sensible Safeguards, opposed the amendment.

Most accounts suggest that Hunter was appeased by House leadership with the offer of a major effort to address immigration and border control in the next Congress. Although there is no specific evidence yet that this amendment was discussed, it does seem likely that a border security bill in the upcoming 109th Congress will include some form of amendment to place the DHS secretary above the law.

Note: This version of the above article correctly describes who may request that the Public Interest Declassification Board review agency decisions to classify documents. The original version incorrectly asserted that only the chairs of certain congressional committees could make requests.

Bush Plans Economy, Tax Summit Dec. 15-16

The White House will host a two-day summit in Washington, DC, to gather expert opinions on a variety of topics related to the economy, including budget and tax reform, Social Security, extending expiring tax cuts and health care. The Dec. 15-16 summit will solicit input from the business community, including small businesses.

While details are not yet final, White House spokesman Scott McClellen said the summit will "feature four to six panels on a variety of issues, aimed at making sure America is the best place in the world to do business…" He also specified President Bush would invite business leaders from different sectors of the economy in an attempt to attract a variety of views. It is unclear whether the commitment to embracing different views, even views from outside the business community, will be realized as the list of invitees has not been finalized.

One of the major topics for the conference will be proposals to overhaul the tax code. President Bush has yet to name members to a bipartisan panel to examine options to overhaul the tax code and will most likely postpone any announcement until after the summit. Senate Finance Committee Chairman Chuck Grassley (R-IA) has recently made statements in the press (Financial Times, Nov. 17 — subscription only), alluding to the importance of having a tax reform proposal from the President early in 2005 to have any hope of it gaining traction next year in Congress. The White House has not outlined any dates by which it would expect a report from the panel, but Grassley and other leaders on Capitol Hill are doubtful about the prospect of the bipartisan panel producing recommendations before next summer.

In addition to tax reform, Social Security is likely to be a central aspect of the agenda of the summit. President Bush will use the two-day conference to help build support for his proposal to allow people to invest a percentage of their social security taxes in private accounts. This plan has received heavy criticism, particularly for the estimated $1 to $2 trillion dollars that would be borrowed to cover transition costs.

Office of Management and Budget Director Josh Bolten downplayed concerns about the additional borrowing. Bolten said regardless of how it was handled, the costs would not pose a serious threat to responsible budgeting or to the president's promise to cut the deficit by half in five years. But critics on Capitol Hill and elsewhere dispute this rosy belief that private accounts will solve the Social Security crisis and not negatively impact the deficit. Grassley has said, "Anybody who thinks borrowing money for the transition to personal accounts is going to solve the problem of the long-term solvency of Social Security doesn't understand the size of the problem."

After meeting with Treasury Secretary John Snow and other Social Security Trustees Dec. 8, President Bush announced he would oppose raising payroll taxes to raise additional money for Social Security. It is still unclear if the President would oppose raising the salary ceiling (currently $87,900) that caps contributions to the program. With or without personal accounts, Grassley is convinced Congress will have to consider either benefit reductions or tax increases — options Bush opposes — to ensure the long-term solvency of Social Security.

There continue to be mixed signals from the administration with regard to deficits and Social Security. On the one hand, the president seems perfectly comfortable borrowing huge sums of money to create private investment accounts in Social Security when many experts believe minor financing fixes will more than solve the problem without adding to the deficit. On the other hand, Bolten editorialized recently in the *Wall Street Journal* that the completed omnibus appropriations bill for FY05 made progress on the important task of controlling budget deficits by "eliminating wasteful spending." But the amount of money Bolten implied would be saved in the omnibus bill falls far short of the amount financing private accounts would add to the deficit. And the budget cuts Bolton trumpets have left many programs woefully under funded. For example, funding for the Low-Income Home Energy Assistance Program (LIHEAP) is well below adequate levels heading into winter.

With the economy continuing to struggle through recovery, the dollar continuing its decline, job creation stagnant and incomes falling, and trade and international investment gaps growing, it is difficult to accept the administration's assurances about Social Security and the deficit — particularly considering its priorities.

Bush Signs Bill Extending Internet Tax Moratorium

On Dec. 3, President Bush signed the Internet Tax Nondiscrimination Act (S. 150), extending a moratorium on all taxation of Internet access and certain aspects of related electronic commerce through 2007. The bill is a result of a multi-year struggle over policy related to taxing Internet access and the development of broadband services across the United States.

Supporters of the ban argue it will ensure the United States stays on the cutting edge of Internet technologies, encourage innovation and expand the reach of broadband networks into poor and rural areas. Opponents say the ban prohibits states already struggling with huge deficits and budget crises from tapping a vital revenue source.

The moratorium was first established in 1998 in the Internet Tax Freedom Act, which banned for three years all taxation (federal, state, or local) related to the Internet, which it dubbed a "tax free zone." This included taxes on monthly service fees paid to Internet service providers, as well as "multiple and discriminatory" taxes paid when conducting business on the Internet.

The new act will extend those bans while continuing to exempt states that were investigating ways to levy fees on those services prior to Oct. 1, 1998 and those that have taxes and fees currently in place.

While this law has ended the debate temporarily, with both sides claiming a partial victory, the future of a tax-free Internet is still very much in doubt. If not for a compromised offered by Sen. John McCain (R-AZ), this bill might have died in conference. Sen. George Allen (R-VA) and House Judiciary Committee Chairman James Sensenbrenner (R-WI) already have announced plans to attempt to make the ban permanent, but that may be hard to pass considering the continuing decline in stability and revenues in state budgets.

Economy and Jobs Watch: November Numbers Still Lag Behind Need

The Bureau of Labor Statistics November Job Report shows a continuing disappointing trend in employment as the nation's employers added 112,000 jobs in November, far below analyst projections of least 200,000 jobs. This report is a bit of a surprise after the October report showed a strong month with 303,000 jobs added. The 112,000 jobs, about what was added in September this year, is below the approximately 140,000 jobs per month necessary to keep pace with new workers entering the workforce.

