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Halving the Deficit Will Involve Major Changes—or 'Fuzzy Math'

Anybody who listened to President Bush speak during his campaign heard a few specific messages reiterated again and again, loud and clear. One addressed the federal budget deficit, which at 3.6 percent of GDP (gross domestic product) in 2004 was the highest it has been in over a decade. Bush has vowed to halve the deficit by 2009. He repeated this promise in a December press conference, stating he will cut the deficit in half while continuing to pursue both making the 2001 and 2003 tax cuts permanent and providing "every tool and resource for our military."

There are many factors working against the president in his quest to fulfill this promise. In 2003, total tax receipts for the federal government were 16.5 percent of GDP – their lowest level since 1959. The U.S. dollar continues to decline in value and the United States has become more reliant on foreign borrowing to finance the government. In addition, Bush has promised to fully fund a costly war in Iraq and extended military operations around the world in the war on terrorism and continues to push for privatizing Social Security, a proposal that many analysts estimate could cost up to $ 2 trillion in transition costs.

With all these factors, many are wondering how the president plans to do it. One way will be to propose a lean federal budget for FY 2006; a budget leaving many programs that Americans depend on dramatically underfunded. Bush has discussed his FY 2006 budget as being both a "tough budget" and a "budget that fits our times," but this really means one thing: less money set aside for non-defense discretionary spending.

These cuts will do little to alleviate the budget deficit. It is convenient for this administration to have such a large budget deficit so it can further its political priorities of shrinking the size and role of the federal government in the name of fiscal discipline. But the cuts the president will make in non-defense discretionary programs in his FY 2006 budget will do little to ease the budget deficit compared to rolling back some or all of the 2001 and 2003 tax cuts.

The administration will certainly continue to use a "reducing the deficit" rationale to justify imposing entitlement caps in the FY 2006 budget. Entitlement programs, such as Medicare and Medicaid, are funded by formulas set in law and not subject to the annual appropriations process. But by including entitlement caps in the budget, the Bush administration will further erode an important aspect of the social safety net just so they can avoid rolling back tax cuts for the super wealthy.

It has recently emerged the administration has another way of battling the budget deficit besides excessively cutting funding for programs and agencies. News sources, including the *New York Times*, reported the administration plans to both use the numbers to their advantage and omit the costs of certain major initiatives and policies.

The *Times* reported on Jan. 2 that administration officials have "decided to measure their progress against a $ 521 billion deficit they predicted last February rather than last year's actual shortfall of $ 413 billion." This means that they are going to use an inflated baseline in pursuing their goal of cutting the deficit in half. Last February, administration officials predicted a federal deficit of $ 521 billion. After the fiscal year ended Sept. 30, the Treasury Department reported that the 2004 budget deficit stood at $ 413 billion – $ 108 billion less than their earlier predicted deficit.

Many economists and analysts argued the February 2004 deficit forecasts had been deliberately overstated to make the real deficit numbers pale in comparison to original predictions, and thus look like the administration was doing well. An October 2004 report by the Center on Budget and Policy Priorities called the situation "misleading at best. The administration's claim [that their policies were helping reduce the deficit] comes about only because the deficit *did not increase as much* in 2004 as the administration earlier predicted it would. This is like a football coach predicting his team will go from a record of 6 wins and 10 losses to a 4-12 record the next year, and then celebrating when the team 'improves' to 5-11." Ranking Senate Budget Committee member Kent Conrad (D-ND) said of the situation, "I believe they were cooking the books." Not only did the overstated deficit prediction allow the administration to claim a "victory" in 2004, but now it is also providing them with a false baseline number to use in their goal of cutting the deficit in half in the next five years.

The administration also hopes to work on lowering the deficit by omitting certain costs, which in fact are very real. Primary among those are the costs of the war in Iraq and Afghanistan, which because they are funded through supplemental requests the administration refuses to count in the deficit numbers. In addition, the administration also is significantly understating the cost of future military and defense plans, according to the Congressional Budget Office (CBO). CBO recently reported that their "Future-Year Defense Plan" will cost substantially more than the amounts cited by the administration in budget projections.

But the largest and most egregious of them all is the president's plans for privatizing Social Security, which many analysts believe could cost the federal government up to $ 2 trillion. As reported in the last edition of the *OMB Watcher*, Office of Management and Budget Director Joshua Bolten appears unconcerned about borrowing such sums and hopes Congress and others will not see the borrowing as debt.

As Bush continues to peddle his rhetoric about cutting the deficit in half by 2009, keep this in mind: the point of cutting the deficit is to help stabilize and grow the U.S. economy and improve the ability of the government to provide for the needs of all Americans. The methods President Bush may employ to meet his obligations while furthering his political goals will more likely have the opposite effect and leave us all in a much worse place.

Social Security Reform Comes Front and Center

The debate on Social Security continues to rage, with scores of new articles, reports, and speeches generated every week. Analysts, economists, politicians and a wide range of others on all points of the spectrum have been holding briefings, discussions, and forums addressing how and when to reform the Social Security investment program.

There is bipartisan consensus that at some point in the future, Social Security will need to be reformed. By 2018, when a majority of the baby boomers will be retired and collecting benefits, the amount of money being paid into Social Security will no longer exceed the amount being paid out in benefits. If no policy changes are made by 2052, says the Congressional Budget Office, the Social Security program will only be able to pay about 80 percent of benefits. It should be said the year in which Social Security will not be able to meet all of its obligations continues to move to later years.

The Bush administration would like people to believe the Social Security crisis is already here, as baby boomers will begin retiring in droves within the decade. However, what the president won't tell you is lawmakers already took steps to address this two decades ago. In the early 1980s, with President Reagan in the White House and Democrats in control of Congress, legislators passed laws both raising the age of Social Security eligibility and started taxing benefits in order to increase revenue for the program. Through the prescience of Alan Greenspan, they anticipated the "baby boomer crisis" and planned ahead. These changes resulted in huge planned surpluses in the Social Security program, which will continue to accumulate until 2018.

So why is there all this talk of crisis right now? Some analysts, including *New York Times* columnist Paul Krugman suggest this "scaremongering" is in large part "an effort to distract the public from the real fiscal danger." In other words, the administration is fabricating a crisis to divert attention from other issues that are potentially much more threatening, such as the cost of Bush's tax cuts if they are made permanent. As the Center on Budget and Policy Priorities pointed out in recent reports, the cost of the Social Security shortfall over the next 75 years does not come close to the cost of either making the 2001 and 2003 tax cuts permanent or of the newly passed Medicare drug benefit. (See the chart below). Both these policies of President Bush would strain the budget to the breaking point long before Social Security would. As E.J. Dionne pointed out in a Jan. 7 editorial in the *Washington Post*, many opponents believe, "Bush is proposing a solution that won't work on an issue that should not be dominating the debate in the first place."

Further, it is striking that the Bush tax cuts were made possible in the first place due to the planned build up of Social Security reserves. The federal government is currently borrowing those funds to finance the deficit. In 2018, when the

payout of benefits will exceed the revenues in the Social Security program, the government will need to begin paying back what it borrowed from Social Security. Thus, by 2018, the only real crisis will be an artificial one created by the Bush tax cuts and the additional borrowing necessitated by them. Despite overwhelming evidence that immediate and drastic Social Security reform probably does not deserve such a high place on Bush's to-do list, the administration and some Republican senators continue to push it as an issue. Last week, an e-mail message surfaced from the White House inner circle, in which the author – senior administration official Peter Wehner – claimed if they succeed in "reforming" Social Security, it will rank as "one of the most significant conservative governing achievements ever." Wehner went on to state:

> Our strategy will probably include speeches early this month to establish an important premise: the current system is heading for an iceberg. The notion that younger workers will receive benefits anywhere close to the level they have been promised is fiction, unless significant reforms are undertaken. We need to establish in the public mind a key fiscal fact: right now we are on an unsustainable course. That reality needs to be seared into the public consciousness; it is the precondition to authentic reform.

Read the entire message in our Budget Blog.

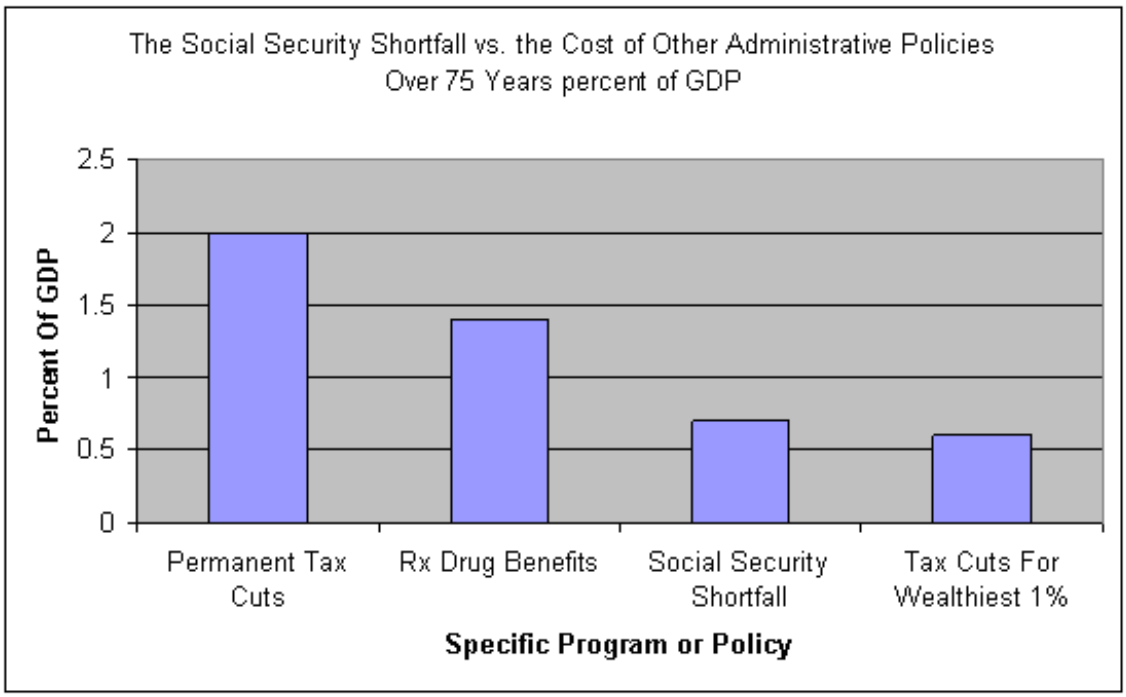
The goals of insiders seem to be twofold: to convince people there is a crisis and the administration's proposals for reform are the only way out; and to push for reforms that will allow the size of benefits paid to drop drastically. There has been recent discussion that the administration and other various groups are interested in linking Social Security benefits to annual price increases rather than wages. The problem is wages generally rise much faster than prices, so if benefits were linked to prices, millions of people would be depending on payments calculated at a significantly lower cost of living than the rest of the economy. Millions of people would see their benefits decline sharply, and in an ironic twist, the very people Bush is courting the most with his proposal for private accounts – younger workers – would be the most adversely affected due to the fact they will have many more years to have their wages outpace prices.

Under this scenario, the Social Security program would no longer be succeeding in pulling people out of poverty – particularly the elderly and the disabled. According to the National Committee to Preserve Social Security and Medicare, for one-fifth of all Social Security recipients, their benefits are their only source of income. One-half of all seniors on Social Security would be living in poverty if they did not receive their monthly Social Security payments. In 2000, Social Security lifted almost 12 million elderly people out of poverty and has consistently been the single most effective poverty prevention program in the history of the United States.

Changing the way benefits are calculated will also negatively affect children, as Annie E. Casey's Michael Laracy pointed out recently in the New York Times. Laracy writes, "If the government changes the way it calculates Social Security benefits, then millions of children would suffer when a parent dies without leaving them generous savings or life insurance."

The fact reforms are necessary to ensure the sustainability of the Social Security program down the road is not a myth. There are many proposals to make small and modest changes to the program that would more than ensure its stability for years. What is a myth is exactly what the Bush administration wants you to believe – that the program is in a crisis right now – and the consequences for such a belief could be drastic.

For frequent updates on the debate over the future of Social Security, check OMB Watch's federal budget blog.



* Note: Data for the cost of the 2001/2003 tax cuts, if made permanent, comes from the Center on Budget and Policy Priorities, "The Implications of the Social Security Projections Issued by the Congressional Budget Office," June 14, 2004, page 2. The estimate of the cost of the tax cuts — 2.0 percent of GDP — is based on estimates by CBO and the Joint Committee on Taxation. Data for the cost of the Rx drug benefit comes from the 2004 Annual Report of the Boards of Trustees of the Federal Hospital Insurance And Federal Supplementary Medical Insurance Trust Funds, page 108. Data for the Social Security trust fund shortfall comes from the Trustees' report, 2004 Annual Report of the Old-Age and Survivors Insurance and Disability Insurance Trust Funds, page 59.

Seen and Heard: 109th Congress Opens with Host of Tough Issues

The 109th Congress of the United States opened last week, with much of the fanfare surrounding GOP pre-session planning (particularly ethics committee rule changes) and the decision of a few Democrats (including Senator Boxer from California) to hopelessly challenge the presidential election results from Ohio during the electoral college count on Thursday. In just the first week, there is already an ambitious agenda for both chambers, and this Congress faces many unfinished priorities and issues from 2004, such as energy and highway legislation, an asbestos trust fund proposal, and tort reform. With the perennially ineffective budget process and Social Security reform looming, this Congress already has a very full plate.

GOP Budgetary Rules Changes Fail

In addition to the lengthy debates concerning the House Ethics committee, GOP pre-session planning meetings saw conservative members of the House submit a number of amendments to the House rules that would have large implications in how the chamber's budget process functions. Despite much vocal dissatisfaction from conservatives, all but one of the budget-related rules changes proposed were defeated by wide margins. The one adopted amendment would have little effect on the budgetary process – it will allow House floor references to the Senate.

Some of the defeated amendments would have allowed points of order requiring a three-fifths vote to increase entitlement spending without offsets; created points of order against rules for floor debate that waive certain budget points of order; required roll call votes on bills costing more than $ 50 million; established accounts to redirect spending to debt reduction or tax relief; required a "rainy day fund" for emergency spending; repealed the "Gephardt Rule" that allows automatic passage of a debt ceiling; and removed a proposed rule to allow Wednesday votes on suspension bills.

New Appropriations Chairs and Immediate Supplemental Spending Bills

Also last week, both the House and Senate GOP elected new chairs to the powerful appropriations committees. In the Senate, Thad Cochran (R-MS) is taking over as Chair of the Senate Appropriations Committee from Ted Stevens (R-AK). Cochran was the next in line in seniority after Stevens stepped down because of Republican term limits.

There was much more uncertainty and drama in the contest for chairmanship of the House Appropriations Committee. Three representatives – Jerry Lewis (CA), Ralph Regula (OH), and Harold Rodgers (KY) – all vied for the spot. The 28-member Republican Steering Committee interviewed and required each to showcase their fundraising ability, voting records, and dedication to spending restraint. California members on the Steering Committee supported Lewis and won over critics who believed he had been too close to Democrats in the past. Lewis has said one of his top priorities will be to get the annual spending bills passed "on time and under budget."

An immediate priority for these new chairmen will be to provide emergency supplemental funding to tsunami victims. The tsunami supplemental would be at least $ 350 million, although that number could change now that Secretary of State Colin Powell and Senate Majority Leader Bill Frist have returned from a tour of the damaged countries. The Bush administration will also submit an emergency supplemental for funding military operations in Iraq and Afghanistan. Most estimates put the military supplemental between $ 80 and $ 100 billion, but the timing is much less certain. Some congressional aides have said the military supplemental may not be submitted until mid-March in order to focus on the tsunami package first. Some House members want to combine the tsunami and military supplemental, but there is resistance from the Senate, particularly Majority Leader Frist, who has said we want to complete a clean tsunami package as soon as possible.

The Elephant in the Room: Social Security Reform

There has been a flurry of reports, articles, analysis, rumors and speculation about the president's number one priority in 2005: Social Security reform. But it is unclear when or even whether Congress will have the time or the will to complete such an overhaul. With the spending process perilously close to complete breakdown, and many other priorities from the 108th Congress still unfinished, the prospect of rationally and deliberately overhauling Social Security seems daunting in the least – especially since the president has yet to release any definitive details of his plan. Last week, the Bush administration worked to smooth over dissension among many Republican legislators after an internal e-mail message concerning Social Security reform from a top Bush advisor was leaked. The message cited the need for benefit cuts to accompany any plan for privatization – a position President Bush earlier said he would not support. GOP legislators are deeply divided over what vague details they have of the president's plan.

At the same time, the House has lost one of its foremost experts on Social Security as Rep. Robert Matsui (D-CA) died on New Year's Day. Matsui was the ranking minority member of the Social Security subcommittee of Ways and Means in the House, the chairman of the Democratic Congressional Campaign Committee, and a top Democratic fundraiser. He was expected to lead the Democrats' fight against privatization plans. Rep. Ben Cardin (D-MD) is expected to move into the ranking member position on the committee and is equally if not more opposed to the president's plan to create private

personal accounts in Social Security. In a public appearance in October 2003, his opposition to Bush's plan was quite clear. "The problem is that the president's proposal will take money out of the system," Cardin said. "Social Security is a guaranteed, lifetime, inflation-proof annuitant, and you can't get that through a private account."

All this adds up to an extremely packed schedule for the first session of the 109th Congress, rife with contentious and controversial issues. The president has repeatedly said he will spend political capital to achieve his goals in his second term and that his re-election gave him a mandate to govern. But with most recent polls continuing to show the president with an approval rating below 50 percent, congressional Republicans may be wary of supporting the president, particularly if it is perceived he is trying to dismantle a program as popular as Social Security.

Wisconsin Speaker Pushing for New Sunshine Law

A Wisconsin lawmaker recently proposed state "sunshine" legislation aimed at providing more transparency in the state's contracting process. Currently, details about government contracts are not available to the public.

Assembly Speaker John Gard (R-Peshtigo) introduced the Contract Sunshine Act Dec. 22, 2004, which would require any state contractors to follow the same disclosure requirements as lobbyists. Under law, anyone that employs a lobbyist must register with the state Ethics Board and file semiannual reports on lobbying expenditures. The new bill would extend these same requirements to anyone that is trying to affect the outcome of a contract. This way, the public can see who is asking for state contracts, and the amounts.