Also disappointing is the decline in average hours worked per week by 0.1 hours. Combined with an essentially stagnant wage growth (up $0.01), average weekly earnings dropped 0.2 percent to $533.47. The rise in wages by one cent was the smallest increase since wages dropped by a penny almost a year ago in December 2003. For the twelve months ending in November, average hourly earnings are up 2.4 percent, but they are essentially flat when adjusted for inflation.

Unemployment was essentially unchanged, with approximately 8 million workers unable to find a job (5.4 percent), but first-time claims for benefits jumped 25,000 in the last week of November to 349,000 after relatively quiet activity the rest of the month. In addition, according to the Economic Policy Institute, both the median and average time unemployed workers spend looking for work rose in November, with the average reaching its highest level since June at 19.9 weeks.

While the jobless recovery in some ways appears to be over, economists are still unclear about certain aspects of the economy and future growth. What is clear is that President Bush's policies have not resulted in adding an average of 306,000 jobs a month as predicted by the White House Council of Economic Advisers. With each successive month of weak job growth and stagnant wages, it becomes clearer and clearer those policies have failed.

New York Joins States Raising Minimum Wage

As the New York Daily News reported last Wednesday, nearly one million New Yorkers work full-time jobs, year round, for poverty level wages. A new New York law may help change conditions for some of these people as New York joined the growing list of states requiring that their workers be paid a minimum wage higher than the level set by the federal government, which is $5.15 an hour.

Last week, the New York state senate overrode Republican Governor George Pataki's veto of the increase, with 50 of the 62 senators voting for it, and only 8 against — well above the 2/3 needed to override a veto. The bipartisan support — especially from the Republican majority — was due largely to pre-election campaign promises senate candidates had made. Senate Majority Leader Joseph Bruno, stated, "The increase will help the working families at the lowest income levels make ends meet, without putting an undue burden on small businesses and the economy."

The law will gradually raise the state minimum wage level 38 percent by $2 an hour. It will increase from the current $5.15 to $6.00 on January 1, 2005, and to $6.75 on January 1, 2006. The final increase, to $7.15, will be implemented on January 1, 2007. The wages of food service workers who receive tips will also rise gradually from the current $3.30 to $4.60 per hour by 2007 .

According to the Fiscal Policy Institute, this wage increases will directly benefit 691,000 workers or roughly 8.8 percent of New York's workforce; another 509,000 workers who make between $7.15 and $8.15 will indirectly benefit from the law. (See the FPI analysis.) Pataki stated his opposition to the wage increase stemmed from worries the state would lose jobs to neighboring states who still pay their workers only $5.15. However, the increases will most likely boost New York's economy while helping hundreds of thousands of people make ends meet and providing neighboring states some incentive to follow its example.

New York was far overdue for a wage increase. The 1968 state minimum wage of $1.50 would have increased to $8.72 per hour by 2003, had it been adjusted for inflation. New York's move is only a step in the right direction. Now the Bush administration should act to raise the minimum wage for all American workers to boost the economy, and to help millions of working families achieve a greater standard of living.

Wealthy Congressmen Support Estate Tax

The estate tax, one of the most progressive tax policies in America, only currently affects the wealthiest 2 percent of Americans. Yet contrary to personal self interest, many members of Congress are not basing their position on the issue on their own pocketbooks. In his recent article in *Tax Notes*, Martin Sullivan made the ironic observation that on average, the more wealthy members of Congress, many of whom would be substantially taxed under the estate tax, are fighting the Bush administration's attempts at repeal.

Sullivan made the point that, "when it comes to fighting class warfare in Congress, the rich are for the poor and the poor are for the rich." Under the current law, which was set forth in the 2001 Economic Growth and Tax Relief Reconciliation Act (EGTRRA), the estate tax is phasing out gradually through 2009. In 2009, the top estate tax rate is 45 percent for all estates. In 2010 the tax will be repealed altogether, but then in 2011, the law reverts back to that which was in place prior to the passage of EGTRRA. That means that after 2010, estates greater than $1 million will be taxed at a gradual rate from 18 percent to 55 percent, with an additional 5 percent tax on amounts above $10 million (but not exceeding $17.184 million). This odd development has inspired some critics to observe, jokingly, that it provides an incentive for heirs to hasten the demise of their benefactors.

The estate tax is not only an important source of federal revenue — repeal would cost the government $80 billion per year — but it is also important because of its progressive structure, as well as the incentive it creates for charitable giving. Unfortunately, the estate tax has been mischaracterized as a tax that hurts small businesses and family farmers. In reality it affects a very small number of businesses and family farms. Even so, there is a very real risk that this Congress will either vote to accelerate repeal, or to make the repeal permanent after 2010.

However, the wealthiest members of Congress, those who would get hit the hardest by the estate tax, overwhelmingly support it, and advocate reform of the policy as opposed to repeal. Different reform proposals could involve raising exemption levels, to lowering the rate at which estates are taxed, to exempting family farms and small businesses altogether. Reform, as opposed to repeal, would be much less detrimental to federal revenue levels.

Sullivan's research found the five wealthiest Senators — John Kerry (D-MA), Jon Corzine (D-NJ), Herb Kohl (D-WI), John Rockefeller (D-WV), and Lincoln Chafee (R-RI) — voted against repeal, and eight of the ten wealthiest Senators are also against repeal. Chafee and John McCain (R-AZ), who are the wealthiest Republican Senators, have both broken with their parties in the past to vote against repeal. McCain's assets, which are recorded as equaling roughly $11.4 million, would be taxed $3.9 million if he passed away in 2005. John Kerry's, whose wealth is estimated to be around $1 billion, would be taxed so that $468.6 million would go towards federal revenue if he passed away in 2005. These wealthy Senators recognize how important the estate tax is, as they continue to support a tax policy taxing their personal assets at a high rate.

Repeal of the estate tax would in fact be extremely detrimental. In an economy plagued by both record high federal budget deficits and spending, coupled with an administration that wants to make existing and costly tax cuts permanent, the loss of this revenue would only further destabilize the economy, and amplify the consequences of a higher deficit, a weaker dollar, and deeper cuts in discretionary spending.

Congress Strips Offending Tax Provision, Passes Omnibus Bill

Last week Congress reconvened for a second lame duck session. They succeeded in stripping controversial tax language from the bill and on Dec. 8 the President finally signed it, officially bringing the much delayed FY 2005 appropriations process to a close. The omnibus bill combines nine appropriations bills Congress was unable to finish working on before the end of the fiscal year, along with thousands of provisions and riders.

Congress had to return after the omnibus passed initially to take out a provision giving appropriators unprecedented access to individuals' tax returns. The outcry over this provision exposed the fact that lawmakers themselves did not know the content of what was inside the massive, 3,000-plus paged bill. It is deeply troubling that year after year the appropriations process is reduced to passing a range of bills as part of a huge, complex, and expensive omnibus.

The FY 2005 spending bill significantly affects the funding levels of most federal agencies and programs. The *Washington Post* published a good synopsis of the highlights of the bill. The bill cuts all non-defense discretionary programs across the board, which was done in order to keep the final spending figure within the $822 billion budget cap Congress and the administration had agreed upon.

As BNA News Services reports, "the $821.9 billion figure allowed Bush to get the big increases he wanted for the Department of Defense and Homeland Security programs but left little for hikes in other programs." In fact, many programs suffered significant cuts. The Environmental Protection Agency saw their funds cut by $355 million, or 4.2 percent, the Federal Aviation Administration's budget for safety inspectors and air traffic controllers was cut by $322 million, and Bush's request for Title I education funding was cut by $607 million, or 9.5 percent. In contrast, the funding set aside for abstinence education programs increased by 28.5 percent, or roughly $30 million.

This overall lean omnibus provides some indication of the administration's priorities in drafting its proposed FY 2006 budget, due out in early February. The administration has made clear numerous times they plan to cut the deficit in half by 2009. The question that remains is how. If they plan to do so by continuing to squeeze non-defense discretionary spending, millions of Americans will see a reduction in essential government services while the savings will barely put a dent in reducing the deficit. The money our government will save pinching pennies in the budget is relatively small

compared with the amount of money President Bush gave away to millionaires in the tax cuts of the first term.

According to the Brookings Institution and the Center on Budget and Policy Priorities, the middle 20 percent of Americans received an average of $647 in 2004 from tax cuts enacted by the government in 2001 and 2003, while people who make above $1 million in annual income received an average of $123,592. Instead of chipping away at small pieces of the deficit by cutting social safety net programs millions of Americans depend on like LIHEAP and Medicaid, President Bush and Congress could make vastly greater strides in deficit reduction by not extending or repealing the first term tax cuts on only those who make above $1 million per year.

DHS Pushes Secrecy on the Hill

The Department of Homeland Security (DHS), which has been strongly criticized for its overuse of secrecy and lack of transparency, is now pushing to lock down information among congressional offices. DHS officials have asked congressional aides to sign nondisclosure agreements that would prohibit them from publicly disclosing information from DHS even though the information is unclassified.

DHS has reported that agency policy requires all DHS employees, now over 180,000, to comply with the three-page nondisclosure agreement even if they have not signed it. While other federal agencies use nondisclosure agreements to protect sensitive but unclassified information, DHS's agreement is stricter and farther-reaching.

The DHS form allows any employee or contractor to restrict information as "official use only." The form also defines "sensitive" as any information that could "adversely affect the national interest or the conduct of federal programs," which could be so broadly interpreted to include information important to oversight and accountability. Violation of the agreements could result in administrative, disciplinary, criminal and/or civil penalties.

Now DHS is asking congressional staffers to sign a nondisclosure agreement. It is not clear what the terms of the agreement are or which staffers are being asked to sign it. However, several staffers acknowledge being approached to sign the agreement.

Congressional offices from both parties have refused to sign the forms. They, along with good government groups, consider the agreements to be part of an unprecedented effort to expand government secrecy that is unmanageable and likely unconstitutional. "This is unclassified material, and we have a right to it without signing over our lives," said Ken Johnson spokesperson of Rep. Christopher Cox (R- CA), chair of the House Select Homeland Security Committee. "We are the overseers, not the overseen."

DHS officials claim that the forms merely educate employees about the importance of protecting sensitive but unclassified information and that it does not restrict the information from appropriate use or disclosure under the Freedom of Information Act. The agreements follow up on a DHS directive protecting sensitive but unclassified information and only sharing the material with those who have been determined to have a "need to know" it.

The two largest federal unions, the National Treasury Employees Union and the American Federation of Government Employees, have urged DHS to retract the policy. "The directive violates public policy and our national interest by providing a ready device for officials to suppress and cover up evidence of their own misconduct or malfeasance," attorneys for the unions wrote in a letter to Homeland Security General Counsel Joe Whitley.

Center Sues FERC Over Restricted Energy Information

The Center for Public Integrity (CPI) has filed a lawsuit against the Federal Energy Regulatory Commission (FERC), claiming the agency illegally blocked access to documents relating to liquefied natural gas (LNG) facilities throughout the country.

CPI, an investigative journalism organization, filed its lawsuit in U.S. District Court for the District of Columbia. The organization requested access to and copies of all FERC's correspondence, including meeting records, transcripts, schedules, minutes, and/or agendas between the agency and companies considering construction of LNG facilities. CPI originally requested the information from FERC under the Freedom of Information Act in February. However, the agency only released "a fraction" of the documents responsive to the organization's request.

Specifically, the organization wants reports on the safety and security of a proposed LNG facility that Hess LNG plans to build in Fall River, Massachusetts. However, Hess's law firm, Baker & Botts labeled its correspondence with FERC about the reports as Critical Energy Infrastructure Information (CEII), thus sealing it away from the public. Under FERC regulations, access to CEII is restricted to those the agency deems have a need to know the information, and only after they sign an agreement of nondisclosure prohibiting them from making the information public.

"It's completely absurd that the folks in Fall River don't have the reports already," exclaimed Bob Williams, CPI project director, "It all comes back to the fact that we think the public's business should be done in public."