While many point to the bill as an improvement over current practices, in copying the lobby law, there are still impediments to full public disclosure. First, an organization only has to report on activities that account for more than 10 percent of its lobbying time. Therefore, if activities to procure contracts do not meet this time requirement they will not be reported. Second, reporting only occurs every six months, delaying public disclosure which can mean that a contract process could see completion before the public can access any of the details.

Recent controversies over state contracts in Wisconsin were the impetus for the new legislation. The Federal Elections Board is facing a lawsuit challenging the way it entered into a $ 9.7 million contract to build a statewide voter registration list. The plaintiffs are claiming the secret deal violated state open records laws.

Wisconsin's Department of Transportation is also under fire because it awarded several contracts for amounts deemed too high. One no-bid contract provided $ 685,000 for the construction of a basic website. The agency is also under investigation after delaying the release of a report that examined the cost of contracting out work. A Milwaukee newspaper and two unions submitted a request under the state open records law, only to be told the report was not finished. When it was finally released several months later in November 2004, the report was found to have been completed in April 2004, directly contradicting the agency's previous claim.

Illinois State Police Issue Gag Order

A new Illinois State Police policy could silence whistleblowers that expose corruption, impropriety or wrongdoing within the police department by prohibiting employees from talking to news reporters.

The gag order came soon after a November 2004 Chicago television news station story exposed improper conduct on the part of state police guarding the governor. The report questioned the size of the governor's security force on out-of-state trips and detailed how bodyguards allowed unauthorized people to drive or ride in state vehicles, among other things.

Illinois Lieutenant Governor Pat Quinn spoke sharply against the policy stating, "State government should do everything possible to protect those with the fortitude to speak out about wrongdoing. The officer who informs the media about possible officer misconduct may be subject to greater discipline than someone committing the misconduct!"

Whistleblowers should be ensured the opportunity to report illegal activities without fear of reprisal from their employer, but despite legal protections afforded under the national Whistleblower Protection Act of 1989, whistleblowers remain at risk of reprisal. This new policy in Illinois increases the risk of punishment or job loss for state troopers who want to do the right thing and expose corruption within the police force. This gag order appears to be a method for the state police to avoid public scrutiny and accountability.

Working Group on Community Right to Know Joins OMB Watch

Since 1989, the Working Group on Community Right-to-Know has helped people defend and improve our right-to-know about environmental and public health concerns. As of January 2005, the Working Group was merged into OMB Watch and will focus on outreach activities.

The Working Group was originally formed to monitor the Environmental Protection Agency's (EPA) implementation of the Emergency Planning and Community Right to Know Act. A handful of organizations, including OMB Watch, were part of the formation. It was originally housed at the Environmental Policy Institute and focused on emergency planning by Local Emergency Planning Committees established by the law. As it moved to a new home at the U.S. PIRG, the community right-to-know portion of the law became a top subject.

Today, the Working Group serves a nationwide network of organizations and individuals whose right-to-know advocacy makes government responsive, holds corporations accountable, empowers communities, and protects public health and the environment.

On Jan. 3, 2005 the Working Group was transformed from a stand-alone entity to a project of OMB Watch to increase its capacity to conduct outreach to state and local groups whose voices are too often not heard by lawmakers, agencies or even national public interest groups. Its new focus is to aggressively provide information and support to state and local groups that oppose information restrictions.

The Working Group publishes an electronic newsletter, "Working Notes eUpdate." You can sign up for the Working Group's short monthly electronic newsletter to read about new fact sheets, tools and resources and connect with others using right-to-know information.

Visit www.crtk.org for more information on the Working Group, or contact George Sorvalis, the primary staff member at (202) 234-8494.

OMB Finalizes Peer Review Proposal

Shortly before the holidays, the Office of Management and Budget (OMB) released a final version of its bulletin to establish government-wide requirements for when and how federal agencies use scientific peer review. The final bulletin makes modest changes to the revised proposal that OMB published April 28, 2004 which only allowed a 30-day comment period. OMB's announcement did not explain the seven-month delay until just before the holiday season, when many academics, scientists and public interest groups concerned with the policy were away on vacations.

After OMB released the revised proposal on peer review last April, OMB Watch acknowledged the improvements but raised several major concerns, which remained unaddressed, and provided recommendations for improving the final proposal.

OMB Watch's major concerns with OMB's revised proposal on scientific peer review addressed these five areas: Authority, Problem Definition, Oversight, Selection of Reviewers, and Regulatory Delay. For our detailed comments on the newest version of the peer review bulletin, please see our detailed analysis.

Court Strikes Down Restrictions on Private Funds for Legal Services Programs

On Dec. 20, 2004 the United States District Court for the Eastern District of New York struck down application of a 1996 rule imposing restrictions on Legal Services Corporation (LSC) funds on private funding of legal aid groups. The judge denied the plaintiffs' challenge to the restrictions on direct LSC funding. In *Dobbins v. Legal Services Corporation*,the court found that the physical separation requirement for activities funded with private dollars violates the plaintiffs' First Amendment rights because it creates an undue burden on important rights and the government's justification did not support imposing such a burden.

The government had argued that shared facilities and staff create public confusion about what is LSC funded activity and what is not. The court said the government's concerns can be met by having legally separate programs with strict accounting for shared facilities and staff to ensure LSC funds are not spent on restricted activities, and having separate public areas for LSC and privately funded activities. The plaintiffs are represented by the Brennan Center for Justice.

David Udell, director of the Brennan Center, said, "Congress needs to apply the same rules to legal services that apply to other nonprofits, including faith-based nonprofits. More than 40 members of Congress have spoken out against the legal services private money restriction, and now a court has declared the rule unconstitutional. Instead of continuing to defend this unconstitutional restriction, Congress should simply get rid of it." The Center has not yet announced whether it will appeal the portion of the court's ruling upholding the restrictions on LSC funded activities.

The suit follows the 2001 Supreme Court ruling in *Velazquez v. Legal Service Corporation*, which invalidated a restriction barring legal aid lawyers from challenging welfare reform laws. The case was filed in December 2001 by four legal service programs in New York City, a private charity and pro bono attorney. They challenged the constitutionality of restrictions

prohibiting LSC grantees from using LSC or private funds for class action litigation, legislative advocacy and community education. This includes the "program integrity regulation," which requires physical separation between LSC-funded recipients and any organizations that engage in these restricted activities. (Se 45 C.F.R. 1610.) The suit also challenged the bar prohibiting programs from collecting attorneys fees in successful cases.

The restrictions were imposed by Congress in 1996, after the Legal Services Program had been threatened with elimination. They are renewed annually through the appropriations process. During this same time the nonprofit community successfully stopped Rep. Ernest Istook's (R-OK) efforts to impose similar advocacy restrictions on all nonprofits that receive federal funding. But, as John Edie, former General Counsel to the Council on Foundations said in a *Foundation News and Commentary* article, "At first glance, this case appears to affect only funding that helps provide legal services to the poor. But, in fact, the implications are much wider. The ultimate disposition of the Dobbins case could make clear to Congress that, in the absence of a compelling reason, it cannot place limits on private donations to organizations that also receive some federal funding, particularly when the private donations are funding speech."

Tsunami Relief Raises Earmarking Issues for Charities

The enormous outpouring of giving for victims of the tsunami disaster in Southeast Asia is bringing the role of nonprofits in international disaster relief into the public eye once again. Many donors are earmarking their contributions for tsunami relief, raising some concern that disaster relief needs in other areas of the world may suffer.

The Red Cross has collected $ 92 million, which will be used for immediate relief as well as long term needs. After the terrorist attacks of 9/11 the group was criticized when donors learned some of the funds for collected would be used for other purposes. This time all gifts are going to its International Response Fund. New York attorney Jack Siegel has set up a website for donors to get information on how to ensure their intent is honored.

Doctors Without Borders suspended its fundraising after collecting more than $ 50 million, saying it had all it needs for those efforts. An announcement on the group's website encourages donors to give to relief efforts in other places, such as Sudan and Iraq.

More contributions are likely to be made now that Congress has passed a bill (H.R. 241) that allows donors to deduct contributions made through the end of January 2005 from their 2004 taxes.

Administration Will Step Up Faith-Based Efforts

Despite budget cuts for social service programs, Jim Towey, director of the White House Office of Faith-Based and Community Initiatives told a recent Pew Charitable Trusts conference on religion and social policy that the administration will push its faith-based agenda in the 109th Congress.

Towey said that the administration will push for legislation allowing religious grantees to based hiring decisions for federally funded positions on religion and promote faith-based programs at the state and local levels. He also cited use of vouchers in a drug treatment program as a mechanism that allows service providers to incorporate religion into their federally funded service because the funds come from the client, not through a direct grant.

Expansion of the faith-based initiative is drawing more attention to continuing declines in federal funding for social service programs. A report Funding Faith-Based Services in a Time of Fiscal Pressures by the Rockefeller Institute of Government examines how long-term fiscal trends affect faith-based social services. The report found:

- During the 1990s funding for faith-based services expanded
- The surplus of state resources compared to social needs "has largely vanished"
- Federal funding for faith-based organizations is small and has not grown.

A summary of conference presentations is online.

White House Advances Anti-Regulatory Hit List

The White House waited until eight days before Christmas to reveal its new regulatory "reform" plan instructing agencies to review and complete action plans on a regulatory hit list of over 200 suggestions for reversing protections of the public interest, mostly proposed by industry lobbyists.

The vehicle for the anti-regulatory plan is the annual report from the Office of Information and Regulatory Affairs (OIRA) on the costs and benefits of regulation. Under the Regulatory Right-to-Know Act, OIRA is required to prepare the annual report, making a draft available for public comment. Just as in past years, OIRA Administrator John Graham opted to use the draft report as an occasion to invite industry to suggest regulations to be "reformed" in order to benefit the manufacturing sector.

In the final report, the White House summarized the public's suggestions and put forward two sets of its own suggestions, all of which the agencies must review by Jan. 24, before the White House announces in February its "regulatory reform priorities."

The vast bulk of the public's nominations for the hit list are directed at environmental regulations, with most others targeting workers' rights and safety (in particular regulations from the Occupational Safety and Health Administration and rules that implement the Family and Medical Leave Act).

Among the protections targeted by industry for reversal and other industry giveaways are the following:

- Privatizing the development and enforcement of regulations – taking those tasks out of government and entrusting them to private contractors
- Keeping consumer complaints out of the public until substantiated
- Relieving air carrier suppliers of the duty to subject employees to drug and alcohol testing
- Weakening even further the rules governing maximum hours that companies can force their truck drivers to work
- Exempting more auto industry manufacturers from the requirement to submit information of potential defects to an early warning database
- Weakening groundwater cleanup goals
- Rolling back a 2001 rule that lowered the reporting threshold for lead
- Weakening or eliminating the FCC's "Do Not Fax" rule
- Altering the rules for listing species on the threatened and endangered lists
- Allowing employers to count guaranteed family and medical leave against employees when distributing perfect attendance benefits
- Weakening worker rights under the Family and Medical Leave Act by forcing workers with FMLA grievances into arbitration instead of the courts
- Allowing mine companies to avoid improving work conditions by instead rotating miner shifts to reduce workers' exposure to diesel particulate matter
- Weakening protections against Listeria for makers of ready-to-eat meat products

In addition to the industry-nominated hit list, the White House issued two sets of its own anti-regulatory directives. One, which the White House titled "Promising Regulatory Reforms," is a fast-track list identifying rulemakings in an early stage of the process that the White House is pushing the agencies to propel to a higher priority status. The other, called "Unfinished Business," is essentially the White House's own nominations for the hit list.

Items on the White House's fast-track list include the following:

- Mercury rule
- Introducing "flexibility" into Title IX regulations securing equal opportunity for women in higher education
- Changes to ease burden on healthcare providers of medical privacy regulations
- Completing the rollback of the roadless rule
- Implementing structural overhaul of vehicle fuel economy regulations

Items on the White House hit list include the following:

- Granting variances from safe drinking water standards to "economically disadvantaged systems"
- Weakening patient protections that require a doctor to inspect any patient placed in restraints within one hour of the restraint
- "Streamlining" HUD predatory lending rules

In order to secure positive spin for the hit list, OIRA added suggestions for reforms that include completion of an OSHA rule on hexavalent chromium (which the agency is already required to finish under court order) and auto safety protections against frontal offset crashes (which most automakers already incorporate because of regulations in foreign markets). Several of them – such as food labeling of trans fats and ensuring that school lunch nutritional guidance does not increase the risk of diabetes – have nothing at all to do with improving manufacturing employment, which was notionally the reason for the hit list.

Track developments related to the hit list and get more information on our website at www.ombwatch.org/article/

archive/309.

Bush Renominates Industry-Backed Radical Right-wingers to Federal Bench

Just two days before Christmas, the White House announced its intention to renominate to the federal bench 20 radical right-wing and corporate-friendly extremists whose nominations had been thwarted in the 108th Congress.

The White House will be supported in this effort by both social conservatives, who see Bush nominees as friendly to conservative positions on controversial social issues like abortion, and the corporate sector, which is dedicating millions of dollars in an unprecedented lobbying effort on behalf of the Bush judicial picks.

Safeguards at Stake

Although a few high-profile issues such as abortion rights and the separation of church and state tend to dominate discussion of the implications of Bush's judicial selections, these particular nominees pose an equally great threat to corporate accountability and the use of regulatory policy to serve the public interest. Many of the nominees show signs not only that they will consolidate the pro-industry bias of many Republican-appointed jurists on the bench but, further, that they are proponents of a radical right-wing philosophy that seeks to undermine the power of the federal government to create national solutions for nationwide needs.

Radical Right-wing Philosophy

Several of the Bush nominees for federal appeals courts subscribe to a radical right-wing theory of constitutional law that would trade the New Deal for a raw deal. As stated most clearly in a book review and a speech by Judge Douglas Ginsburg (also a former White House regulatory czar and unsuccessful Supreme Court nominee), this extremist philosophy advocates a return to pre-New Deal constitutional doctrines construing the Constitution as forbidding early progressive efforts such as bans on child labor and hour and wage controls. After FDR announced the eventually unsuccessful court-packing plan, the Supreme Court brought this doctrine (generally referred to as the *Lochner* era) to an end. Since then, the federal courts have found in the Commerce Clause, the Spending Clause, and section 5 of the Fourteenth Amendment expansive power to regulate in the public interest.

Radical right-wing extremists actually advocate a return to *Lochner*. One of the returning nominees, Janice Rogers Brown, declared in a speech that the New Deal "cut away the very ground on which the Constitution rests." In Ginsburg's memorable turn of phrase, the Constitution went into "exile" after the New Deal reversal of *Lochner* and its progeny. Returning *Lochner* from exile could mean, in a contemporary context, any of the following threats to regulatory policy:

Cabining the Commerce Clause. The Commerce Clause is perhaps the most important source of congressional power to legislate in the public interest, in particular for the environment and workplace health and safety. The Rehnquist Court has already struck the first blow, most dramatically in its rejection of the Gun-Free School Zones Act and the Violence Against Women Act, which were the first court decisions in 60 years to find a congressional act unconstitutionally exceeding Commerce Clause authority.

Dusting Off the Non-Delegation Doctrine. The very basis of modern regulatory policy is that Congress delegates broad grants of authority to regulatory agencies, which are empowered to work out the technical details of public-interest legislation in regulations that have the force of law. *Lochner*-era courts flirted with a harsh version of the Separation of Powers doctrine that would forbid this kind of delegation of legislative authority. Notably, the occasion for Ginsburg's infamous phrase "the Constitution-in-exile" was a review of a book entitled *Power Without Responsibility: How Congress Abuses the People Through Delegation*.

Pitting Property Against Protection. The Takings Clause forbids the government from taking private property unless it compensates the property owner, the classic example being eminent domain. In the hands of radical right-wing extremists, who maintain that property rights should be elevated to the same status as personal civil liberties such as free speech, the Takings Clause could be expanded to turn regulation into unconstitutional takings. Regulation of the environment or workplace safety, for example, would be effectively blocked by a requirement to pay corporations for their lost profits.

Making Mandates Meaningless. Although it receives less attention than the Commerce Clause from critics of the radical right-wing threat, the Spending Clause is also under attack. Through the Spending Clause, Congress is able to ensure that states receiving federal funds for programs such as foster care and Medicaid meet certain minimum standards. For example, the Adoption and Safe Families Act forbids states receiving federal foster care funds from allowing children to languish in foster care for excessive periods of time without having plans for permanent outcomes. Although the primary means of establishing these standards is the carrot of federal funding, public interest groups have successfully used civil rights litigation to bring in the stick of court injunctions. Radical right-wingers advocate harsh interpretations of the Eleventh Amendment, non-constitutional federalism doctrines, and the standards for finding enforceable rights in federal statutes in order to close out victims of state indifference from making these mandates meaningful.

Scaling Back Civil Rights. Civil rights are already under attack as the Spending Clause and section 5 of the Fourteenth Amendment are constricted, but they are further imperiled by some radical right-wingers who hew to originalist readings of the Constitution and reject the possibility of any civil rights not spelled out specifically in the Constitution. Many basic civil rights – such as the right to privacy of married couples and the rights of parents to raise their children without undue interference from the state – are not spelled out as such in any specific clause but are considered "implicit in the concept of ordered liberty" and thus arising from the penumbra of existing constitutional clauses.

Giving States More Rights than People. A recurring theme throughout the radical right-wing project is an advancement of states' rights as a countervailing force against federal regulatory policy. As states secure more rights against federal mandates, the downside will be felt by both vulnerable populations relying on state administration of federal programs as well as state and local government employees, who are being excluded from the expansion of rights for other workers.

Several of the Bush nominees – most notably Janice Rogers Brown, Thomas B. Griffith, William Myers, Patricia Owen, and Bill Pryor – subscribe to one form or other of radical right-wing extremism. Another, Michael Kavanaugh, has been instrumental in helping the Bush administration pack the courts with other radical right-wing extremists.