CPI just released a report on LNG entitled, "Appealing to a Higher Authority," which asserts that FERC "is aggressively undermining the authority of state and local governments to reject dozens of proposed liquefied natural gas facilities all across the country." The report claims that over the past three years FERC commissioners have met inordinately more often with LNG industry representatives than with opponents of specific LNG projects.

Sage Grouse Recommendation Follows Data Quality Challenge

A data quality challenge recently filed by an industry group may have influenced government officials' recommendation that the greater sage grouse not be listed as an endangered species. The Partnership for the West is a coalition of organizations, which support a largely anti-environment agenda and receive support from corporations like Dow Chemical.

The request for correction under the Data Quality Act (DQA), filed Sept. 23, challenged the quality of U.S. Fish and Wildlife Service's (FWS) 90-day Finding for Petitions to List the Greater Sage-grouse as Threatened or Endangered and a conservation assessment. The group asserts that the documents "overstate threats to the species and understate the exhaustive conservation efforts currently underway by federal agencies, eleven Western States, local working groups, private landowners and environmental groups." The petition also states that listing the greater sage grouse as endangered would actually put the species at greater risk because it would undermine current conservation efforts.

The data quality petition is just one of many tools the Partnership for the West has employed to derail the listing of the grouse as an endangered species. The group also wrote letters to western governors asking them to oppose any listing of the species. The western governors group later recommended the species not be listed.

The DQA has primarily been used as a tool for industry to dilute, derail, and delay regulation by challenging the reliability and accuracy of information. The protection of endangered species has recently emerged as a major target for such data quality challenges. The U.S. Air Force may have joined the industry in misuse of the DQA when it submitted a petition that triggered the cancellation of listing slickspot peppergrass as an endangered species.

In a similar sequence of events, after the Partnership for the West's DQA challenge of government documents on the greater sage grouse, FWS biologists recommended the species not be listed as endangered, pointing to a number of assessments that say the species is not facing extinction. For more information about the recommendation, see a related article in this issue.

Reclamation Officials Withhold Dam Safety Information

The Bureau of Reclamation refuses to disclose safety details about the Jackson Lake Dam to a county official trying to verify his county is out of harm's way. The Teton County Commissioner, Bill Paddleford, wants the information as part of the area's emergency planning, which includes the city of Jackson.

The Jackson Lake Dam is located on the Snake River and holds an estimated 275 billion gallons of water. If the dam were significantly damaged and released this water, it could wash away towns along the lower portion of the river. The dam is also only seven miles east of the Teton Fault, which geologists believe is overdue for an earthquake that could surpass a 7.0 magnitude. For these reasons, Paddleford believes it is important to verify the soundness of the dam and prepare for all contingencies during the emergency planning.

The Bureau of Reclamation officials claim the dam is perfectly safe, and released a "nonsensitive" version of an engineering report to respond to concerns. However, the information does not satisfy Paddleford, who wants specific answers to safety questions.

This is just one of many examples of public information being shielded under the guise of security concerns since 9/11. In many cases, the government restricts information directly related to public health and safety. In a similar example, the Federal Energy Regulatory Commission (FERC) removed information from its website about problems in a Montana dam. Owners of the Milltown Dam near Missoula found gaps near the foundation. The agency never notified County commissioners about the problem, and were instead notified by a county employee who found the report on FERC's website. FERC removed the document a few days after the commissioners sent a complaint to the agency. In this case, the public can access the document at memoryhole.org. However, much of the information stripped from websites after 9/11 is no longer available in the public domain.

AU Sues to Block Funding for California Missions

On Dec. 2, Americans United for Separation of Church and State (AU) filed a lawsuit in federal court to block taxpayer funding for restoration of mission churches in California. The suit charges that the recently passed "California Missions Preservation Act" is tantamount to taxpayer-supported religion.

The bill, signed by President Bush on Nov. 30, requires the Secretary of the Interior, currently Gale Norton, to make grants of up to $10 million to the California Missions Foundation to repair the missions and their artifacts. Many of these artifacts are religious symbols and artwork.

Americans United for Separation of Church and State (AU) allege that the bill advances religion in violation of the Establishment Clause of the First Amendment. The Roman Catholic Church owns 19 of the 21 missions the bill funds, in which it also celebrates mass. AU is concerned that this bill could be the forerunner of taxpayer-supported maintenance of "historic" houses of worship.

However, California's missions are the state's most visited historical landmarks, drawing 5.3 million people each year, including hundreds of thousands of California fourth-graders who study mission history. All are state historic landmarks and six have been deemed national historic treasures. Additionally, federal money has been routinely spent before on historic structures where church services are held, including Atlanta's Ebenezer Baptist Church, San Antonio's Mission Concepcion, and Boston's Old North Church.

Opponents of the lawsuit state that the money will go to the California Missions Foundation, a private, nonprofit group which is undertaking a fund raising campaign to refurbish the structures. The missions require at least $39 million in repairs, and an additional $11 million for visitor improvements and conservation. The legislation allows for the disbursal of matching funds up to $10 million.

The legislation was amended before it was passed to require the disbursement of funds be made contingent on a finding by the Justice Department that the statute does not violate the First Amendment.

ACLU Files Info Request on Government Spying on Nonprofits

The Dec. 1 issue of *USA Today* reports the American Civil Liberties Union (ACLU) has filed Freedom of Information Act requests to learn the extent of "surveillance, questioning and interrogation" of people associated with activist groups and individuals traveling to and from the Middle East. The request focuses on the activities of anti-terrorist task forces in ten states, including Arizona, California, Colorado and Texas.

The anti-terrorism task forces are made up of combined local, state and federal law enforcement personnel. The program has expanded from 34 task forces in 2001 to 100 in 2004. The ACLU has also questioned the ongoing participation of Central Intelligence Agency (CIA) personnel in illegal investigations of U.S. citizens. The CIA claims its officers are acting as advisors, not investigators.