Industry Connections and Bias

A troubling related development is the announcement that the National Association of Manufacturers will be lobbying, for the first time, on behalf of the Bush administration's judicial nominees. C. Boyden Gray, a prominent player in the Reagan and Bush I administrations with a background of running industry-funded front groups for conservative causes, has already been stumping on behalf of these nominees, as has conservative stalwart Grover Norquist. Although a genuinely surprising development, NAM's announcement is only the culmination of a long-term plan by industry to nurture radical right-wing jurists and pack them into the state courts, where they have been weakening corporate accountability by making it more difficult for injured consumers and wrongfully discharged employees to seek legal remedies. Helping these industry-backed nominees pack the federal courts is a companion to a larger campaign against civil justice and corporate accountability: pass tort "reform" legislation that removes most class action cases from state courts into the federal courts, and pack the federal bench with conservative judges who will rule on behalf of corporate special interests.

The campaign is already showing results for industry. According to the Center for Investigative Reporting, Bush nominees to federal appeals courts and courts of claims "are notable for their close ties to corporate interests, especially the energy and mining industries…. The investigation reveals that more than a third of President Bush's nominees to these federal courts — 21 of 59 nominations since 2001 — have a history of working as lawyers and lobbyists on behalf of the oil, gas and energy industries." Analyses by the People for the American Way Foundation of split decisions on the appeals courts reveal a pattern of hostility by Bush appointees to civil rights, environmental law, and other public interest litigation. More specifically, the Environmental Law Institute has discovered that Bush appointees are more conservative than even other Republican-appointed judges in National Environmental Policy Act (NEPA) cases. Finally, a report in the journal *Judicature* concludes that Bush appointees to federal district courts "are among the most conservative on record for all modern administrations, being on a par with Ronald Reagan's judicial team. Furthermore, in the realm of civil rights and liberties the Bush jurists are clearly the most conservative on record, being a full four points more conservative than even the trial judges appointed by Presidents Reagan or Bush, Sr."

The Perfect Political Opportunity?

That corporate special interests have been mounting a stealth campaign to pack the courts with radical right-wing extremists makes sense, given the enormous wealth already pumped into their steady assault on regulatory policy. In some cases, corporate special interests may be at odds with some of the principles of radical right-wing theory. For example, corporate special interests may not agree with the extremists' hostility to federal preemption of state regulatory authority, because it is in the interests of industry to be able to capture a centralized regulatory authority and not have to expend its resources lobbying the regulatory authorities of all 50 states. Such fine points do not matter at this stage, however, because the fight is not over specific tenets of an ideology but, instead, over the person of the nominees themselves. The industry-backed radical right-wingers tend overall to be industry-friendly, and their jurisprudential approach overlaps enough with industry interests to make it worth industry's millions.

Other factors make this a critical moment. The GOP's use of the social conservative base and the high-profile nature of some controversial social issues mean that a significant grassroots base is already mobilized to defend Bush's judicial nominees. The recent humbling of Sen. Arlen Specter (R-PA) means that a voice of moderation on the Senate Judiciary Committee may be muted, and the combination of industry support and the threat of weakening the filibuster option may splinter centrist Democrats from the party's progressive wing – the result in each case being a weakening of Senate resistance to radical right-wingers. Finally, the tendency in the national press to focus on high-profile issues like abortion will keep these more technical and complicated issues off the radar.

Federal regulatory policy has been an important equalizing force that raises standards in such areas as environmental quality and workplace health and safety. With the federal government rather than the states setting the regulatory floor, we have been able to avoid an ugly race to the bottom and a destructive return to laissez faire. Radical right-wing jurists find beauty in laissez faire and are wealthy enough to be unharmed by the race to the bottom. The threat to regulatory policy has never been more sweeping, or more real.

Expect Anti-Regulatory Bills in 109th Congress

When the 109th Congress reconvenes on Jan. 20, expect Republican lawmakers to continue work on anti-regulatory measures that will protect industry interests at the cost of the public interest.

House Speaker Tom DeLay (R-TX) has repeatedly mentioned "universal regulatory reform" as one of several high-priority items for the 109th Congress's agenda, and the House Government Reform Committee announced late last year that reauthorization of the Paperwork Reduction Act will be only one part of "a reform-focused legislative and oversight agenda that will streamline the federal government."

Moreover, Sen. George Voinovich (R-OH) has recently requested the Government Accountability Office to investigate the current state of fiscal federalism and related issues in the wake of the Unfunded Mandates Reform Act. This request may signal Voinovich's interest in revisiting UMRA and putting teeth into its requirements, one possibility being a stringent "no money, no mandate" requirement that would eviscerate the ability of the federal government to use federal funding as a vehicle for raising standards for human needs programs and ensuring civil rights.

Additionally, the Congressional Research Service is currently investigating the history, policy, and legal issues related to the construction of fencing and other barriers along the nation's southern border. The implication of this research is that Rep. Duncan Hunter (R-CA) is interested in reviving the defeated effort to grant the Secretary of Homeland Security the power to waive all federal law in order to expedite completion of the border.

Further, as we discuss here, the White House has been meeting secretly with industry interests to brainstorm anti-regulatory measures that could be added to the upcoming reauthorization of the Paperwork Reduction Act.

Among the anti-regulatory measures attempted in the past or discussed recently are the following, any one of which could resurface in the 109th Congress:

- Preventing agencies from issuing new regulations unless they can show that monetized benefits exceed industry estimates of the costs of implementing the regulations;
- Imposing fictional "budgets" of total regulatory costs that agencies can impose in any given year, then forbidding any new regulations once an agency has reached its "budgeted" cap;
- Blocking economically significant regulations from being implemented until they are voted on by Congress – in essence, imposing a statutory form of the nondelegation doctrine; and
- Diverting limited agency resources into more navel-gazing analyses, such as those already required by the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and executive orders.

Continue checking back at our website and our blog REG•WATCH for further developments and action alerts.

White House Meets with Industry to Plan Deregulatory Strategy

Over the past several months, the White House has met with industry representatives to develop a sweeping deregulatory strategy.

The White House's Office of Information and Regulatory Affairs (OIRA) has given industry a leg-up on the upcoming reauthorization of the Paperwork Reduction Act (PRA). According to *Inside EPA*, OIRA has been working with a coalition of industry groups to strategize using the PRA reauthorization as a vehicle for developing new anti-regulatory policies.

On top of that, during the mid-December White House economic summit, Treasury Secretary John Snow led a panel discussion on tax and regulatory reform. According to BNA's *Daily Labor Report*, representatives of industry groups and industry-funded think tanks recommended rolling back existing regulations and developing anti-regulatory policies that echo the suggestions developed in the meetings between OIRA and industry.

Both the OIRA meetings with industry and the economic summit indicate a broad attempt by industry, industry-funded think tanks, and the administration to dismantle or weaken existing regulation while making it more difficult to promulgate new public safeguards. Following through on the industry recommendations – which range from increasing the use of cost-benefit analysis to legislating judicial review for the Data Quality Act – business may very well receive the "regulatory relief" it seeks at the cost of longstanding public health, safety and environmental protections.

The Paperwork Reduction Act

The Paperwork Reduction Act created the Office of Information and Regulatory Affairs (OIRA) within OMB and gave it a number of very specific assignments, which included meeting annual paperwork reduction goals, reviewing every agency's information management activities, and improving federal information policy. Despite this broad mandate, the heart of the law turned out to be the paperwork clearance process resurrected from the 1942 Federal Reports Act. Through the paperwork clearance process, OIRA reviews all activities of federal agencies, including the independent regulatory agencies, which involve collecting information from ten or more persons. These information collections include application forms, questionnaires, surveys, and reporting, recordkeeping or labeling requirements. Thus, everything from tax forms to

health research questions must be approved by OMB. Funding for the PRA expired in 2001, and since that time paperwork reduction has received funding annually through Transportation, Treasury, and Independent Agencies Appropriations.

According to the *Inside EPA article*, OIRA has met with industry officials and industry-funded think tanks to discuss several additions that may be included when the bill is reauthorized this year. On the whole these changes will create new barriers that agencies must surmount to pass new regulation as well as open up existing regulation to potential rollbacks. The changes to the PRA may face some resistance in Congress but will certainly be an important agenda item for the House Government Reform Committee in the coming year.

Potential Pro-Industry, Anti-Regulatory Measures

A number of overlapping themes emerged from both the summit and OIRA's meetings with industry for potential anti-regulatory measures that may be enacted during the PRA reauthorization or in other forms during the coming congressional session. Industry representatives weary of "regulatory burden" have recommended rollbacks of existing regulations. At the economic summit, Mercatus director Susan Dudley recommended inserting sunsets into rules that appear to be outdated. She asserted that older rules must have a demonstrated necessity in order to remain on the books. Responding to industry demands that new regulations be based on "better" information, OIRA is considering including language in the PRA that will expand the use of cost-benefit analysis and giving greater authority to the Data Quality Act. Industry has also suggested a desire to expand the use of the Regulatory Flexibility Act to review existing rules on the books.

Increasing the Use of Cost-Benefit Analysis

One possible amendment to the Paperwork Reduction Act being considered by industry representatives and OIRA is a codification of Executive Order 12866. Issued under Clinton, E.O. 12866 requires agencies to perform cost-benefit analysis on regulations prior to publication and also requires OMB to review all "major" rules.

Cost-benefit analysis is already a tool often used by opponents of regulation. While it is easy to quantify the cost of a new regulation on industry, it is much more difficult to estimate the benefit in economic terms, especially when that benefit is a better quality of life, healthier children, or cleaner air. Rather than cost-benefit analysis being just another tool in the regulator's toolbox, codifying E.O. 12866 will create a legal mandate for cost-benefit analysis and will increase its role in developing regulation.

Reviewing Existing Regulation

Already the Regulatory Flexibility Act requires that agencies proposing rules that would have a "significant" economic impact on small business, small not-for-profit organizations, or small governmental entities must prepare a Regulatory Flexibility Analysis (RFA) and try to find simpler, less burdensome ways for such small organizations to comply with federal requirements. The Act was created in 1980 in response to criticism from small businesses that they were drowning in federal forms and going broke because of federal regulations. The Act also requires that agencies go back and review existing regulations at least once every ten years and reassess the rule's impact on small business.

According to the *Inside EPA* article, industry may also use the occasion of the paperwork reduction act to ensure the increased the use of Regulatory Flexibility Act analyses. EPA and other agencies have already begun to increase the number of reviews they perform. Between the December 2002 Unified Agenda and the December 2004 agenda, the number of rules undergoing section 610 reviews increased from 34 to 42. The additional reviews seem to be especially targeting the Environmental Protection Agency. The December 2002 agenda included no 610 reviews for EPA, but 10 have been added over the past year, including reviews of regulation regarding lead-based paint activities in child-occupied facilities and worker protection from pesticides.

Larry Mocha, the U.S. Chamber of Commerce representative, voiced the business community's desire for greater use of section 610 reviews. Mocha plans to lead town hall sessions on the Regulatory Flexibility Act at the state levels. The Small Business Administration, working in conjunction with the industry-funded think tank ALEC, has likewise been lobbying the states.

Expanding Data Quality Provisions

The call by industry representatives that regulation be based on "better" information could translate into an expansion of the powers of the Data Quality Act. One idea being floated at OIRA is to include language in the Paperwork Reduction Act that would create the legal right to sue agencies over data, cost benefit analyses, and other decisions that agencies use to make regulatory decisions. This provision would effectively overturn two recent federal court decisions holding that the DQA is not judicially enforceable, and it could open regulations to even more challenges from industry.

A Mounting Threat

Both in President Bush's closing remarks at the summit as well as in White House information on the conference, regulatory reform was put forth as an objective in the coming term. The "White House "Securing Our Economic Future" Fact Sheet stated that though "America has a growing, dynamic and changing economy . . . the economy remains handicapped by unnecessary tax and regulatory burdens." It went on to say that "the president wants to streamline regulations and reduce paperwork." OIRA's meetings with industry provide even further evidence that regulatory reform is clearly on the agenda for the coming year, and the strategy against public safeguards is beginning to take shape.

New Forestry Rules Endanger Wildlife, Limit Public Participation

Three days before Christmas the U.S. Forest Service gave the timber and paper industry an early Christmas present, announcing a final rule that will drastically overhaul the U.S. Forest Service's land management system.

The plan will relax existing standards, allowing forest managers greater flexibility in managing national forests. Using a model commonly implemented in the business arena, forest managers will now implement an environmental management system which will allow them to set their own environmental goals in a continual cycle of planning, implementation and assessment, rather than creating long-term plans that are open for public review, as was previously the case. While implementing plans quickly and efficiently is a benefit to both industry and environmental advocates, the new regulation cuts out public participation in the process and eliminates protections for fish and wildlife.

The environmental management system will replace the environmental impact assessments used by the forest industry for the past two decades. Under the new regulations, forest managers can produce environmental impact statements if they believe such statements are necessary, but managers are given discretion as to the extent to which they produce environmental impact analysis. Environmentalists believe that without the environmental impact assessments, forest managers will be able to implement forestry plans without paying heed to environmental protections. Eliminating the environmental review process also cuts out public participation in the planning process. Forest managers will now be able to easily approve logging, drilling or mining plans without having to assess the environmental impact or answer to the public.

Further threatening fish and wildlife within the national forests, the new regulations do not specifically require forest managers to protect fish and wildlife populations from becoming threatened or endangered. Rather, managers must consider the best available science to make decisions that benefit the entire ecosystem. The regulation essentially jettisons any wildlife protection provisions from land management plans. The new regulation gives environmental protection and economic interests equal weight.

Forest managers are to be held accountable under the new plan through an audit system. However, the regulation gives little guideline as to who these auditors will be. Auditors are just as likely to be industry representatives and as they are to be environmental scientists. Furthermore, true oversight of such a program would come with a heavy cost.

The regulation impacts 155 national forests, covering 191 million acres. Environmental groups have already planned to challenge the regulation in court.

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In This Issue

State Budget Crises Begin to Result in Actual Cuts

While much has been written recently about the federal budget deficit, states across the country are continuing to struggle under budget crises of their own. Most states are required by law to balance their budgets. While the federal government often carries large deficits to finance its programs and priorities even when revenues are not sufficient, this is usually not an option for state legislatures. Often, the resulting deficit financed federal policies are responsible for making state fiscal situations worse.

According to a report from the Center on Budget and Policy Priorities, shifting health care costs, federal tax cuts, federal restrictions on state taxing authority, and unfunded mandates such as No Child Left Behind have all placed added strains on state budgets, and are partially responsible for the massive deficits currently seen in some states today. In fact, the National Conference of State Legislatures has reported that “despite an improving economy, states still must close … a $ 36 billion [collective budget] gap in the fiscal year 2005.”

These state deficits are not without consequences. As state legislatures convene early in 2005 to construct their budgets, many will be weighing the option of cutting government services in order to bring budgets into balance. For example, significant cuts are currently being debated in Tennessee, New York, California and Florida. Cuts to programs in these states give some relief to soaring deficits, but they will have a disproportionate negative effect on state residents, especially at the lower end of the economic scale.

Tennessee is currently experiencing budget trouble because the Medicaid program makes up such a high percentage of the state’s budget that the program is becoming unsustainable financially. Medicaid costs have increased nationwide by 63 percent over the past five years and that increase has put a strain on state Medicaid budgets across the country.

Tennessee Governor Phil Bredesen (D) recently announced he is cutting TennCare, one of the nation’s most innovative health programs for the working poor. TennCare is the state’s Medicaid program which covers nearly 25 percent of all residents and 40 percent of all births. The program provides health insurance for many of the state’s working poor. Under Bredesen’s proposed cuts, 323,000 low-income adults will be removed from the program, and an additional 400,000 will see services limited. In addition, law enforcement officials are predicting many of the mentally ill patients who are cut from TennCare will cause added strains on the criminal justice system. This will not increase the burden for other programs in the state, but it will also mean Tennessee has inadvertently chosen to embrace incarceration over treatment or rehabilitation – not necessarily a sound financial decision.

The reason for this massive cut is that Tennessee cannot afford the government health plan; according to the *Washington Post*, Bredesen says the expanded Medicaid program is devouring the state budget. Increases in costs to the Medicaid program threaten to cut into funds for other state programs, like education. By cutting Medicaid, however, the state will also lose $ 1.1 billion in federal matching funds. Health care advocates nationwide see this as one step in a growing trend of states being forced to scale back government funded care.

New York is also experiencing budget difficulties that may be resolved through cuts to health programs. Medicaid is the state's biggest and fastest-growing spending category, and Gov. George Pataki (R) is calling for cuts in planned growth to the $ 44.5 billion program. Pataki has proposed slashing $ 1 billion from the state's Medicaid program. Even though this cut would technically have 2005 spending levels up over last year's, benefits for poor and working class New Yorkers would be sharply reduced. The state's insurance program for the working poor, called Family Health Plus, currently serves 340,000 people. While some political analysts and government aides are noting this proposal is only intended to trim the current spending, others are more fearful of the consequences, especially for those 340,000 people. Kenneth E. Raske, the head of the hospital association, said in the statement that "the magnitude of these proposed cuts is unbearable, and if these cutbacks actually took place, the care of all hospital and nursing home patients would suffer." Luckily, Pataki still has to get his plan through a legislature that, according to the *New York Times,* has "deep political investments in the Medicaid status quo."

In California, Gov. Arnold Schwarzenegger (R) has submitted a $ 111.7 billion budget proposal that freezes spending on schools, highways, and the poor. He is freezing education spending and instead proposing specific incentive proposals California Teachers Association President Barbara Kerr called "a smoke screen for the governor cutting funding and breaking his promises." Schwarzenegger is trying to avoid raising taxes, and instead is focusing on spending controls with this year's budget. Even though California is running a $ 9.1 billion deficit, the governor refuses to consider taxation as a way to help balance the budget. As a result, he is facing opposition from Attorney General Bill Lockyer, and State Treasury Secretary Phil Angelides, and the state legislature in passing his budget. Assembly Speaker Fabian Nunez (D) stated, "I will not support a budget that starves Californians of the services that they depend on." For more on the situation with California's budget, read this article.

In perhaps the most egregious example, Florida Governor Jeb Bush (R) is proposing a change to the state's Medicaid program that would make Florida the first state to allow private companies to decide the scope and nature of services in the state run program. Under the plan, Medicaid recipients in Florida would be allotted a sum of money to purchase their own private health insurance. This decision will have profound implications for the state's 2.1 million Medicaid participants as it essentially will work to privatize the Florida system and move people into private managed care programs. This change is being promoted by Bush as a way to cap the costs of the state's Medicaid program.

In the report "Facing the Fiscal Crises in State Governments: National Problem, National Responsibilities," Robert Behn and Elizabeth Keating state, "the existing, built-in financial demands of the states' current responsibilities are growing more rapidly than are revenues." Instances such as California's $ 9.1 billion deficit are due not only to irresponsible budgeting, but also to this tension between output and revenues.

States across the country, including California, Florida, New York, and Tennessee, are being increasingly squeezed because the federal government is not allocating as much money to them as in the past, yet at the same time are expecting them to fully fund the programs and policies passed in the U.S. Congress. The result, not surprisingly, is that state politicians – many of whom are scared or unable to raise taxes – end up making cuts to programs instead. This leaves people, many of whom are dependent upon government services, even more vulnerable.

There are other alternatives to slashing low-income Americans from their health insurance and other government supports. In Indiana recently, Gov. Mitchell Daniels (R), a former Bush administration budget chief, asked for an income tax increase on the state's wealthiest citizens, those who make over $ 100,000 annually. Daniels is quoted as telling the state legislature, "With this money, we will achieve a balanced budget... and bring our savings account to a level near the minimum standard of prudence. Let's each agree to do a thing or two we'd rather not do, temporarily, so that the state we all love might get back on its fiscal feet." Mitchell's fiscally responsible and progressively oriented actions spreads the burden of providing for those who have the least across the entire population of Indiana – rather than letting the poor shoulder the burden. His example is one that could easily be followed by other governors and even the president himself in his FY06 budget. Unfortunately, it seems as though Daniels is alone in his commitment to preserving essential services for the poor.

Social Security Will Impact More Than Just Seniors

One of the most gaping holes in the debate on Social Security reform is the lack of discussion about Social Security as a life and disability insurance program. The program insures much more than just the elderly in retirement; fully one-third of payments go to non-retirees. These benefits – to around 17 million Americans – insure workers and their families from slipping into poverty when a worker becomes disabled or dies.

The issue of disabled workers sheds light on many of the problems of private account proposals. These benefits are vital. If a worker earning $ 32,000 per year (near the national average) dies, Social Security replaces about 78 percent of his or her annual earnings (or $ 25,000). The Social Security Administration has calculated that for a family with two young children, the Social Security program provides the equivalent of a $ 400,000 life insurance policy or a $ 350,000 disability insurance policy.

This is guaranteed insurance and security for unexpected life events that private accounts cannot provide, even in the best

of circumstances. Almost three in 10 of today's 20-year-olds will become disabled before they are 67 years old. Since approximately 78 percent of the private workforce in America has no disability insurance, the role of Social Security as a disability insurance program is crucial.

The president's 2001 Social Security Commission proposals did not recommend changes in the disability benefits program. However, all cost calculations assume disability benefits, as with retirement benefits, will be reduced by up to 46 percent. This incongruity has had disability advocates worried from the start. According to the *Chicago Sun-Times*, Marty Ford of the Consortium for Citizens with Disabilities feels, "anything [that is done] to the retiree formula will affect people with disabilities."

One of the main problems with the proposals for private accounts that has advocates and others worried is that disabled beneficiaries typically work less and need benefits sooner in life. This shorter timeline would negate some of the perceived benefits of private accounts, as there would not be enough time to accumulate the money needed to support a disabled worker. This point was noted by the Commission in their report, saying that disabled beneficiaries most likely would not have their full lives to accumulate enough funds in their private accounts to supply the same levels of benefits the current system does.

In addition to disabled workers themselves, Social Security provides benefits to spouses, children, and parents. Approximately 5.4 million children under age 18 receive part of their family income from Social Security. Private accounts may make up the cut in benefits necessary to create the accounts, but only for those who work to retirement. The families of those who don't last will certainly get less – at a time when they absolutely need more. Social Security provides much more than supplemental income at retirement – it provides life and disability insurance to protect against calamities and unplanned events for millions of Americans. Throughout the Social Security debate, it will be important for lawmakers and all those involved in the process to keep this fact in mind.

Will Bush's Social Security Reform Plan Succeed?

President Bush has been clear that Social Security reform is a top priority in his second term. Even though he has not announced a plan, he expressed his desire to allow people the option of creating private – or in Bush language, personal – investment accounts. Given the necessity of benefits cuts as well as heavy transition costs years into the future, several high-ranking Republicans have begun expressing doubts about the president's plan. Moreover, many are beginning to question whether Social Security really has a "crisis" as Bush claims.

According to the Century Foundation, what the public wants is far different from the administration's top priorities. In fact, four recent polls found many Americans feel differently than the president on this issue and think there are other government priorities that deserve greater immediate attention than Social Security.

The Pew Research Center poll found that 65 percent of people agreed with "keeping Social Security as a program with a guaranteed monthly benefit based on a person's earnings during their working life," which is how the system is currently structured. The new Time/SRBI poll found people divided on the issue of whether or not this country is facing a Social Security "crisis." The poll also found 56 percent of respondents believed they would fare better under the current system (in contrast to the 33 percent who felt otherwise), compared with how they think they would fare under a system requiring them to invest some of their payroll taxes in stocks and bonds. The Washington Post/ABC News poll found Bush's approval rating at only 38 percent overall on Social Security, and an even lower 33 percent among people ages 18 to 30. Finally, a New Annenberg survey found 86 percent of respondents opposed to a Social Security proposal with the following premise: "When current workers retire, giving them lower benefits than what they are now promised."

It is clear there is neither a mandate nor majority support for overhauling the Social Security program in the way President Bush intends. Not only is the public skeptical, but so are many leading members of Congress, including some key Republican lawmakers. On Jan. 18, Rep. Bill Thomas (R-CA), chairman of the House Ways and Means Committee, publicly predicted partisan conflict over Social Security will quickly render President Bush's plan for reform a "dead horse." Thomas prefers to begin the reform debate with a broader approach and carefully consider any option that would ensure the solvency of Social Security. Options he said should be examined among others include changing Social Security's financing mechanism and possibly adding a savings plan for long-term or chronic care as "an augmentation to Social Security payments." He reiterated these points on talk shows the subsequent weekend.

Sen. Lindsey Graham (R-SC) has shown equal skepticism about the administration's proposals by suggesting raising payroll taxes on the wealthy in order to finance Social Security reform. Other political figures, such as former House Speaker Newt Gingrich and Rep. Rob Simmons (R-CT) have also voiced levels of opposition. Some have criticized what they feel has been a mishandled policy initiative by the administration; others believe a fresh start in rethinking the situation is necessary in order to gain bipartisan support. Sen. Charles Grassley (R-IA), chairman of the Senate committee that handles tax policy and Social Security, has stated multiple times he believes the Senate needs to begin working on a reform plan first rather than having details handed-down by the White House in order to have the proposal succeed.

Despite bipartisan criticism and speculation of Bush's plans for reform, interest groups on both sides have already geared up to lobby Congress when reform is addressed this year. The banking lobby is currently appealing to both the administration and key members of Congress in an effort to secure a profit if any sort of personal savings accounts are included in Social Security reform legislation. The group America's Community Bankers are hoping they can convince lawmakers to include high-yield, federally insured savings products as investment options if personal savings accounts are created. According to an article in *The Hill* on Jan. 19, banks, bond traders, and investment houses are expected "to stand behind Bush in his push to divert a portion of payroll taxes to private markets." Financial organizations are particularly

interested because private accounts would channel huge sums of revenue out of a traditional government program into their coffers and be a guaranteed long-term source of income for the financial services industry. The financial services lobby will prove to be an important ally for an administration facing intense opposition both from within their own party and from powerful advocacy groups outside of the government such as AARP.

The president is expected to discuss his proposal in his State of the Union address on Feb. 2, although details will most likely not be released until late February.

Budget Battles Loom as Advocates Prepare

Advocacy groups and policy experts are gearing up for the difficult and crucial budget battles anticipated this year in Congress. A number of briefings and conference calls recently have been held to educate and prepare people in Washington, DC, and around the country.

On Jan. 13, many gathered in Washington, DC, to hear presentations on the budget outlook and expected timetable in 2005, explanation of the budget reconciliation process (which may be especially crucial this year), materials on spending caps, and how-to guides to debate and discuss budget issues. The briefing was co-hosted by the Center on Budget and Policy Priorities, AFSCME, the Coalition on Human Needs, Fair Taxes For All, the National Women's Law Center, the National Education Association, and OMB Watch.

Also last week, the Coalition on Human Needs held two conference calls on many of the same topics, in which more than 400 advocates from around the country took part. The aim was to give state and local advocates the tools and knowledge they need to get involved in the federal budget debate. Materials from that briefing are available on CHN's website.

NRC Censors Environmental Impact Statement

The public will not have access to health and safety data about a proposed uranium enrichment plant in New Mexico, despite a legal requirement that the public have ample access to such information.

Louisiana Energy Services plans to build a facility in Eunice, NM, which is located in the southeast part of the state. The Nuclear Regulatory Commission oversees such facilities, and the National Environmental Policy Act requires government agencies, including NRC, to prepare publicly available Environmental Impact Statements (EIS) for projects that could damage the environment, and acknowledge and respond to public comments.

The process of informing the local community and allowing it to participate in the decision of locating such plants is important. In the past, when uranium enrichment plants have been proposed in communities such as Homer, LA, and Hartsville, TN, residents' concerns about health risks motivated them to strongly oppose the plants.

However during the process in the Eunice case, the NRC only briefly supplied the EIS for the proposed plant but in October 2004, NRC took down its entire website in response to concerns about access to "sensitive" information. As a result, the Eunice EIS was no longer publicly available.

Then just two weeks prior to the end of the comment period, NRC posted a significantly redacted version of the EIS, removing basic health and safety information, including occupational, transportation and worst-case accident scenarios. This is the information that the public needs the most in order to comment on the placement of such a facility in their community.

The agency's actions blatantly violate public disclosure laws that have been in place for over 30 years. NRC has intentionally hampered the public's ability to learn about and provide input on a project that could greatly impact public heath and safety.

These concerns are especially important in the case of uranium enrichment facilities. Existing plants in Piketon, OH, and Paducah, KY, reportedly make plant workers sick and contaminate the area's soil and water with radioactive uranium.

Please send NRC Chairman Nils Diaz a letter through our action alert system condemning NRC's process of railroading the location of this facility without properly notifying the public of the associated health risks.

Data Quality Update: Court Decision Appealed

In a Jan. 14 news release, the Salt Institute announced that it would appeal the dismissal of its data quality case against the National Heart Lung and Blood Institute (NHLBI). The Salt Institute along with the U.S. Chamber of Commerce had filed suit against NHLBI claiming that statements made by the agency about health benefits from lower sodium diets did not comply with the Data Quality Act.

However, U.S. District Court for the Eastern District of Virginia dismissed the case Nov. 15, 2004, ruling that the Data Quality Act (DQA) was not judicially reviewable and that the plaintiffs lacked legal standing to bring the lawsuit. The Salt Institute and the U.S. Chamber of Commerce have decided to appeal these rulings in an attempt to reinstate their case against NHLBI. "Our appeal is for more transparency in the use of science," claimed Richard L. Hanneman, President of the Salt Institute, "and we are asking the court to banish the games-playing and data manipulation that has compromised implementation of the Data Quality Act by the National Heart, Lung and Blood Institute."

Dissecting a Data Quality Challenge

The Center for Progressive Regulation (CPR) recently sent letters to the Environmental Protection Agency (EPA) and Office of Information and Regulatory Affairs (OIRA) as well as Dow, Exxon, Shell, Ethyl and Clean Harbors Environmental Services corporations regarding contamination at the Devil's Swamp Superfund site near Baton Rouge Louisiana.

In 2004, after years of deliberation, the site was proposed for inclusion on Superfund's National Priorities List. However, NPC Services, a corporation formed by numerous chemical and oil companies to clean up hazardous waste sites, opposed the listing by submitting a data quality challenge to EPA. The agency elected to consider the data quality petition a part of NPC Services' public comments in response to the site's listing.

CPR's letters voice concerns that the data quality challenge and EPA's decision to handle them as additional comments could further delay action to finally cleanup the hazardous waste site. EPA stated that the issues brought up in the challenge are delaying the listing. The letters also request that EPA and the companies address the issue of subsistence fishermen living near the site and provide alternative food supplies while cleanup is pending. CPR also urged EPA and OIRA to issue guidance barring the application of the DQA to rulemakings.

Congress Seeks Additional Information on DQA

On Jan 13, Rep. Joe Barton (R-TX), Chairman of the House Energy and Commerce Committee, sent letters to 15 federal agencies and commissions requesting information on the implementation of the DQA. Barton explained that the request was to help the committee "assess directly whether the agencies are implementing and following data-quality procedures as Congress intended." However, the lack of any hearings or floor debate on DQA coupled with the meager ten lines of legislative language that comprise the act give little indication of Congress's intention for the DQA.

The committee also seeks to examine the general impact and effectiveness of DQA requirements. The letter requested answers to nine detailed questions about implementation of the DQA from January 2001 to the present. Unfortunately, the questions deal almost entirely with procedure and policy, including requests for job titles of those responsible for overseeing DQA and copies of internal memoranda. None of the questions address concerns about abuse of the DQA process by industry to further delay that development of rules and regulations. Nor do any of the questions request estimations of cost or time spent by the agencies and commissions implementing the DQA so that the committee could evaluate the effectiveness of the act.

In one interesting question Barton asks the agencies to "describe and explain your agency's position regarding the potentially available appellate avenues, including administrative hearings and the federal court system, as a means of petitioners to appeal agency decisions relating to DQA." However, the federal courts, not agencies, decide whether an issue may be heard and as noted above the courts have already ruled that the DQA is not judicially reviewable.

Barton instructed the agencies and commission to provide the requested documents and answers by Jan. 28, giving the agencies only two weeks to gather the information.

DHS Cancels Nondisclosure Agreements for Unclassified Information

The Homeland Security Department (DHS), under pressure from congressional offices, federal employee unions and the media modified it policies for "Sensitive But Unclassified" (SBU) information and stopped requiring nondisclosure agreements.

DHS officials were requiring that all agency employees sign a strict non-disclosure agreement for unclassified information that was deemed "sensitive" and had even begun asking congressional aides to sign the agreements. The nondisclosure agreements prohibited signers from publicly disclosing any information from DHS deemed "sensitive" or labeled "For Official Use Only" even though the information was unclassified. For more information read OMB Watch's previous article.

Janet Hale, Undersecretary for Management at DHS, issued a Jan. 11 memo to senior department heads explaining the new policies for protecting SBU information. Under the new SBU directive, signed Jan. 6, employees and contractors will no longer have to sign nondisclosure agreements to access SBU information and all previously signed agreements are no longer valid. Instead, the new directive stresses education and awareness to foster the appropriate level of protection for SBU information.

Clearly DHS will also desist in requesting congressional offices to sign such agreements. The original SBU directive never mentioned such requirements and congressional offices from both parties refused to sign the forms when approached, and voiced strong complaints to the requests.

Several areas of concern with the directive remain unchanged. For instance, DHS's policy still allows any employee or contractor to label information, "For Official Use Only." The directive also maintains the overly broad and vague definition for SBU as "any information that could adversely affect the national interest or the conduct of federal programs."

Bill to Allow Campaigning by Religious Organizations Back in House

On Jan. 4, Rep. Walter Jones (R-NC) introduced H.R. 235, the Houses of Worship Free Speech Restoration Act of 2005. The bill would amend the Internal Revenue Code to allow religious congregations to support or oppose candidates for public office and conduct partisan campaign activities without losing their tax-exempt status, as long as the activity takes place in the context of a religious service or gathering. While narrower than previous proposals, the bill still unfairly favors religious organizations over other nonprofits and allows tax-deductible contributions to support partisan activities.

The bill is the latest in a series of attempts by Jones, who introduced the first version of the bill in June 2001 (The Houses of Worship Political Speech Protection Act or HOWPSPA). Congress has consistently rejected the proposal, which has been opposed by nonprofits, clergy and campaign finance reformers. Currently, tax law prohibits all religious, educational, charitable and other organizations exempt under section 501(C)(3) of the tax code from opposing or supporting candidates for office. H.R. 235 would change that for religious organizations.

H.R. 235 is narrower than earlier versions of the bill in that it limits the *type* of activities permitted, but it is more expansive in that there is no ceiling on the number of activities that could be permitted. Under H.R. 235, the permitted campaign-related activities would have to occur in the "content, preparation, or presentation of any homily, sermon, teaching, dialectic, or other presentation made during religious service or gatherings," but *any* amount of these activities could be conducted provided they were part of the presentation at a religious gathering. However, religious organizations would be precluded from making campaign contributions or paying for advertisements in newspapers.

Since this language would permit any activity that could be deemed part of a sermon or other presentation during a religious service, it allows for the express endorsement or opposition to a candidate for public office during a sermon. Religious leaders could request that contributions be made directly to the candidate's committee or other political organizations or even individual contributions of services to political campaigns. They could appeal to their congregations to vote for particular candidates.

Compared to last year's version the bill also narrows what the houses of worship can do outside of the service facilities. Under the Houses of Worship bill introduced in the 108th Congress, the church could reprint the sermon or minutes of the gathering and mail them to church members and the general public. In contrast, the Houses of Worship bill introduced in the 109th Congress restricts churches to expressing personal opinions so long as these views are not disseminated beyond the members and guests assembled together at the service. It specifically restricts mailings that result in more than an incremental cost to the organization and any electioneering communication as defined by the Bipartisan Campaign Reform Act of 2002. However, FEC regulations have interpreted broadcasts by Section 501(C)(3) nonprofit corporations as exempt from the definition of "electioneering communication."

Current law protects the integrity of charitable nonprofits by preventing individuals from using tax-deductible contributions to avoid tax and legal restrictions that apply to political donations. It also prevents individuals from using charitable nonprofit organizations, which are, by definition, organized for public purposes, to advance their personal partisan political views. Supporters of the bill claim religious leaders are afraid to speak out on public issues. However, all 501(C)(3)s, including religious organizations, are allowed to engage in advocacy activities such as lobbying, public education campaigns, comment on public policy, and litigation.

This regulation exists to protect the integrity of the election process. The 501(C)(3)s receive a tax-exemption because

their work is educational, religious or charitable. It is an acknowledgment that the organization performs an activity that relieves some burden that would otherwise fall to federal, state, or local government. Taxpayers should not be required to fund the political activities of tax-exempt organizations.