Law Symposium Exposes Weaknesses of Anti-Terrorist Guidelines for Nonprofits

A recent Pace Law Review Symposium, "Anti-Terrorist Financing Guidelines: The Impact on International Philanthropy," highlighted the need for changes in the government guidelines and increased transparency of the reasons behind government decisions to shut down several Muslim charities accused of financing terrorists. The U.S. Treasury Department published the guidelines, which have been widely criticized, in November 2002. Speakers at the symposium said the current situation has lead to a decrease in international philanthropy, inappropriate application of the guidelines, a perception of ethnic discrimination against Muslim organizations and shut down of several charities with no terrorist-related convictions. A Treasury official acknowledged problems and said the department is working with the sector to revise the guidelines. See summary.

Nonprofit Accountability Update

Reports of financial scandals and the emergence of many new nonprofits have increased scrutiny of the nonprofit sector. The Senate Finance and House Ways and Means Committees both held hearings in June that put nonprofits under the spotlight, and more congressional oversight activity is planned. Moreover, calls for greater nonprofit accountability are coming not only from the federal government, but also from state legislatures.

The Panel on the Nonprofit Sector, managed by Independent Sector , recently announced both the participants for its five work groups and the creation of a nine-member Citizens Advisory Group. The five work groups will assist the Panel as it prepares recommendations to the Senate Finance Committee on improving oversight and accountability of nonprofits.

The work groups will review: § Governance and Fiduciary Responsibilities; § Legal Framework; § Oversight and Self-Regulation; § Small Organizations; and, § Transparency and Financial Accountability. The work groups will discuss possible changes to existing laws, advocate increased self-regulation in areas, and identify issues where more research is needed.

Additionally, the Citizens Advisory Group, comprised of leaders of America's business, educational, media, political, and religious institutions, will advise the Panel as it develops recommendations to Congress to improve the oversight and governance of nonprofit organizations by providing broad perspectives on how to strengthen governance, transparency, and accountability within the sector.

Members of the panel are: Norman R. Augustine, chairman, Executive Committee, Lockheed Martin Corporation, Bethesda, MD; Johnnetta B. Cole, president, Bennett College for Women, Greensboro, NC; John M. Engler, president and CEO, National Association of Manufacturers, Washington, DC; Rev. James A. Forbes, senior minister, Riverside Church, New York, NY; Alex S. Jones, director, Joan Shorenstein Center on the Press, Politics and Public Policy, John F. Kennedy School of Government, Harvard University, Cambridge, MA; Bob Kerrey, president, New School University, New York, NY; Leon E. Panetta, founder, The Panetta Institute, Seaside, CA; John E. Porter, partner, Hogan & Hartson, Washington, DC; Sharon Percy Rockefeller, president and CEO, WETA, Arlington, VA.

With Congress' passage of the Sarbanes-Oxley Act, many state legislators and attorneys general have passed or been considering various proposals to increase nonprofit accountability at the state level. The National Council on Nonprofit Associations has compiled a chart detailing these pending bills and proposals to change nonprofit governance in the states.

Civic Engagement Conference Summary-Return the Charity to the Citizen!

The National Conference on Citizenship, held Dec. 3 in Washington, DC, examined the role of citizenship in the post-9/11 world. The conference provided a forum to discuss the important role nonprofits play in encouraging citizenship. Read more for a summary of points made at the conference.

The conference theme was highlighted by John DiIulio, Jr., former director of the White House Office of Faith-Based Initiatives, who moderated a panel discussion on nonprofits and citizenship in front of 500 educators and nonprofit leaders.

“After working at Princeton as a professor for many years, I decided to take a sabbatical and work at a middle school in inner-city Philadelphia teaching government and ethics. For our class trip, we went to Washington, DC. We walked around all day, packed as much into the day as we could, and the last thing we visited was the Lincoln Memorial. 40 kids spilled out of the bus and ran up the step of the Memorial. When they reached the top, almost in unison, they started reading aloud the Gettysburg Address.” He paused. “With a one-in-three-lifetime chance of ending up in prison, from a place where 60 percent of the kids their age in their community are illiterate, what does citizenship mean to these lower income, impoverished children?”

Nonprofits struggle with the concept of civic renewal and the rights of citizenship — how to get individuals involved in their local, state or federal government or community organizations.

Most people are civically engaged in some way, but their forms of participation and interaction differ significantly. A small percentage are involved in many ways, but most people are more specialized or selective in their forms of engagement. Some focus almost exclusively on their church, while others thrive on political activity.

Nonprofits make a difference when they are engaged. However, people still encounter significant barriers to participation. The challenge is how do nonprofits encourage individuals to make a difference in their communities.

All forms of citizen interaction and participation contribute to a community’s strength — from joining an organization to donating to a charity to socializing informally. Nonprofits fill a role in civic engagement by bringing people together. Many nonprofits create social capital by creating places of common interest. Unfortunately, many nonprofits have become too specialized and removed from ordinary citizens, and tend to intimidate volunteers.

One way nonprofits can attract participants is by providing service opportunities. Alan Khazei, founder of City Year, discovered that by challenging young people to serve their country, his organization has inspired them to take part in their own collective enterprises. The values these young people learn through City Year take hold, and as a result, they vote in higher numbers than any other voter group.

Nonprofits also need to return charity to the citizens. Historically, charities have been viewed as voluntary and disorganized. The first foundations — Ford, Rockefeller, Sage — took public affairs out of the hands of the volunteers and put it in the hands of specialists.

Recently, nonprofits’ common cause has been voter mobilization as a way to re-involve the citizen in politics. While this greatly encouraged record voter turnout last month, voting without other civic involvement allows the voter to select between two specialists without getting their hands dirty. The day after the election, they can simply return to their lives and let the experts rule.

Nonprofits need to provide more ways for citizens to get involved at all levels in which they operate — local, state and federal. By providing service opportunities, individuals can come together and create a sense of civic engagement and collective enterprise and truly return the charity to the citizen.

Superfund Lacks Funds to Cleanup Toxic Waste Sites

Facing an increasing backlog of sites with the same meager budget, the Superfund program administrator thinks he's found a new way to tackle the country’s most severe hazardous waste problems: Stop addressing them.

Superfund Program Looking for New Solutions

On Dec. 2, Thomas P. Dunne, acting administrator for the Environmental Protection Agency’s (EPA) office of solid waste and emergency response, announced at an academic Superfund conference that the agency might temporarily discontinue listing new Superfund sites. Facing a fiscal crunch, the agency is considering ceasing to list new sites and holding off new cleanup projects until work on current projects is completed as a way of focusing the program’s resources on existing problems.