Additionally, tax-exemption is afforded to churches as a safeguard to preserve separation of church and state by preventing governments from using taxation to favor one religion over another. Allowing churches to advocate for one political party or another would blur the line between the separation of church and state. The money in the collection plate should not pay for bumper stickers or attack ads on behalf of a politician or political party.

Court Rules on Key Issues on Funding Faith-Based Groups

A Jan. 11 ruling by a federal district court judge in Wisconsin in a complex case challenging the federal faith-based initiative has blocked funding to a program that incorporated religious content into government funded activities, but dismissed a claim that another program discriminated against secular nonprofits in awarding subgrants. *Freedom From Religion Foundation v. Towey* may be appealed by both sides.

In June 2004 the Freedom From Religion Foundation (FRFF) filed a broad constitutional challenge to the federal faith-based initiative, but was limited to questions relating to two specific grants in November when the court dismissed the broad case for procedural reasons. The two grants in questions represent two of the most difficult issues involved in the faith-based initiative:

- Are grants or subgrants awarded in a discriminatory manner, favoring religious groups?
- Can and will the government enforce the ban on including religious content in government funded activities?

In this case the judge found FFRF did not meet the burden of proof required to show discrimination in favor of religious groups in awarding subgrants in a program funded by the Compassion Capital Fund, even though 80 percent of the subgrants went to faith-based groups. The grant involved was to Emory University's Rollins School of Public Health for a three-year program that involved subgrants to partner foundations that in turn provided technical assistance and small subgrants to faith-based and community organizations focusing on community health needs.

The court found Emory's criteria for selecting partners to be neutral, although all eight had a religious affiliation. The neutral criteria included whether the potential partner had an independent funding base and an ability to collaborate with other faith-based or community organizations. Some of the partners favor faith-based organizations in making grants with their private dollars. There was no proof that Emory conducted an open competition for partner selection.

In the first year 19 of 23 subgrants made by these partners went to faith-based organizations. In the second year 26 of 31 subgrants went to faith-based groups. However, the court held that this alone was not sufficient to overcome the presumption that a constitutional government program is implemented in a constitutional manner. If the ruling stands it will be difficult for future plaintiffs to prove discrimination. A claim may require a more qualified secular group that did not seek funding to challenge a grant to a less qualified faith-based organization.

The second grant in the case involved MentorKids, which received a grant from the Department for Health and Human Services (HHS) to provide services to children of prisoners. MentorKids made no effort to separate its religious activity from its publicly funded program. Mentors were required to submit statements on their personal Christian conversion, discuss the Bible with the kids they worked with and submit reports on their religious progress.

HHS did not defend these practices. They suspended the MentorKids grant and asked the court to dismiss the case. However, the court refused because the grant could be reinstated absent a court order barring such action. The ruling bars MentorKids from receiving future grants under its current structure. The blatant disregard for following government rules in this case raises serious questions about the will and ability of the federal government to oversee grants to faith-based organizations. The lack of clear guidance and standards, beyond a very general rule that religious activity must be separated in time and place from government funded activity, contributes to the problem.

Congress Faces First Faith-Based Issues of 2005

A Quarter of HUD's Budget Slashed in Bush's Budget

The Bush administration, in a drastic reversal of election promises, plans to cut $ 8 billion in funding at the Department of Housing and Urban Development (HUD), in programs often administered by faith-based organizations, resulting in a reduction of the agency's $ 31 billion budget by almost a quarter.

The Community Development Block Grant (CDBG) is one of the programs that would be drastically reduced, greatly affecting state and local faith-based and community programs. CDBG, a $ 4.7 billion program, gives money to state and local governments to fund a variety of programs, including day care centers, literacy programs and housing development. Many of the faith-based organizations that provide these programs get their money through CDBG grants.

The White House rationale for the funding cuts is the lack of accountability in the programs. According to a White House

spokesman, many of the programs have not been able to demonstrate effectiveness and have experienced fraud. However, the White House Office of Faith-Based and Community Initiatives has not set benchmarks for the recipients of its grants and the program has long lacked any standards of accountability. Instead of funding cuts, it is indicative of a need to institute benchmarks and standards of accountability for grant recipients.

The funding cuts are surprising to some, as campaign rhetoric indicated an increase of money into the faith-based program. Additionally, a White House analysis of HUD funding to faith-based groups indicated that the agency awarded a greater percentage of grants to faith-based organizations than secular organizations.

WIA Reauthorization Would Codify Discrimination in Hiring

On Jan. 4, Reps. Howard "Buck" McKeon (R-CA) and John Boehner (R-OH) introduced the Job Training Improvement Act, legislation that aims to strengthen and improve America's job training system to help states and communities ensure workers get the training they need to find good jobs. The bill is a reauthorization of the Workforce Investment Act (WIA), and would ensure access to job training, counseling and search information to help individuals get back on their feet.

However, this legislation also seeks to codify discrimination in hiring for federally funded positions by religious organizations. The bill repeals longstanding civil rights protections designed to protect workers against this kind of religious discrimination. Since their inception in 1982, these job training programs have included important civil rights protections against employment discrimination based on religious beliefs in programs that receive federal funding.

The original 1998 Workforce Investment Act consolidated 60 federal job training programs into three block grants to the states. It instituted a voucher program for job training services and provided direct services to displaced workers such as job training and employment search assistance.

Importantly, it re-codified the nondiscrimination provision included in the Job Training Partnership Act of 1982. The 1998 legislation received strong bi-partisan support from both the Senate and House in the 105th Congress. This twenty-one year old provision has been successfully implemented since the inception of the job training program, allowing religious organizations to provide essential government services while maintaining a commitment to protecting civil rights and religious liberty.

Post Election Analysis of 527s Dispels Myths, Shows Trends

The Campaign Finance Institute (CFI) held a briefing on Jan. 14 that provided a glimpse of findings in its soon to be published book *The Election after Reform*. In a special presentation on independent political committees (often referred to as 527s) CFI analyst Steve Weissman said these groups did not become substitutes for party soft money that could no longer be given to political parties under the Bipartisan Campaign Reform Act of 2002 (BCRA). The findings provided more detail on 527 groups based on data and interviews conducted after the election and compared with data from 2002.

Much of the justification for last year's proposals to regulated independent political committees like campaigns and parties stemmed from a fear that independent groups would replace soft money that formerly went to parties. The CFI findings show that soft money actually decreased in 2004 by $ 302 million. In addition, most of the federal 527 funds in 2004 came from one-time groups, as opposed to established political committees active in previous elections.

CFI found that individuals were by far the largest source of funds for 527 groups. Individuals gave 527s over $ 250 million, while labor gave less than half that, and business contributions were even smaller. Donations from business decreased from 2002 levels, while labor donations nearly doubled.

In 2004 the number of individual donors giving to 527s rose to 1,882 from 1,231 in 2002. While the vast majority gave in the $ 5,000 to $ 100,000 range, 56 percent of the money came from contributions of $ 2 million or more.

The make up of these 527 groups is complex. CFI's statement said, "We also discovered that the simple image of Republican-created vs. Democratic-created 527s overlooked important political distinctions between groups that existed before BCRA and those constructed afterwards." They went to note that parties and consultants helped foster development and fundraising for 527s in 2004.

CFI sees a large potential for expansion of 527 activities in upcoming federal elections. Weissman noted that "the effectiveness of potential regulation of 527s in eliminating soft money will depend, in part, on whether the FEC and IRS develop a coherent policy relating to alternative nonprofit vehicles for soft money.

House Bill Calls for Agency Performance Ratings

A controversial bill that would require yet more burdensome analysis of regulatory and other government programs has resurfaced after passing the House but stalling in the Senate during the 108th Congress.

Rep. Todd Platts (R-PA) reintroduced the Program Assessment and Results Act (the "PAR Act" or "PARA"), which would authorize the Office of Management and Budget (OMB) to assess the performance of all federal programs at least every five years – or even more frequently for some programs, at OMB's discretion. Packaged in the notionally uncontroversial principle that budgeting decisions should be informed by performance appraisals, the PAR Act would effectively endorse OMB's existing performance review program, make those controversial assessments a permanent fixture in government policy, and contribute to corporate special interests' campaign to reduce regulation through paralysis by analysis.

From GPRA to PART to PAR

The PAR Act is the latest in a long line of efforts to impose government performance measures. The two most relevant to PARA are the Government Performance and Results Act of 1993 (GPRA) and OMB's Program Assessment Rating Tool (PART).

About GPRA

Under GPRA, agencies have been setting performance goals and gauging their success at meeting those goals for a decade. A bipartisan effort to improve government performance as well as public *perception* of government performance, GPRA requires federal agencies to work with OMB and Congress to create strategic plans with long-term goals, develop annual indicators to determine whether goals were being reached, and provide annual performance reports on the results achieved.

There is a gap between the real and the ideal in GPRA. Aside from voluminous reports, there is no obvious sign of GPRA's actual usefulness. In most agencies GPRA appears to have become primarily a compliance activity and nothing more. GPRA has done very little to improve the public perception of government performance, since public awareness of GPRA is almost non-existent and even Congress has shown limited interest in GPRA, even though it is designed to ultimately lead to "performance budgeting," with performance assessments being used as a basis for authorization and appropriation funding levels.

About PART

PART is a duplicative executive branch initiative layered on top of GPRA. In fact, according to a recent GAO report, in some cases PART has eclipsed GPRA – even though GPRA is required by law, and PART is merely an executive branch policy. Created by this administration, PART is a review system aimed at determining performance at the level of individual programs, in contrast to GPRA's agency-wide focus.

The PART consists of six questionnaires designed for different government activities – competitive grant programs, block/formula grant programs, regulatory-based programs, capital assets and service acquisition programs, credit programs, research and development programs, and direct federal programs. Essentially, it consists of "yes" and "no" questions, although in the "results" section of the tool there are some additional gradations.

As with cost-benefit analysis and risk assessments, the PART is yet another complicated and highly technical tool in which potentially controversial political judgments are embedded in faux-objective formulae. With 10 percent of the total score depending on cost-effectiveness and improved "efficiencies," the PART may be yet another vehicle for pushing the agencies to treat industry compliance costs as an equal counterweight to the public interest.

And Now. . . PARA

Platts' bill would amend GPRA and essentially subsume the PART. PARA would require OMB to work with agency heads "to the maximum extent practicable" to select which programs will be subjected to performance reviews in a given year and conduct the reviews. PARA requires all programs to be reviewed at least once every five years, although OMB and the agencies can determine "higher priorit[ies]," "special circumstances," observed improvements, or other factors warranting more frequent reviews for selected programs. The OMB director would be authorized to produce criteria for selecting programs and guidance for conducting reviews.

H.R. 185 does improve slightly upon its predecessor in the 108th Congress by requiring OMB to announce, 90 days in advance of the release of PARA reports, a list of programs picked for review and the criteria to be used in conducting the reviews. OMB would be required to provide for some sort of notice and comment for the program list and the review criteria. Other provisions would address performance reviews that depend upon classified information and classify the reviews as "inherently governmental functions" that cannot be contracted to the private sector.

Problems With PARA

Although the PART would almost certainly disappear with the end of the current administration, the PAR Act would effectively make PART a permanent fixture on the government landscape. Although PARA never mentions PART, the likely

effect of PARA would be that PART would be subsumed under PARA, which has no sunset provision.

The PAR Act would at least assert some congressional authority over the existing practice of PART reviews, which are not currently authorized by any statute. Even so, that authority is only a formality, because the bill supplies no substantive standards against which to hold OMB accountable or to restrain the exercise of OMB's discretion.

The new version of PARA addresses several of the concerns of the Democratic opposition in the 108th Congress, among them a notice-and-comment provision, incorporating agencies themselves in the performance reviews, and a specific provision for handling confidential information. A larger problem remains: that PARA would add to the many analytical burdens that divert increasingly limited resources to "navel gazing" instead of real action to meet public needs. As these burdens – detailed in this law review commentary – are multiplied, regulatory policy runs into the problem of paralysis by analysis. If ensuring the effectiveness of and need for government programs actually were a priority, then these analyses would build in self-checks that stop to review the analyses themselves and assess their actual usefulness. This problem is replicated in PARA, which assumes that performance measurement and related management decisions are inherently valuable enterprises that need never be reviewed for their consequences for the public interest.

Finally, PARA – which is part of a larger trend in the direction of imposing corporate-style outcome- and performance-based management techniques in the public and nonprofit sectors – perpetuates the myth of the perfectly efficient corporate machine. As news reports accumulate revealing accounting scandals, suppression of science and false advertising of harmful products, graft, insider trading, obscene CEO pay-outs unrelated to corporate performance, and board/executive collusions, corporate special interests have been toppling from their undeserved heights. It should be clear by now that the corporate sector is driven by values that are fundamentally incompatible with the values which should govern policy makers charged with serving the public interest. The PAR Act does have a worthwhile goal – improving government – but it threatens to confound its own goal.

EPA Assessment Finds Potential Risk to Humans in Teflon

While an Environmental Protection Agency draft risk assessment for a chemical compound used in the production of Teflon did find that exposure could lead to adverse health effects, EPA fell far short of condemning the chemical or its makers.

In a draft risk assessment on perfluorooctanoic acid (PFOA), a chemical produced by DuPont and used to make the non-stick product Teflon, among other products, EPA has claimed that even low levels of exposure may cause serious adverse health and developmental effects in humans, ranging from increased cholesterol to delays in sexual maturation, while other research suggests even worse consequences such as defects and cancer. The agency did find that PFOA exposure increases levels of cholesterol and triglycerides, which can increase the risk of heart attacks and stroke.

Tilted Science

An analysis of EPA's draft risk assessment by the Environmental Working Group found that EPA has rigged the risk assessment in order to make its own brand of regulatory Teflon: producing a scientific record so compromised that it shields DuPont from regulation. According to the EWG, EPA had "ignored its own science panel's guidance and internal industry research":

> In March 2004, the EPA's Scientific Advisory Panel instructed the EPA that, when assessing the family of chemicals that include [PFOA], the agency had to consider that several types of cancers, including testicular and pancreatic cancers, are relevant to humans.
>
> The Agency ignored the panel's instruction in [the resulting] risk assessment ....

Although EPA's own internal guidelines require that a chemical be considered carcinogenic when it meets any one of five criteria, it dodged the question with the Teflon ingredient — which meets three out of the five criteria, according to EWG.

Ken Cook, president of Environmental Working Group, said, "There's a big difference between sound science and tilted science, and at every turn in this important process, EPA officials favored DuPont."

A 1950s Innovation with Unforeseen Side Effects

PFOA takes years to leave the body and can be found in the environment and animals as far away from factory sources as polar bears in the Artic and dolphins in the Mediterranean. Traces of PFOA have been found in individuals all over the world.

Though only trace amounts of PFOA exist in Teflon products when they hit the market, some scientists believe the chemical may be released as Teflon ages. Other scientists have suggested that PFOA, which is also used in stain- and grease-resistant carpets, clothing and fast-food packaging, may be released into water supplies when carpets or clothing are washed. PFOA found in French-fry boxes, microwave popcorn bags, and hamburger wrappers might be absorbed into the food.

A Case of Regulatory Failure

EPA has now filed suit seeking as much as $300 million in fines from DuPont for withholding important safety information about the chemical. The case highlights a broken environmental regulatory system that relies heavily on industry to police itself. Whereas substances added to food must undergo rigorous testing and review by the Food and Drug Administration, industrial chemicals undergo far less regulation. EPA often must wait for industry to provide information on the adverse health effects of its own products.

According to the *Chicago Tribune*, DuPont has been aware of the potential risk of PFOA since 1961, when company scientists began advising DuPont executives to avoid contact with the chemical. However, the information about the danger of the drug only came out after a couple who lives near the Teflon plant sued the company after the mysterious death of several of their cows. Most of the information about the negative impacts of PFOA was first made public in the court hearings.

In the early 1980s, the company discovered that a DuPont employee had passed the chemical on to her fetus. EPA argues in its lawsuit that this case should have prompted independent analysis of the effects of the chemical. EPA has also accused "DuPont of failing to notify the agency when two of five babies born to plant employees in 1981 had eye and face defects similar to those found in newborn rats exposed to PFOA," according to the *Tribune*. DuPont will also settle a suit next month for as much as $343 million for PFOA contamination in drinking water in Ohio and West Virginia. According to the *Tribune*, "DuPont also has known since at least 1984 that water wells in West Virginia and Ohio were contaminated with PFOA, according to company records. But people who rely on the wells for drinking water didn't find out until 2002, when internal DuPont documents started pouring into court."

Though the company says that it has reduced emissions at the Teflon plant by 90 percent, tests last fall reveal that the level of PFOAs in the Ohio river are the highest to date.

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In This Issue

President Bush's FY 06 Budget: An Overview

President Bush sent his proposed Fiscal Year 2006 (FY 06) budget to Congress on Monday, Feb. 7, in a package that is one of the most special-interest-driven budgets presented in a very long time. The new budget calls for a large transfer of benefits to corporate special interests and the most well-off through additional tax cuts, regulatory and litigation "reforms," and other measures that weaken public safeguards and government in general. At the same time, the president proposes cutting programs serving low- and middle-income Americans. The budget calls for a trade-off that is both unfair and unwise.

The Bush tax cuts enacted since 2001 have resulted in federal revenue now being reduced to the level it was in the 1950s as a percentage of the economy. Faced with this prospect, it might seem prudent to roll back the cuts to raise revenue to meet today's needs. But the president proposes extending the tax cuts that largely are targeted to the wealthy and making them permanent, adding another $ 1.6 trillion to an already burgeoning federal debt. This alone would be fiscally irresponsible.

Irresponsibility, however, is only one part of the equation. The president's solution to the growing debt is to reduce the annual deficit by cutting programs that serve you and me. The president believes that tax cuts for wealthy families are good for the country. For example, he proposes that inherited wealth, regardless of its size, should not be taxed. Currently, families may pass on $ 3 million ($ 1.5 million if single) tax free to their heirs, but he wants all wealth to be tax free. For families with estates larger than $ 3 million, they are forced to pay taxes — unless they have taken advantage of various provisions to reduce their taxable amounts. For example, they may give an unlimited amount to a charity to reduce the value of the estate. Under the president's proposal, the estate tax would be permanently repealed; heirs would be able to receive entire estates without any taxation.