The comments sparked outrage from Sen. Jim Jeffords (I-VT), who said, “We have already dried up the funds needed to clean up the toxic sites we currently know about; now the Bush administration suggests sticking our head in the sand and not even [taking inventory of] other polluted sites. The millions of Americans who live within a short distance of a contaminated site want real solutions, starting with fully funding the program and reauthorizing the expired polluter pays fees. We should be working to protect our environment and public health by cleaning up more sites, faster, rather than shirking our responsibility.”

Dunne also suggested two other approaches that may help stretch Superfund’s dismal $450 million budget: creating economic incentives for businesses to clean up sites and creating a management system that would allow communities to have more of a realistic view of cleanup costs and priorities. Dunne insisted that the agency is not married to any of the

ideas, but that they highlight the need for serious dialogue on how best to tackle cleanup of the hundreds of severe toxic waste sites around the country.

A Price We All Pay

The Price Tag of Hazardous Waste: $253 Billion

A recent EPA report projects that at the current pace, it will take between 30 and 35 years and $253 billion dollars to cleanup most of the nation's known and yet-to-be-discovered toxic waste sites. This figure is significantly higher than EPA's last estimate, released in 1996, that cleanup would cost $187 billion over 30 years. EPA projects that it will have to remediate at least 294,000 hazardous waste sites — and that number could go as high as 355,000. That estimate includes the 77,000 hazardous waste sites that have already been discovered plus 217,000 yet-to-be-discovered sites. According to the report, the $253 billion price tag will be borne predominately by the polluters.

Less than 1 percent of all hazardous waste sites are part of the Superfund program, which includes only the worst toxic waste messes, but Superfund cleanups account for 15 percent of the total projected cost. Currently there are 456 Superfund sites remaining to be remediated, and EPA expects to find approximately 280 more.

Administration Allows Taxpayers to Foot the Bill

The Superfund program was started during the Reagan administration to locate, investigate and clean up the nation's worst toxic waste sites. As originally conceived, the Superfund would pay for cleanups using money primarily from an industry-financed trust fund. This fund was created through a tax imposed mainly on chemical and petroleum companies, who are accountable for most of the industrial waste in toxic sites. In 1995 Congress failed to reauthorize the Superfund tax, and the resources used to clean up toxic waste dumps have since dwindled. Bush opposed reauthorization, allowing the fund to go bankrupt in October 2003 and forcing taxpayers rather than polluters to bear the brunt of cleanup costs.

'All Appropriate Inquiries' Rule Lets Developers Off the Hook

Even without the fund, EPA is only supposed to tap into taxpayer money after obtaining funding from all liable parties, yet recent policy changes have limited the liability of those involved.

In one recent move, EPA issued a new regulation that weakens the environmental standard for appropriate inquiry into the history and environmental condition of brownfields, shielding potential developers from future liability. The standards are required by the 2002 brownfields law, which provides incentives for redeveloping former toxic sites without sacrificing public health and safety.

The weakened environmental standard prompted five Democratic lawmakers to submit comments to EPA Administrator Mike Leavitt (whom President Bush has nominated to be his new secretary of Health and Human Services), charging that the new regulation is inconsistent with the intention of Congress and the brownfields law and that the weakened standard "will result in more contaminated sites going undiscovered, allowing contamination to go unaddressed and allowing a continuing threat to public health and the environment."

Along with their complaints, Reps. John Dingell (D-MI), Hilda Solis (D-CA), and Frank Pallone (D-NJ) joined Sens. Barbara Boxer (D-CA) and Jeffords in attacking the new regulation for failing to require that an environmental professional conduct the inquiry, thus increasing the possibility that environmental problems will be missed. The lawmakers noted that "the probability of missing an environmental problem becomes unacceptably high when the person conducting the inquiry on the ground does not have the experience or judgment of an environmental professional. The consequences are serious."

The new rule also allows for exemptions to the brownfields law requirement that visual inspections of the facilities and adjoining properties be conducted as part of the inquiry. Such exemptions include weather, the location of the property, and refusal of the seller to allow access despite good faith efforts by the purchaser. The lawmakers note that the "opportunity for mischief is great" if such exemptions are allowed. "Actual visual inspection of a facility is central to every environmental inquiry," the lawmakers contend.

The letter further asserts that the standard would:

- Allow sellers of contaminated property to "take excess profits from the sale of the property and put those profits out of reach before the need for cleanup is known";
- Increase the likelihood that taxpayers will bear the cost of cleanup when contamination is found; and
- Allow purchasers to claim liability exemption despite the weakness of the inquiry standard and to take no further action to investigate or cleanup environmental problems.

Lawmakers, IG Call for Reinstatement of Polluters Fees

At a time when one in four Americans live within four miles from a Superfund site, 34 out of the 61 total ongoing Superfund projects did not receive funding in 2004, according to an EPA letter to Jeffords. In October, Jeffords and Boxer sent a letter to Leavitt demanding that the polluter fees be reinstated to pay for future cleanups and that the Superfund program be fully funded. Even the Inspector General has called for hundreds of millions more in the agency's $450 million budget in order to meet the increasing backlog of site cleanups. However, increased funding has yet to arrive and taxpayers, not polluters, continue to pay the cost of cleanup.

Panel Nixes Endangered Species Status After Politico Bashes Science

A panel of Fish and Wildlife Service officials has recommended against granting Endangered Species Act protections to the greater sage grouse, based on source materials that included scientific assessments from federal biologists and a critique of that science from a political appointee with no background at all in biology.

The recommendation, which is likely to be followed, means that the sage grouse's habitat will not receive special protections. That habitat overlaps with areas of likely oil and gas deposits in Colorado, Montana, Utah, and Wyoming — areas the Bush administration has been pushing to open up for energy developers, who would face significant regulation under the Endangered Species Act if the sage grouse were listed as an endangered species.

The *New York Times* discovered, however, that the FWS panel made its recommendation after reviewing two versions of the same scientific assessments. The first, an overview of the extensive science available on the sage grouse and its dependence on sagebrush, was prepared by agency wildlife biologists. The second, offering revisions to the biologists' draft report and commentary criticizing the science, was prepared by Julie MacDonald, a politically appointed senior policymaker with no background in wildlife biology.

"The consistent thrust of Ms. MacDonald's critique was to dismiss the methodology behind studies that indicated significant declines in grouse population or habitat, to denigrate many studies as mere 'opinion' and to seek inclusion of industry comments that she found compelling," according to the *Times*.

That assessment would place MacDonald's interference with science squarely within this administration's pattern of distorting science to meet political ends. The right-hand box of this article (not available to those reading this article in the PDF version of the *Watcher*) lists other *Watcher* articles chronicling the politicization of science during this administration, which include White House changes to a report from scientific experts on the hazards of mercury and the administration's efforts to hide information about climate change.

The following are some examples of MacDonald's changes and criticisms:

From the scientists: "Prior to the settlement of the Western United States by European immigrants in the 19th century, sage grouse lived in 13 states and 3 Canadian provinces. Sagebrush habitats that potentially supported sage grouse occupied approximately 463,509 square miles."	MacDonald's rejoinder: "This entire discussion of estimated habitat, estimated range, estimated population should be eliminated as it is 1) not supported by contemporary accounts, 2) not supported by data and 3) simply a fairy tale, constructed out of whole cloth, based on a series of arbitrary assumptions."
From the scientists: "Sage grouse depend entirely on sagebrush throughout the winter for both food and cover."	MacDonald's rejoinder: "I believe that is an overstatement, as they will eat other stuff if it's available."
According to the scientists: the sage grouse numbered in the millions before settlers arrived in the 19th century	MacDonald's rejoinder: these estimates are "simply a fairy tale, constructed out of whole cloth"
According to the scientists: one study revealed that a population of 4,000 birds in one Utah valley dwindled to less than 200 after their habitat was fragmented	MacDonald's rejoinder: "Citing examples like this, which are extreme, do not elucidate the issues we are faced with …. This example should be deleted."
In the scientists' assessment: a study from the Western Association of Fish and Wildlife Agencies, in which experts compiled the vast body of science available on sage grouse populations, territory, historical trends and adaptability	MacDonald's rejoinder: "We should treat it as we would treat an industry publication."

See related article this issue.

FCC Rigs Cost-Benefit Report to Side With Industry on Cable A La Carte

The Federal Communications Commission (FCC) sided with the cable and big media industries against regulation mandating *à la carte* cable service, justifying its position with a cost-benefit analysis rigged against *à la carte* options.

The vision of cable *à la carte* is that cable customers could pick and pay for only the channels they want. Most American consumers can only purchase cable service in large tiered packages, like "basic" and "expanded" service packages, which require them to pay for channels they never watch in order to receive the channels they do want.

Under enormous pressure from large cable companies and media conglomerates, the FCC has signaled its rejection of the possibility of cable *à la carte* by releasing an analysis that it rigged in favor of the cable and media industries and against consumers. Consumers Union criticized the FCC analysis as "dramatically flawed" because it "focuses primarily on a mandatory *à la carte* system rather than the voluntary system Consumers Union and other public interest groups have proposed. It also inflates the cost by assuming that everyone would have to buy or rent a special cable box, when consumer groups have said that the proposal should target digital cable subscribers, who already pay for the box."

Consumers Union noted that the analysis also inflated the cost of the addressable converter boxes considered necessary for the most feasible implementation of cable *à la carte*. Further, the FCC's analysis mentioned in passing without seriously contemplating the possibility that one company's trap boxes—addressable boxes installed outside of a building—could effectively manage *à la carte* and mixed bundling alternatives, much less that *à la carte* regulation could drive down the implementation costs of necessary technology or spur other innovations.

One of the most startling developments in the debate over *à la carte* cable is the effectiveness with which gigantic media corporations isolated consumer groups by wedging apart other potential public interest allies. The key was the industry's

re-framing of its targeted and niche marketing efforts to program for women and minority groups as public service. The megacorporations involved downplayed their control over such channels as TV-One (in which the giant cable provider Comcast is an investor) and Oxygen (likewise owned in part by Time Warner, a giant in both cable service and cable/ broadcast content) and lured identity politics groups into the battle by claiming that *à la carte* would threaten the diversity of programming available on cable.

Having successfully enlisted groups such as the Ms. Foundation, the Rainbow/PUSH Coalition, and the NAACP into criticisms of *à la carte* as a threat to diversity, the cable and media giants opposed to *à la carte* successfully downplayed the real threat to diversity in programming: their own monopolistic and monopsonistic market dominance.

Two key factors contribute to the current market climate, which *à la carte* would counteract:

Media Consolidation: Most broadcast and cable channels are owned by a small number of gigantic media corporations. Many cable channels, such as ESPN, are in such demand that they are essential components of any successful package in the current non-*à la carte* tiered-and-bundled market. The companies that own these must-carry channels, especially the broadcast networks, are able to exploit that dominant position by forcing cable providers to carry other channels in the media companies' portfolios. This factor is particularly relevant in the retransmission agreements that any cable company must sign in order to carry the over-the-air broadcast networks, which are owned by corporate megaliths.

Cable Monopsony: With the exception of a few communities across the country, American cable companies are government-sanctioned monopolies: the only company in town allowed to offer wired cable TV services. As monopoly *sellers* of cable service, the cable companies are, in turn, exclusive or monopsony *buyers* of cable programming. Accordingly, the cable companies are empowered to extract concessions from would-be providers of cable programming. Consumer groups observed that TV-One, a new cable channel created by black media entrepreneurs, is available on Comcast cable systems because the original owners finally sold a stake in the channel to Comcast. Oxygen, a new channel founded by women and directed at women, likewise secured its status when it won carriage on New York City's cable provider—which is owned by Time Warner, an investor in Oxygen.