To pay for this policy, the president proposes to cut or eliminate around 150 non-defense programs. Nearly 50 education programs, such as vocational education, would be eliminated, along with large cuts in others such as the safe and drug-free schools program. The president also makes cuts in programs that directly affect community services including major economic development cuts such as to Community Development Block Grants (CDBG).

Discretionary programs take the brunt of the president's proposals. But FY 06 will not be the worst year for non-defense discretionary programs. The president proposes enforceable discretionary spending caps that are very restrictive for non-defense discretionary programs. (See related article on budget process reforms.) Defense spending would be allowed to grow by $ 42.4 billion from FY 05 to FY 07, while non-defense discretionary spending would be cut by $ 300 million over the same period. This would be bad enough, given it means that services will not be able to keep up with inflation and increases in demand. But from FY 08 through FY 10, the president proposes that defense and non-defense discretionary spending be joined under one cap. That means that increases in defense spending will come out of the hide of non-defense discretionary programs.

The president's budget is not only tough on agencies such as Housing and Urban Development, Environmental Protection Agency, Education, and Agriculture, it also raises questions about homeland security priorities. For example, the number of border guards requested do not even come close to the number identified in an intelligence bill President Bush recently signed. Additionally, while more money was requested for first responders, the allocation formula has changed. Under the president's plan, smaller communities will receive less or no money for homeland security. Combined with cuts in CDBG and other domestic programs, this will present a major problem for mayors across the country. It is also likely to put pressure on members in Congress, who will be asked to protect federal funding going to their districts.

The president also lays some markers on entitlement programs. He proposes $ 137 billion savings over 10 years. The largest amount, roughly $ 44.6 billion over 10 years, would come from changes in the amounts states will receive for Medicaid. In exchange for less money to the states, the president proposes to provide states with "more flexibility in determining Medicaid eligibility and how benefits are delivered." This translates into enormous pressure on states still reeling from their own fiscal crises to cut Medicaid benefits or restrict eligibility. The president also proposes changes to Title IV-E of foster care that would give states "flexibility" in financing. The proposal was put forward previously and rejected by Congress.

Worse yet, the president also proposes significant budget process reforms. These, too, are highly political and designed to constrain discretionary entitlement and discretionary spending. The highly successful pay-as-you-go (PAYGO) rules used in the 1990s give way to a new Bush plan. Under PAYGO, tax cuts had to be paid for by increasing other revenues or cutting entitlements; similarly, entitlement increases had to be offset with other spending reductions or tax increases. Under the Bush proposal, only entitlement programs would be covered by the PayGo rules; taxes would not be. This is obviously to keep from increasing taxes and to promote additional tax cuts.

Overall, the president proposes a budget of just under $ 2.6 trillion, laying out a blueprint for slashing many domestic programs while raising spending on the military and homeland security. This budget sends a powerful signal about national priorities, creating tradeoffs between the very rich and the rest of us. In some respects this budget is the by-product of a right-wing strategy for defunding the federal government. The plan is to slash taxes so there is less federal revenue, forcing huge increases in the deficit, thereby creating a manufactured crisis that calls for spending cuts. Congress must resist the president's message and recognize that there are national needs that cannot be ignored. While program efficiencies should always be sought, Congress must provide an adequate revenue base to meet public needs.

A Runaway Debt Has a Price

It took since the beginning of this country until 2000 to amass a $ 5.6 trillion debt. But President Bush will have nearly doubled it by the time he leaves in 2009. The debt is scheduled to rapidly rise every year from this point on – and that increase is also true as a percentage of the economy.

A rising national debt has consequences. It means that the country must borrow more money for which we will have more annual interest payments to make. In FY 04, we spent $ 160.2 billion on debt interest. By FY 10, we will spend $ 313.9 billion – nearly double the amount paid six years earlier.

These are such large numbers that it is sometimes difficult to imagine their magnitude. But $ 313.9 billion in FY 10 is roughly equal to all government outlays excluding defense, Social Security, Medicare, income security and other health programs. It could fund all programs dealing with education, employment, social services, energy, community and regional development, international affairs, agriculture, and general science, and still have money left over.

Put another way, interest on the debt in FY 10 will equal the cost of running the Departments of Agriculture, Commerce, Education, Energy, Interior, Justice, Labor, State, and Housing and Urban Development.

A Slick but Misleading Budget

The president presents a snappy budget, complete with pretty photos on slick paper. His Management Agenda includes a Program Assessment Rating Tool (PART) — a five-part scoring system to rate programs — and a Standards for Success that provides green, yellow or red dots as a scorecard on achieving agency goals. The president also has each agency address his presidential goals, which include:

- Promoting economic opportunity and ownership;
- Protecting America;
- Supporting a compassionate society;
- Making government more effective;
- Agency-specific goals.

In addition to his tax policies, the president also notes the need for litigation and regulatory reform. On litigation reform, the president calls for changes on medical liability, class action law suits, and asbestos litigation. On regulatory reform, the president emphasizes the need to address the costs of regulation, as well as the need to review regulations periodically for "relevancy." (See related article on management changes being proposed.)

All of this provides an impression of transparency and efficiency. But this is a thin veneer. The good-sounding words are not followed with substance to back them up. And what substance is provided tilts heavily in favor of special corporate interests, not the public interest. On litigation and regulatory reform, these are special interest favorites pushed by industry and conservatives. On management reforms, the PART gives the White House Office of Management and Budget authority to assess programs, helping to politicize results. The presidential goals sound nice, but, as described above, fraught with large budget cuts. Supporting a compassionate society may increase faith-based groups in getting government grants, for example, but there are fewer resources with which to do the work. In other words, faith-based groups may get a larger piece of the pie, but the pie itself is getting much smaller.

The issue is not just a slick budget with a very political agenda, it is also that the numbers used in the budget present a misleading picture by:

- Providing discretionary spending details for only one year, instead of multiple years as is the tradition. The result is that the budget does not show the full impact of proposed cuts — even though the president proposes discretionary spending caps that will force large cuts in future years.
- Not providing the costs for making the Bush tax cuts permanent.
- Not including the cost of the continuing wars in Afghanistan and Iraq. For 2006 and beyond, the president provides no figures.
- Not including the cost of his Social Security reform plan, which is projected to cost $ 754 billion in its first five years, $ 1 trillion to $ 2 trillion over the first decade, and around $ 4.5 trillion over 20 years.
- Not counting the $ 774 billion ten-year cost of reforming the Alternative Minimum Tax.
- Claiming to cut the deficit in half over four years when in fact the president uses an earlier inflated estimate of the deficit to serve as the baseline from which to show cuts. Inevitably, the reduction in the deficit will be misleading because of all of the above factors and for one other reason – Congress is unlikely to accept the president's proposal to eliminate nearly 150 non-defense programs.

Like budgets produced in the Reagan era – when education and human services program eliminations, consolidations, and cuts were the norm – it was difficult to follow the proposals from the documents presented to the public. The Bush budget provides a summary of program increases and new initiatives, including "$ 3.7 billion for a new economic and community development program that consolidates 18 ineffective or duplicative programs into a flexible and targeted program." What is not said is that this new initiative cuts $ 1.8 billion from the consolidated programs, including the Community Development Block Grant.

Long-Term Implications

The president's budget puts this country on the wrong track. Using the president's assumptions and projections, the deficit will begin to get better as a percentage of the economy. But by 2013, the deficit falls off a proverbial cliff and things only get worse for as far as the eye can see. By 2070, the deficit would be 15 percent of the GDP, an unsustainable level. The deficit as a percentage of GDP is currently less than 4 percent, and it has stimulated national concern about its size.

These long-term projections by the administration also do not include any of the above factors left out of the budget (e.g., Social Security reform, costs of continuing wars). Moreover, if productivity is lower than projected the steepness of the cliff is even greater.

All in all, this is a clarion call for thinking beyond the immediate action of any one fiscal year. The tax cuts enacted since 2001 were ill-advised and must be rolled back. Otherwise the draconian cuts will create seismic disruption and disaster in our communities.

Bush Budget Seeks Deep Domestic Cuts, Radical Budget Reforms

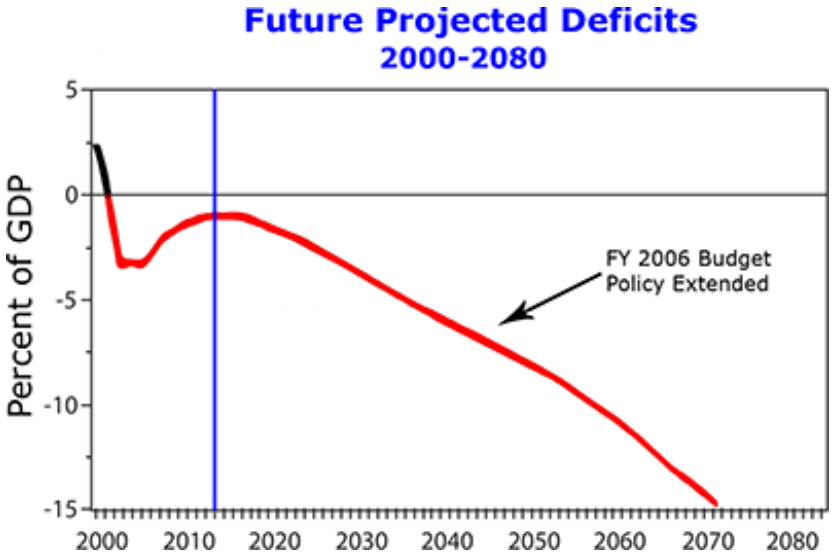
The president's Fiscal Year 2006 (FY 06) budget was released today and contains deep cuts in domestic discretionary spending except for homeland security. Overall, the president's $ 2.57 trillion budget seeks to cut non-defense domestic discretionary spending by 1 percent – eliminating dozens of popular government programs and drastically reducing funding for many others.

Hardest hit among the federal agencies are the Departments of Housing and Urban Development (11.5 percent cut in discretionary authority), Agriculture (9.6 percent cut), Transportation (6.7 percent cut). Justice (5.5 percent cut), and Labor (4.4 percent cut). These figures do not include the impact of inflation, which would exacerbate the impact of the cuts. OMB Watch will provide updates on further programmatic impacts.

The administration has focused on increases in non-defense domestic discretionary spending as the cause of the budget deficits incurred since the president took office in 2001. Unfortunately, the numbers tell a different story. A number of analyses have shown that roughly half of the deficit incurred since 2001 has been caused by the massive 2001/2003 tax cuts – which primarily benefited upper-income Americans. Rather than rolling back these tax cuts in his budget in order to stave off drastic cuts to other programs serving low-income Americans, the president has proposed extending those cuts

permanently. The result is that the five-year deficit projections actually increase according to the administration's own numbers despite crippling cuts to numerous domestic programs.

The long-term projection is even worse. The long-term view in the figure below shows the current enormous deficits as just the tip of the iceberg. As the baby-boom generation ages, the deficit as a percentage of GDP will take a steady and sharp nose-dive after 2013. This graph shows the current tax and budget policies to be unsustainable and highly irresponsible in the long run.



Budget Process Changes

Unfortunately the proposed budget numbers and horrific long-term fiscal outlook are not the only bad news in the budget release. The president has also included a number of proposals that would significantly change the process by which Congress develops and approves the federal budget. Taken in total, these proposals would be make it very hard to increase spending on entitlement programs, would do nothing to pay for additional tax cuts, would greatly constrain spending on non-defense discretionary spending over the next five years, and would shift the balance of power surrounding the budget process from the legislative to executive branches.

Special Treatment of 2001 and 2003 Tax Cut Legislation

The radical proposal in the budget concerns rules on scoring the 2001 and 2003 tax cuts. These tax cuts are set to expire at various times from now until 2010. The president is proposing that the Congressional Budget Office (CBO) and the Office of Management and Budget (OMB) consider the extension of those tax cuts as if they have already happened in all future cost projections. By doing this, any legislative proposals to actually extend those cuts would be seen (in CBO and OMB cost projections) as revenue neutral – or as not costing any money. In fact, current CBO projections show the extension of the tax cuts as costing $ 2.1 trillion – quite a bit more than zero.

One-Sided PAYGO rules

The administration is also proposing one-sided Pay-As-You-Go (PAYGO) rules that would bar any legislative changes to mandatory spending that would increase the deficit or raise taxes. The only option for increasing funding for mandatory programs under this proposal would be decreases in funding for other mandatory programs, once again pitting programs serving low- and moderate-income Americans – such as unemployment insurance, Food Stamps, and Medicaid – against each other.

This proposal changes the old version of PAYGO rules, which required that both mandatory spending increases and tax cuts be paid for. Under the president's proposed change, there would be no limit on the number or amount of tax cuts and no requirement those cuts be paid for. By doing this, the administration opens the door for further government busting deficit-financed tax cuts.

Discretionary Spending Caps

The president also proposes spending caps on discretionary spending from FY 05 through FY 10 that would be divided into defense, non-defense, highway, and mass transit categories. From FY 08 through FY 10, the defense and non-defense categories would be collapsed, allowing money within the cap to be used for either defense or non-defense activities. (The highway and mass transit categories would continue to remain separate, providing their funding.) Combining the defense and non-defense categories creates a financial squeeze, especially in FY 08–FY 10, as the Defense Department budget will increase faster (in percentage terms) than all the rest of discretionary spending. The remaining discretionary programs will be forced to compete with the military for a proportionally decreasing slice of the pie.

Proposed Discretionary Spending Caps

(in billions of dollars)

	2005	2006	2007	2008	2009	2010
Defense Category						
BA	420.2	438.8	462.6	NA	NA	NA
Outlays	463.5	444.3	446.1	NA	NA	NA
Non-Defense Category						
BA	402.5	401.5	403.1	NA	NA	NA
Outlays	427.1	436.1	430.0	NA	NA	NA
Combined Defense/Non-Defense						
BA	NA	NA	NA	886.6	907.9	919.8
Outlays	NA	NA	NA	889.3	905.6	971.4
Highway Category						
Outlays	32.1	34.4	34.9	36.0	39.3	NA
Mass Transit Category						
Outlays	7.2	6.9	6.5	6.9	7.0	NA
Total Cap on Discretionary Spending						
BA	822.7	840.3	865.7	886.6	907.9	919.8
Outlays	929.9	921.7	917.4	932.2	951.9	971.4

The implications of these caps are huge. The Center on Budget and Policy Priorities has calculated that if defense, homeland security and international affairs are funded at the levels the president proposes, by 2010 the rest of discretionary spending will need to be cut by 16 percent to remain under the total discretionary cap (See Assessing President Bush's New Budget Proposal). For reference, the president has proposed cutting this group of programs by one percent in FY 06. Therefore those programs would most likely see a four percent cut on average each year after FY 06.

Other Proposals

The president has also proposed a number of other budget process reforms that would greatly increase the power of the executive branch of government. The first is a line-item veto for appropriations bills. With this power, President Bush and future presidents could sign appropriations bills into law, but strike out specific spending earmarks within the bill. As written in his own budget proposal, this power would, "give the president authority to defer new spending whenever the president determines the spending is not an essential government priority." This power (which was already struck down by the Supreme Court as unconstitutional during the Clinton administration) would greatly undermine the constitutional power of the purse that is given to Congress.

Another proposal involves changing the congressional budget resolution from a "concurrent resolution" to a "joint resolution." This means the yearly budget resolution – which serves as a non-binding roadmap for Congress as it moves through the budget process – would be subject to presidential approval or veto. This would greatly increase the control the president has over the content of the budget resolution.

Other reform proposals, such as biennial budgeting, automatic appropriations, and ten-year sunsets on all programs, would also greatly weaken the power of the legislative branch while shifting power to the executive. These are drastic and unprecedented proposals that Congress must reject.

CBO's Reduced Deficit Projections Mislead

Last week, the Congressional Budget Office (CBO) released an updated Budget and Economic Outlook with new 10-year deficit projections for 2006–2015. The report estimated 10-year deficits to have dropped from $ 2.3 trillion to $ 1.4 trillion since last September, a 39 percent decrease. These conclusions, however, are very misleading.

The CBO's recent Budget and Economic Outlook is an update to an earlier analysis it released last September. By law, the CBO must only use currently enacted policies and laws in creating their budget outlook projections. The improvement in the budget deficit projections are a direct result of this requirement. When the report was released last September, the CBO included $ 115 billion per year through 2014 for supplemental defense expenditures in Iraq and Afghanistan in their projections. At the time, a supplemental appropriations bill for $ 115 billion had recently been approved.

In their current estimates, the CBO includes no supplemental funding for Iraq and Afghanistan. Yet it is universally acknowledged that more supplemental funding will be requested by the Department of Defense and provided by Congress. The next supplemental request is expected to be at least $ 80 billion and it was recently reported there is likely to be a second supplemental request of at least another $ 80 billion before 2005 is over.

The new CBO report acknowledges this discrepancy and includes adjustments to their previous projections in order to have a fair baseline to compare the two reports. When this adjustment is made, CBO concludes that ten-year deficit levels will actually increase by half a trillion dollars, or 0.3 percent of GDP. Three-quarters of this increase is due to legislation surrounding the extension of tax cuts. Further, the CBO projections fail to take into account some costly policies that are widely expected to become law in the near future. These include reforming the Alternative Minimum Tax ($ 400 billion over 10 years), extending expiring tax cuts (up to $ 1.3 trillion over 10 years), and creating private accounts in Social Security ($ 1–$ 2 trillion). Given the potential costs of those policies, as well as projected increases in health care costs, it would be foolish and irresponsible for policymakers to think they can sufficiently pay for those policies – and the nation's other spending priorities – while attempting to make Bush's tax cuts permanent. Yet that is exactly what the administration is proposing. Doing so would explode deficits far beyond any projections we are seeing today.

For good articles on the Budget and Economic Outlook released last week, read this article in the *Washington Post* and this article from Bloomberg News. To read more about why CBO projections tend to underestimate the real picture of the deficit read this OMB Watch analysis by economist John Irons. Written last fall, Dr. Irons explains his take on why ten-year budget deficits will most likely be much greater than any predicted by the CBO.

Bush Makes Social Security Centerpiece of State of the Union

When President Bush addressed Congress and the nation on the evening of Feb. 2, he devoted much of his address to his proposed changes to Social Security, yet declined to provide the American people with details regarding exactly which reforms he plans to pursue. Many believe this strategy is to avoid what President Clinton faced when he tried to reform health care a decade ago. Clinton had submitted a heavily detailed proposal to members of Congress, who were then able to pick it apart and subsequently defeat it. Bush's deliberate vagueness allows him to sell his plan to the nation conceptually, while leaving us to guess what the true consequences of his reforms might be.

President Bush began his discussion of Social Security with a laundry list of statistics about the system and where it is heading if nothing is done about it. While stating the facts Bush used some potentially misleading rhetoric. He said, "by the year 2042, the entire system [will] be exhausted and bankrupt." The words "exhausted and bankrupt" do not accurately describe the situation. The White House's own Social Security Trustees have predicted a 27 percent benefits cut by the year 2042 if no reforms to the program are passed. The nonpartisan Congressional Budget Office (CBO) has predicted a 22 percent benefits cut by the year 2052 if no reforms are passed. This one-quarter cut to benefits is not the same as "exhausted and bankrupt." By then our surplus will be exhausted, not the entire trust fund.

Bush used these words to make the situation appear more dire than it actually is and to gain more support for his plan to overhaul what is, in fact, a financially sound program. Additionally, the projected cuts do not come close to the size of the cuts projected if future workers participate in private accounts in an economy seriously burdened with debt. (For details on the subject see this recent report from the Center on Budget and Policy Priorities.)

While discussing the future of Social Security, Bush went into detail regarding the shortfall that lies ahead. He said, "For example, in the year 2027, the government will somehow have to come up with an extra $ 200 billion to keep the system afloat - and by 2033, the annual shortfall will be more than $ 300 billion." These numbers may be accurate, however the context in which Bush used them is misleading. To begin with, the shortfall created by Bush's 2001 and 2003 tax cuts is significantly larger than any Social Security could create. In fact, in 2027, the tax cuts are projected to cost approximately $ 345 billion, and in 2033, $ 375 billion. The Social Security shortfall "crisis" could easily be avoided if this administration had more fiscally responsible tax policies. Secondly, by proposing to divert revenue from Social Security to private accounts, the president will end up *adding* approximately $ 100 billion to the amount of the shortfall by decreasing the amount of money available in the general fund needed to pay out benefits.

In discussing solutions, the president noted many options were on the table regarding which plans to pursue. He mentioned eliminating Social Security payments to the wealthy and invoked ideas supported in the past by Democrats such as the late Sen. Daniel Patrick Moynihan of New York. After listing a number of ideas, however, Bush spent a good deal of time discussing the benefits of personal accounts. The few details he provided included that he will never raise payroll taxes to address the upcoming shortfall, unlike President Reagan who surprisingly did in 1983. Instead, Bush said

he supports a plan which would divert 4 percent of income — about 35 percent of the amount of personal funds currently going towards the payroll tax — into private accounts to be invested in stocks, bonds and mutual funds. The 4 percentage points outlined by Bush are in fact almost two-thirds of the 6.2 percent currently paid by workers into the system. The ideology behind this proposal is that investment as opposed to taxes could potentially yield higher returns for some beneficiaries as well as avoid a shortfall by moving a chunk of the payments from government funds to private stocks and bonds.

This plan fails to take into account two major details. One is that moving this money from government revenue to financial markets adds an extreme level of risk to the amount of money recipients will end up collecting. Social Security money is currently invested in government bonds, which are risk-free. Moving that investment to the financial markets opens the door to the possibility that people will collect less than they would under our current, straightforward social insurance program. Secondly, there has been little discussion of the fact that diverting revenue from taxes going to the government to financial markets significantly impacts the ability of the government to continue to pay Social Security benefits. A shortfall in these funds would mean that the date at which Social Security benefits are scheduled to exceed payments will come sooner.

According to the CBO, in the year 2020, tax revenues will no longer be sufficient to pay benefits and the program will have to start using interest it has accrued on the trust fund. If significant levels of revenue are diverted from the trust fund beginning in 2009, this date will move up to 2012, as estimated by the Center on Budget and Policy Priorities. The projected shortfall that Bush claims to fear so greatly would occur significantly sooner under his plan.

Senate Democrats did respond to the comments Bush made about Social Security in the State of the Union address. All but one signed onto a letter to the president addressing the problems they see. The letter stated, “According to most estimates, setting aside 4 percentage points of the 12.4 percent Social Security payroll tax — nearly one-third of the tax — would require the government to borrow close to $ 2 trillion over the next 10 years in order to pay scheduled benefits to current and near-retirees. Adding this borrowing to the policy changes above would bring the per capita share of the debt to close to $ 30,000 by 2015, the end of the ten-year budget window.”

The senators make an important point in their letter. If 6.2 percent of workers’ incomes are currently going towards general national revenue, and then 4 percent is diverted to the private sector, the government loses out on a large sum of money that otherwise would have been there. This accounts for the high level of debt that many predict such a policy will create. If the plan goes into effect in 2009, from that year until 2018, the plan is expected to generate $ 1.3 trillion worth of debt for the American people. From 2019–2028, it would cost an extra $ 3.3 trillion. Bush and others who support private investment accounts have made it clear they are pursuing these reforms because the retirement security of their children and grandchildren depend on it, not to mention the solvency of Social Security.

Bush has said, “Leaving our children with such a mess would be a generational betrayal.” But personal investment accounts in place of guaranteed, government-funded benefits will provide neither security nor solvency. They will instead further lead the program towards bankruptcy, all while placing trillions of dollars worth of debt onto the shoulders of the next generation. When Bush and GOP members of Congress discuss “doing this for the children,” remember this: Their irresponsible fiscal policies are putting “their children” further into debt. If Bush succeeds in reforming Social Security in the way he wants, every child born in this country starting in 2015 will be born $ 30,000 in debt.

It is no secret America’s economic system does not provide equally, adequately or even fairly for all. The existence of a viable safety net is necessary to ensure millions of citizens are able to live their lives with a basic level of quality and dignity. There are many questions the administration and Congress should ponder in deciding whether to dismantle Social Security in favor of private investment accounts.

For more on this topic, see:

- Democrats Take Aim at Social Security Proposal
- Introducing Private Investments to the Safety Net
- Bush Puts Much of Legacy on the Line With Social Security Plan
- Credibility Deficit
- CBO report on long-term projections for Social Security
- An analysis of how Bush’s numbers are misleading, from the Center on Budget and Policy Priorities.

Center for American Progress Progressive Tax Plan

On Jan. 31, the Center for American Progress unveiled its progressive tax plan, titled "A Fair and Simple Tax System for Our Future: A Progressive Approach to Tax Reform." This comprehensive plan provides an alternate vision for tax reform based on the themes of fairness, simplicity, and opportunity through tax policy. The release of this plan is part of a broader Progressive Policy Series the Center is publishing aimed at outlining responsible policy proposals and proposing steps lawmakers can take to enact them.

The Center chose to work on a fair, simple and progressive tax plan as a response to what it believes are irresponsible policies pursued by President Bush and Congress. In his first term, Bush pushed through tax cuts that primarily benefited the wealthiest, making our federal tax system increasingly complicated and unfair. He has taken away revenue sources necessary to fund both his policies and national policies that were created and put in place before his time. And although Bush is not expected to push fundamental tax changes in Congress until late this year at the earliest, he has made it known he wants tax reform to be a central priority during his second term.

The progressive tax policies promoted by the Center for American Progress would restore fairness, simplify the tax code, and increase economic opportunity. The Center's plan would tax each source of income fairly, reduce the dependence on payroll taxes (which are regressive), and enhance the take-home pay of lower-income taxpayers. To simplify the tax code, the authors of the plan propose reducing the number of income tax brackets from six to three, and taxing each progressively at 15, 25 and 39.6 percent. The plan also closes corporate and individual tax loopholes, and eliminates the Alternative Minimum Tax. To increase economic opportunity through the tax code, the plan restores fiscal discipline by addressing the record deficit situation, working to close the current fiscal gap, and offering Americans new opportunities to save and create wealth for retirement. The Center proposes getting rid of the "upside-down deduction-based incentive and replace it with an across the board 25 percent refundable tax credit for retirement savings." This would offer Americans an incentive to save for their retirement.

The Center's tax plan would keep the income tax progressive, which is an important way to level the playing field and increase equity in our society. It reduces taxes for approximately 70 percent of taxpayers — those making less than $ 200,000 annually — and provides an average tax cut of more than $ 600. Those who make over $ 200,000 would see some tax increase. Most importantly, these specific policies end up reducing the deficit by nearly $ 500 billion over the next ten years, which is key given new CBO projections putting the FY2005 deficit at well over $ 400 billion. It is clear the fiscal health of this nation would benefit from proposals such as the ones put forth in the Center's progressive tax plan.

Republican Policy Committee Attempts to Bolster Data Quality Act

The Senate Republican Policy Committee (RPC) appears to be preparing for a battle over the Data Quality Act (DQA), as it recently released a very slanted background document that praises the law's benefits and attempts to bolster its legitimacy.

Contrary to its intentions, the Jan. 18 RPC paper actually supports criticisms that OMB Watch and other public interest groups have leveled at the DQA since the law's inception — that it is a tool to hinder regulation through attacks on information. The text of the paper states, "Another purpose of the law was to prevent 'regulation by publication,' where federal agencies publish unsupportable claims that achieve a regulatory impact without having to go through the regulatory process." The RPC is claiming that agencies are creating pressure on companies to take action without formally producing a rule that requires action, but instead by merely publishing information. There is no evidence agency publications can achieve the same impact as a regulation or that any agency has published "unsupportable claims."

However, there is mounting evidence that the business community has used the DQA to delay and derail regulations by attacking and weakening the publications uses as foundations for those regulations. An OMB Watch report documented the use of the DQA for anti-regulatory purposes by regulated industry.

The RPC report cites a challenge filed by the Competitive Enterprise Institute (CEI), an industry-funded organization, as an example of how the DQA can ward off bad information. But the example demonstrates how industry attempts to use the DQA as a means to silence discussion of important public protections. In this case, CEI submitted petitions to several agencies challenging the quality of a peer-reviewed government global warming report. The issue of global warming is highly controversial, with disagreement on its existence within the policy and scientific communities. CEI raised complaints about the peer review process and the accuracy of data models used in the creation of the report. However, instead of recommending corrections for the challenged information, as required under the DQA, CEI requested the complete removal of the document from public distribution.

The government's global warming report did not represent "regulation by publication." The report was a best effort to define the global warming issue based on the best information and methods available at the time, and did not have direct implications for the operations of regulated industry. The report, as do most scientific studies, represented a stepping stone to better understanding of the issue, new research and improved models. Removing the information stifles dialogue on the issue, and does nothing to correct any misinformation in the document. CEI filed a lawsuit over the challenge and settled the case by getting a disclaimer placed on the report noting that it did not comply with the DQA. In reality, the DQA has not garnered improvements in data quality. Instead, it has created more burdens on agencies and has given industry a tool for derailing, delaying and diluting the regulatory process.

The RPC also looks to correct supposed misperceptions about the DQA in its report. Most notably, it asserts that the DQA

was **not** a last-minute rider that had no debate in Congress (it was attached to the Treasury and General Government Appropriations Act for Fiscal Year 2001 at the last second by Rep. Jo Ann Emerson (R-MO)). The RPC explains that the DQA was simply another version of the data quality measures contained in the Paperwork Reduction Act of 1995, and that several hearings were held on that law. Although the Paperwork Reduction Act does mention quality of information several times, it does not contain any instructions for specific criteria or the creation of a mechanism to allow companies to challenge particular information. Therefore, any hearings or analysis could not have explored the issue substantively since the law only vaguely alluded to the principle. The RPC's claim that this was equal to debate on the DQA is unconvincing.

It appears that the some business groups and conservatives will also attempt to revisit the issue of judicial review under the DQA for petitioners seeking the correction of information. Currently the law contains no mention of the issue. This lack of language in the law caused two judges to rule in 2004 that the law does not provide judicial review. The Department of Justice agreed, saying that no statutory basis for federal court review exists, as the DQA does not contain any provisions allowing private parties to enforce the statutory terms in court. The industry groups that have filed suit against the government are sure to support any move to incorporate judicial review under the law.

DC Council Passes Bill to Reroute Hazardous Materials

Last week, the City Council of Washington, DC, voted 10–1, with one abstention, to enact emergency legislation requiring rail companies to reroute hazardous cargo around the city. This legislation, "Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005," will make Washington the first city in the nation requiring companies to route hazardous cargo shipments away from population centers. The bill now only needs DC Mayor Anthony Williams' signature.

This vote came on the heels of a deadly chlorine leak from a hazardous-cargo train in the small town of Graniteville, SC. The Jan. 26 collision killed nine people, injured more than 250, and forced 5,400 residents from their homes. However, the consequences could have been much worse if the accident had occurred near a more populated area – such as the nation's capital. According to a Naval Research Laboratory study, if a similar incident happened on an existing rail line near the National Mall with Fourth of July crowds, 100,000 people could be killed in 30 minutes.

Washington is not the only city that needs to address the very real security and safety vulnerabilities that come with the shipping of hazardous materials. On a daily basis, trucks, trains, barges and pipelines carry some 800,000 hazardous material shipments throughout the country, with dangers often unknown to many people. Yet federal incident databases give governments and communities an incomplete picture of hazardous shipments and mishaps.

Most local officials have no idea what hazardous materials move through their communities because truckers and carriers fought for and received an exemption from the country's two most important environmental right-to-know laws. These laws, the Emergency Planning and Community Right-to-Know Act of 1986 and the Clean Air Act Amendments of 1990, enable communities and local officials to find out about chemical hazards in facilities, but not about chemical hazards in motion, on wheels or tracks, that pass through neighborhoods.

The Surface Transportation Board, an independent federal agency, requires carriers to report a 1 percent sample of their yearly shipments, but this information is presented in a way that is not helpful to local officials in determining the risks of hazardous chemical shipments. The Surface Transportation Board should require annual totals and worst case scenarios for the most hazardous chemicals and make those available to the public and local officials.

The DC bill shows that cities and communities can act to protect and inform their citizens. Officials in other cities should carefully examine the DC bill and consider implementing similar safeguards for their region. Local officials and communities should also demand carriers make available annual totals of hazardous chemicals shipped through communities and worst case accident scenarios for those chemicals.

Risks from transporting hazardous cargos can ultimately be minimized by: reducing the use of hazardous chemicals; giving the public the right to know about hazardous cargo shipments; and rerouting hazardous cargos away from population centers.

It is unacceptable that three years after the 9/11 terrorist attacks the federal government still has no program to minimize risks from hazardous chemicals. In fact, federal government officials have publicly opposed the district's efforts to re-route hazardous cargos. But there is no federal program to ensure that hazardous cargo shipments do not travel through population centers; no federal program to compel users of hazardous chemicals to consider and substitute safer chemicals where practical; and no federal program to fully inform communities about hazardous cargo shipments. This leaves the matter in the hands of states and cities. Washington, DC, has taken this matter firmly in hand and is doing something about it.

Freedom of Information Far From Free

The Justice Department has informed the People for the American Way (PFAW) that responding to the group's Freedom of Information Act (FOIA) request for all records related to the decision to seal the records of immigrants detained in the wake of the 9/11 terrorist attacks will cost nearly $ 400,000. The unusually large price tag appears to be the agency's latest move in an ongoing struggle to withhold the information.

PFAW, a leading civil rights organization, filed the FOIA request more than a year ago on Nov. 25, 2003. The Justice Department immediately denied the request on the grounds of privacy and then denied the organization's appeal. PFAW, unsatisfied with the Justice Department's claims, filed a lawsuit in August 2004 seeking the records.

Then on Jan. 11, two days before the deadline for arguing why the lawsuit should be summarily denied, the Justice Department reported that it had changed its position and would search for the requested records. The organization was told that an initial canvass of U.S. Attorneys' offices led to an estimated search time of 13,314 hours, which at $ 28 an hour, would make the total search fee approximately $ 373,000. Justice also cautioned that this was only an estimate and the final cost could be higher.

The Justice Department requested that PFAW pay the estimate in advance and gave the organization until Feb. 10 to respond. Lawyers for the department have asked for a court hearing during the week of March 14.

PFAW requested the information so it could produce a public report about the government's efforts to use secrecy against hundreds of unidentified detainees who were arrested and held for months without criminal charges following the 9/11 attacks.

New Website Promotes Sunshine Week March 13

The Sunshine Week project debuted a new website this week, **sunshineweek.org**, that offers a number of resources and tools to journalists and others looking to cover or participate in this year's activities. The intent of Sunshine Week is to highlight the importance of open government through news stories and other media during the week of March 13. Reporters and editors can find at the website an array of op-eds, story ideas, reports, links to participating groups nationwide, and other resources.

Sunshine Week is a new national initiative that builds on the success of past Sunshine Sundays, which began in Florida. Sunshine Sundays resulted in the publication of stories, cartoons and editorials on the importance of open government and how government information is used on a daily basis by both the public and the media. The initiative is already receiving enthusiastic responses from news and other media outlets across the country.

The American Society of Newspaper Editors is leading the project with help from the American Library Association and a 54-member Steering Committee.

NAACP Says IRS Summons Illegal, Politically Motivated

On Jan. 27, the National Association for the Advancement of Colored People declined to respond to a summons from the Internal Revenue Service in an audit based on charges of illegal partisan activity. The NAACP said the IRS did not follow proper procedures and the agency's actions are politically motivated. The IRS denied its motives are political and referred the allegation to the Treasury Department's Inspector General for Tax Administration. The audit is unusual because it is based on NAACP Chairman Julian Bond's July 2004 convention speech that criticized Bush administration policies.

The IRS issued the summons Jan. 14, seeking information normally reported in the annual nonprofit IRS return, Form 990. The NAACP response said the summons was not issued for a legal reason because it is not yet due, noting, "It appears that political pressure, rather than any sound legal authority, motivated the Service to ignore the statutorily-mandated procedures for initiating an examination." The letter noted the IRS can only take action prior to filing Form 990 if it meets the requirements of Section 6852 of the Internal Revenue Code, which gives the IRS authority to act on flagrant violations of the prohibition on electioneering by 501(c)(3) organizations. The NAACP letter said, "While criticism of an administration's policies might constitute intervention under some set of circumstances, it hardly rises to the level of a 'gross violation' or a 'flagrant' expenditure. Indeed, criticism or praise of government policy is First Amendment speech of a high order in a democratic society."