In the current environment, it would probably be impossible for an independent or black- or women-owned cable channel to secure adequate carriage in enough cable systems to succeed as a viable enterprise, in part because media consolidation consumes most of the available real estate in a cable channel line-up, and in part because cable monopsony means that scarce channel openings will most likely be given to programming in which the cable company giants like Comcast or Liberty Media are investors.

The Crowded Field

The following is only a brief glance at the consolidated ownership and related investments of some of the major cable and media companies.

Comcast

- E!
- Style Network
- Outdoor Life
- The Golf Channel
- G4
- Comcast regional sports channels
- TV One

Disney

- ABC
- ABC Family
- ESPN
- ESPN-2
- The Disney Channel
- TOON Disney
- SOAPnet
- Lifetime
- A & E
- E!
- Style

GE/Vivendi/NBC Universal

- NBC
- Telemundo
- CNBC
- MSNBC
- Bravo
- Sci-Fi
- TRIO
- USA
- ShopNBC
- PAX

Liberty Media

- QVC
- Encore
- STARZ!
- Discovery
- TLC
- Animal Planet
- The Travel Channel
- Discovery Health
- GSN
- Hallmark
- *And a stake in NewsCorp*

NewsCorp

- FOX
- Fox Movie Channel
- Fox regional sports channels
- FX
- Fuel
- National Geographic Channel
- SPEED Channel
- FOX News

Time Warner

- The WB
- HBO
- CNN
- CNN Headline News
- TBS
- TNT
- Turner Classic Movies
- Cartoon Network
- Oxygen

Viacom

- CBS
- UPN
- MTV
- BET
- VH-1
- Nickelodeon
- Comedy Central
- TV Land
- Spike TV
- CMT
- Sundance Channel
- Showtime

Food Supply Called 'Easy' Target for Terrorists

The Food and Drug Administration's response to bioterrorism has done little to protect our food supply, prompting even the outgoing Secretary of Health and Human Services to show concern.

In his resignation remarks last week, Tommy Thompson told press that he believed that it would be "easy" for terrorists to contaminate our food supply. "For the life of me, I cannot understand why the terrorists have not attacked our food supply because it is so easy to do," he said, adding that he "worried every single night" about terrorist threats to the nation's food supply.

Four provisions of the bioterrorism act required FDA to develop new regulations to protect our food supply. FDA's latest bioterrorism regulation on the establishment and maintenance of records represents the fourth regulation promulgated by FDA in response to the act. The regulation requires that food suppliers establish and maintain records of where their food shipments came from and where they go next. In the case of an attack on our food supply, these records will assist government officials in discovering the source of the attack, although they will do little to protect our food supply from an actual bioterrorism threat.

FDA's three previous rules require registration of foreign and domestic food facilities, necessitate prior notice of food shipments imported or offered for import in the US, and authorize the use of administrative detention so that food products that might pose a threat of serious adverse health consequences or death may be detained.

Administrative detention is only effective once the adverse threat has been found, but, as Thompson pointed out, only a very small percentage of food supply is ever inspected. If the food threats are not discovered, administrative detention can do little to protect the food supply. The registration of facilities will, like the new record-keeping regulation, assist FDA in tracking any attacks once they occur, but it will do little to find potential threats.

The prior notice of shipment could have been a real effort to block the entry of contaminated food into our food supply, but the rules were significantly weakened during review with OMB. The original proposal, issued in February 2003, required importers to notify the FDA by noon the day before the shipment was to arrive. The final standards, however, required just eight hours notice for shipments arriving by sea, four hours for those transported by air or rail, and only two hours for shipments coming by land — hardly enough time to investigate a potential bioterrorism threat.

According to a statement by the Center for Science in the Public Interest Food Safety Director Caroline Smith DeWaal, our food supply will remain an easy target for terrorism unless FDA is given the authority necessary "to visit foreign factories and farms that want to ship food to the U.S., and authority to mandate recall and traceability all along the food supply. Ultimately, the food laws should be comprehensively modernized and food-safety functions combined into a unified food-safety agency, rather than the hodgepodge we have today."

With Thompson set to depart, Bush has nominated Mike Leavitt, currently the administrator of EPA, to head HHS. It is unknown how or to what extent Leavitt will work to strengthen food safety safeguards. Generally while at EPA, Leavitt, a former governor of Utah, favored the regulated community, promoting minimal regulation and voluntary standards in lieu of requirements.

Rocket Fuel Ingredient Ignites Controversy

Perchlorate, a key ingredient in rocket fuel that is associated with developmental delays, can be found in lettuce from Florida, bottled water from California, and organic milk from Maryland, according to initial data from the Food and Drug Administration.

Although it is too soon to determine whether perchlorate contamination of food and water is truly widespread, the FDA's early results are nonetheless the latest chapter in a dispute pitting environmental and public health against industry influence over science and the prerogatives of the Department of Defense.

Perchlorate is one of a class of endocrine-disrupting chemicals that slow brain development in the fetus and can cause reproductive disorders such as low sperm count, early onset of puberty, genital abnormalities, and cancer. The proof of this connection between perchlorate exposure and these conditions is stronger than ever before imagined, according to a June 2004 press briefing from a group of researchers that conducted a comprehensive literature review.

Meanwhile, federal regulators are waiting on a report on the health effects of perchlorate from a National Academies panel. The panel was criticized by the Natural Resources Defense Council and the Center for Science in the Public Interest for including four members with significant conflicts of interest. One, the chair of the panel, resigned before the panel's first meeting in Oct. 2003, while another resigned this June—after the panel had already met four times. The remaining two are still on the panel, which is expected to release its report next month.

Perchlorate has also been found in 22 Department of Defense sites across the country, the drinking water well for a high school in Massachusetts, and ground water in Iowa. The stakes are so high that Environmental Protection Agency officials issued a gag order to regional staff forbidding them from cooperating with congressional investigators and prevented agency scientists from discussing studies showing that lettuce absorbs large amounts of perchlorate.

Moreover, stonewalling from the White House has forced NRDC into court to demand answers about the White House and industry efforts to block regulatory protections for perchlorate.

1742 Connecticut Avenue, N.W., Washington, D.C. 20009
202-234-8494 (phone)
202-234-8584 (fax)