On Nov. 12, 2004, IRS Commissioner Mark Everson responded to a letter from Sen. Max Baucus (D-MT), who asked for more information on the motivation for the audit and expressed concern about Nixon-era type intimidation tactics. Everson's letter said the IRS had not received any request to audit any group from the executive branch, but that two members of Congress requested "we look at one or more organizations in this area." Everson said those requests were treated the same as any other third party referral.

The NAACP letter, noting the requests from members of Congress, said, "The IRS has not explained its motivation for initiating an exam program at the behest of political figures who may themselves have been active participants in the campaign …. However, we must conclude that the intention was to chill appropriate voter registration and get-out-the-

vote efforts, while conducted by the NAACP or by other organizations that are targeted by similar examinations in the program."

Everson's letter to Baucus denied political motivation, saying that "career employees determine whether specific information we review warrants further action." He described the IRS program to enforce the ban on partisan activity by 501(c)(3) organizations in 2004 as consisting of education and enforcement. The enforcement effort was overseen by a committee of career employees that was created in the summer. They reviewed more than 100 cases and more than 60 were selected for examination, including about 20 religious organizations. Details, including the identity of the groups being audited, have not been made public because tax law protects the privacy of the groups. Everson did say the groups represent diverse viewpoints.

Everson noted changes in the law since the Nixon era. Any White House request for IRS action must be signed by the president and reported to Congress's Joint Committee on Taxation (Internal Revenue Code Section 6103(g)). Executive branch employees and cabinet heads are prohibited from making such inquiries by Section 1105 of the IRS Restructuring and Reform Act of 1998.

IRS Clarifies Rules for Foundation Funding for Lobbying

A recent letter from the Internal Revenue Service to the Washington, DC-based nonprofit, Charity Lobbying in the Public Interest, sheds light on the rules that govern private foundation lobbying. CLPI had requested that the IRS answer a series of questions aimed at clarifying the law on foundation support of nonprofits that engage in lobbying. The response from the IRS dispels the misperception that foundation funding of nonprofits that lobby is inappropriate and illegal.

The CLPI letter had asked the IRS to clarify the conditions under which private foundations can pursue activities designed to influence public policy, when a foundation can make a grant to a nonprofit, and the freedom permitted to foundations to both lobby and earmark funds for lobbying by nonprofits.

The IRS response notes the difference between what private foundations can do themselves and the wider scope of activities they can fund. It details the conditions under which private foundations can engage in activities that shape public policy. According to the IRS, private foundations may engage directly in a wide range of educational activities that influence the formation of public policy but are not lobbying, as long as the foundation does not state a viewpoint on specific legislation in its communications with legislators or their staff, and does not present a call to action. The restrictions do not limit foundations' contact with executive branch officials in order to assist the development of regulations.

The letter specifies the conditions under which a foundation can make a grant to a nonprofit for a specific project that includes lobbying. It states that a private foundation can make a grant to a public charity for a specific project that includes lobbying if no part of the grant is earmarked for lobbying, and the private foundation obtains a proposed budget that shows that the amount of the grant does not exceed the amount budgeted for activities that are not lobbying, as long as the foundation believes in the accuracy of the budget.

The letter also makes clear the ability of community foundations, which are public charities and therefore under different regulations than private foundations, to engage in or fund lobbying activities. This gives them greater flexibility than private foundations. If they have chosen to use the expenditure test in Section 501(h) of the IRS Code to measure their lobbying limit, they can engage in or fund lobbying activities up to their expenditure limit. If they do not use the expenditure test, they may lobby to the extent that their lobbying does not constitute more than an insubstantial part of the community foundation's activities.

Private foundations have historically been cautious about funding nonprofit organizations that engage in lobbying. The IRS letter makes it clear that foundations may fund groups that lobby, and provides guidance that foundations may safely rely on to facilitate funding. Lobbying is a powerful advocacy tool for nonprofits, and the IRS letter provides a powerful endorsement and reinforcement for nonprofits to engage in the public policy arena — and an important clarification for foundations that want to support their work.

New Bill to Regulate Independent PACs Introduced

On Feb. 2, seeking to act before the 2006 congressional campaigns get underway, sponsors of the Bipartisan Campaign Reform Act of 2002 (BCRA) announced the introduction of a new bill aimed at regulating independent political committees. The 527 Reform Act of 2005, S. 271, specifically targets groups exempt under Section 527 of the tax code, so that charities and other groups exempt under Section 501(c) that focus on issues, not candidates, would not be impacted. Chairman Trent Lott (R-MS), a co-sponsor of the bill, scheduled a hearing for March 8 in the Senate Rules and Administration Committee.

S. 271 is an improvement over last year's version, as well as the approach advocated by some reformers in rulemaking proceedings at the Federal Election Commission (FEC) in the summer of 2004. It drops vague language that would have regulated any group whose "major purpose" is to influence federal elections and specifically targets 527 groups. However, some concern remains that the rationale behind the bill could be extended to 501(c) groups in the future.

The premise behind the bill is that all groups seeking to influence federal elections should be subject to the same

regulations, whether they are candidate campaigns, political parties or independent groups that have no ties to parties and candidates and do not coordinate with them. This rationale goes beyond the arguments used to uphold the constitutionality of BCRA, which addressed the potential for corruption in the link between donors and federal officeholders. Although sponsors cited the potential of large donors to independent political committees to corrupt the electoral process, the bill makes no distinction between 527s dominated by large donors and 527s that may be made up of small donors or are membership governed.

S. 271 would require 527 groups to comply with the same regulations as federal candidates, campaigns and parties. These include:

- a ban on corporate contributions and a $ 5,000 annual limit on individual contributions;
- the use of only hard money (collected subject to federal contribution limits) for public communications that "promote, support, attack or oppose" a federal candidate, regardless of whether it expressly advocates election or defeat of that candidate;
- the allocation of expenses for communications that mention political parties and state or local candidates, even if no federal candidate is mentioned, so that 50 percent of the costs are paid from federally regulated funds;
- the allocation of expenses for communications that mention both state/local and federal candidates so that 50 percent of the costs are paid from federally regulated funds, regardless of how much time or space is allocated to the federal candidate;
- a cap of $ 25,000 on contributions from individuals for the state and local component of a 527 that works on both federal and state/local elections.

The 50-50 allocation rule is similar to a regulation approved by the FEC last year currently being challenged in court by the political action committee (PAC) Emily's List.

The bill contains exemptions for 527 groups:

- with annual budgets under $ 25,000;
- that work exclusively on non-federal campaigns or elections with no federal candidate on the ballot;
- that work exclusively on state or local ballot initiatives;
- that work on the nomination or confirmation of non-elected officeholders.

House sponsors of the bill said they believe leadership will take it up promptly. House Administration Committee Chairman Bob Ney (R-OH) said he expects to hold hearings on a similar bill.

Grassley Revenue Proposal Dims Chances for New CARE Act

On Jan. 24, Sen. Rick Santorum (R-PA) introduced S. 6, The Family and Community Protection Act of 2005, a tax and welfare reform bill that includes the Charity, Aid, Recovery and Empowerment Act (CARE). Although the bill was included in Majority Leader Sen. Bill Frist's (R-TN) *Republican Top Ten Agenda for 2005*, recent moves by Senate Finance Committee Chairman Charles Grassley (R-IA) dim the Act's chances of success.

Grassley is looking for revenue-raisers to offset the $ 50 billion needed to extend the tax cuts currently scheduled to expire at the end of the year. He wants to combine revenue offsets from the Senate version of last year's corporate tax bill that died in conference with new offsets identified last week in the Joint Committee on Taxation (JCT) report, including tightening deductions for the charitable donations and rules for tax-free bonds.

The Joint Committee on Taxation has issued the report suggesting ways to close the federal budget gap by picking up some of the revenue from tax-exempt entities. According to the Committee, the section on exempt organizations could pick up nearly $ 7 billion over the next ten years.

The proposals include:

- denying exempt status for organizations that fail a five-year review for renewal;
- imposing a termination tax on exempt organization conversions;
- taxing participation in abusive tax shelter deals;
- extending intermediate sanctions;
- increasing excise taxes on private foundations;
- limiting deductions for conservation easements and gifts of clothing, household goods and other property;
- increasing penalties for failing to disclose tax returns;
- expanding the base of the excise tax on private foundation investment income;
- limiting the exempt status of fraternal beneficiary societies that provide commercial-type insurance;
- cracking down on credit counseling organizations.

Grassley, chairman of the Senate Finance Committee, which was already seeking to reform charitable organizations, says the recommendations "should help to remove the rose-colored glasses that a lot of people use to view tax-exempt organizations."

Investigation of Agency Use of Funds for Propaganda Requested

Several columnists, some with ties to nonprofits, have recently been the agents of covert propaganda for the Bush administration. An investigation by *USA Today* revealed that the Department of Education (ED) hired a public relations agency, Ketchum Incorporated, to promote the No Child Left Behind Act (NCLB). As part of this contract, Ketchum entered into a subcontract to pay Armstrong Williams, a conservative commentator, $ 240,000, to promote the NCLB. Two more cases of similar actions have surfaced, prompting the Campaign Legal Center to request an investigation by the Department of Justice (DOJ).

For more than 50 years, annual federal appropriations laws have banned the outlay of appropriated funds on publicity and propaganda unless specifically authorized by Congress. This regulation prohibits covert propaganda that does not identify the government as a source, information intended for "self-aggrandizement" or "puffery" and materials that serve a solely partisan purpose. The prohibition reflects the belief that the federal government should not use its resources to influence public opinion in political or policy issues.

The contract between ED and Ketchum says that, "Ketchum shall arrange for Mr. Williams to regularly comment on NCLB during the course of his broadcasts." And that "Secretary (Rod) Paige and other Department officials shall have the option of appearing from time to time as studio guests to discuss NCLB and other important education reform issues." This practice, known as "pay to play," is a practice generally regarded as unprofessional, unethical and corrupt.

A recent investigation by the *Washington Post* found that syndicated columnist Maggie Gallagher received a $ 21,000 contract with the Department of Health and Human Services (HHS) to write positive articles on the president's $ 300 million Federal Marriage Initiative.

Gallagher also received an additional $ 20,000 from a nonprofit organization, the National Fatherhood Initiative, to author a report titled, "Can Government Strengthen Marriage?" The National Fatherhood Initiative paid for the report using grant money it received from DOJ.

Gallagher publicized the policy, encouraged HHS to implement it, and commissioned polls to contradict other columnists who had found the public was not supportive of the Bush marriage initiative. Although Gallagher has argued that the contact was for specific work, the contract actually does not restrict the variety of activities in which Gallagher could be engaged.

Additionally, columnist Mike McManus received at least $ 4,000 from HHS for his work in support of the Federal Marriage Initiative. Marriage Savers, a nonprofit organization operated by McManus, received $ 49,000 from another organization that receives HHS money to promote marriage to unwed couples that are having children.

In both the Gallagher and McManus cases, Wade Horn, Assistant Secretary for Children and Families at HHS, is involved with the nonprofit through which money was funneled. Wade Horn has been in the marriage promotion business for quite some time. He is a co-founder and former president of the National Fatherhood Initiative, which made its national debut in March 1994 with Don Eberly serving as president, Horn as director, and David Blankenhorn as chairman of the board of directors. Eberly is a former White House advisor and civil society scholar who has served as Deputy Assistant to the President for the Office of Faith-based and Community Initiatives.

Additionally, Horn is a former board member of Marriage Savers, a nonprofit organization McManus founded in 1996 based in Potomac, MD, who was quoted in at least three columns McManus wrote.

In response, the Campaign Legal Center called on the Department of Justice to determine whether members of the Bush administration have violated federal law by using government-appropriated money to pay columnists to promote administration policies. Additionally, a number of representatives, led by Rep. Henry Waxman (D-CA), have requested a Government Accountability Office examination into the agency's use of covert propaganda.

Although the journalists have apologized, the use of taxpayer money to convince the public of the suitability of a particular policy is a violation of the public trust. Congress and DOJ must act to ensure that the government is spending money on the policies its constituents choose.

HHS Withholds Study Results Showing Head Start Is Effective

The Department of Health and Human Services (HHS) failed to publish two reports that show Head Start is effective in raising the academic performance of low-income children. The National Head Start Association (NHSA) recently leaked the data, noting that the Bush administration continues its efforts to dismantle the program. Head Start advocates have been fighting the administration's proposals to restructure the program for more than two years.

NHSA held a press conference on Feb. 3 announcing the results of two studies, one from the National Reporting System assessment, that showed Head Start children made gains in English and early math skills. Another study, the Head Start Family and Child Experience Survey, known as FACES, concluded that graduates of the program were at national educational norms in early reading and writing and close to catching up in math and vocabulary.

HHS's failure to release these study results is another chapter in its efforts to restructure the program. NHSA's advocacy on Head Start issues has generated a series of retaliatory actions by HHS, including an inaccurate letter threatening action against groups that legally used their private funds to lobby, and an unnecessary survey on administrative costs.

Budget Includes Anti-Regulatory Proposals

As expected, the White House included several threats of new anti-regulatory initiatives in today's budget release to Congress.

As OMB Watch reported earlier, the White House used the occasion of the budget release to announce two proposals for creating unelected commissions with far-reaching powers to weaken protections of the public health, safety, civil rights, and environment:

- The first plan would force all government programs to plead for their lives on a periodic basis. (Some reports suggest that the sunset period would be 10 years, but the text in the president's budget did not otherwise specify the time frame.) All programs would automatically expire at the end of the sunset period unless Congress affirmatively votes to retain them. A "sunset commission" would conduct reviews of the programs' effectiveness and establish the basis for Congress's decision. This plan would effectively force all programs — which range from foster care funding for abused and neglected children to the entire Occupational Safety and Health Administration, the agency charged with protecting America's workers on the job — to divert resources from their vital missions into justifying their continued existence.

- The second plan would allow for ad hoc commissions charged with reviewing administration proposals for restructuring or eliminating programs in order to "improve performance and increase efficiency." These proposals would then be fast-tracked through Congress. In essence, the White House would be empowered to usurp Congress's own priorities for its agenda and force it to consider proposals for wide-ranging transformations in the structure of American government. Although the proposals to "consolidate" and "streamline" programs would seem initially more structural than substantive, structural changes can be the technical cover under which major substantive changes are hidden. For example, this year's budget calls for consolidating various block grants into the new "Strengthening America's Communities Grant Program," while subtle clues in the text — referring to "focuse[d] resources" and a "targeted, results-oriented approach" — could be the harbinger of changes in the direction, purpose, and function of the original grant programs.

From FY 2006 Budget, "Promoting Economic Opportunity and Ownership"

"Excessive regulations can prevent the creation and growth of new small businesses and the jobs they create; in the first term, the administration slowed the growth of new rules by 75 percent. The president wants to streamline regulations further and reduce paperwork to alleviate the burdens that unduly handicap America's entrepreneurs and job creators. The administration is taking action in several areas to streamline Federal regulations, while still moving forward with crucial safeguards for homeland security, human health, investor and environmental protection. Regulations should be analyzed based not just on their benefits, but also on their costs. When regulations are proposed, the

Another paragraph in the budget hints that the administration may be conceding to industry requests for increased reviews of regulations and sunsetting older regulations. As OMB Watch reported earlier, the White House has been conducting secret back-room meetings with corporate special interests to solicit their suggestions for government-wide reforms to regulatory policy that would weaken public safeguards in order to increase industry profits. A suggestion repeated in both those meetings and the regulatory "reform" panel of the White House economic summit called for sunsets at the level of individual regulations (rather than programs) and increased use of Regulatory Flexibility Act "section 610 reviews" of regulations' costs to small businesses. The few scant news reports of those meetings tended to refer to sunsets and 610 reviews in the same breath, as though the increased reviews should be the occasion for forcing individual regulations to go through a sunset/ justification process. Although the relevant text in the budget does not make that kind of explicit link, it does refer to "out of date" regulations being reviewed to determine if they produce net benefits.

There are two recurring themes in these proposals: performance and sunsets. Each is a Trojan horse: hidden in what seems a simple, uncontroversial virtue is an attack on public protections.

The performance theme, using the key words "results" and "performance," seems harmless enough: the idea is that government programs should be assessed for their results and modified when

> scientific research supporting their enactment must be sound, and subject to careful scrutiny. And when regulations are out of date, they must be reviewed for relevancy, and to make sure the benefits they produce are at least equal to their costs."

performance is below expectations. The vision of performance management is that of the corporate executive moving around departments, consolidating programs, and cutting under-performing projects, according to the executive's own whims or supposed savvy. Recent exposés of insider trading, falsified accounting and excessive CEO compensation unrelated to performance reveal that the corporate executive may not be the best model for government leadership. Moreover, it is incompatible with democracy, which is responsive to the will of the people rather than the fluctuations of the market, and the public interest, which is a guiding principle of equity and justice rather than heartless economic efficiency.

In fact, this administration's use of the "performance" theme has not comported with the promise of good government but instead has been to cover the White House's weakening of public protections and vital services to the most vulnerable. As Professor Beryl Radin has observed, the White House's performance rating tool (the Program Assessment Rating Tool, or "PART") has several measures of economic efficiency but no measures of equity or justice. Actual results themselves constitute only half of the total score, the rest of which is based on internal process. In the PART results in the 2006 budget, programs rated "ineffective" apparently were targeted for elimination if they were housed in HUD or the Department of Education; of the 22 programs rated ineffective, nine (41%) had their budgets completely cut, and seven of those were either HUD programs (22%) or Education programs (56%). The only "ineffective" program to see an increased budget was the Department of Treasury's Earned Income Tax Credit Compliance Program.

The other theme, that programs or regulatory protections should have sunset dates, implies that there is something outdated or time-worn about "older" regulations and programs. These "older" protections include the ban on lead in gasoline and requirements of FDA approval for drugs before they enter the market. They continue to safeguard the public in ways that are immeasurable (and, in fact, have already been factored into the cost of doing business — so that elimination of them could cause more disruption than "relief" for business).

The administration's hostility to regulatory safeguards makes some cruel sense in one narrow sense — it is, at the very least, consistent with the rest of the budget.

PART of the Problem: The Assault on Grant Programs

A notable trend in the PART assessments is a bias against programs that operate through grants, whether competitive grants or block grants.

- Competitive grant programs generally received low PART scores: 36% were rated ineffective or adequate, while only 24% were rated effective or moderately effective, and the remainder were given the inconclusive score "results not demonstrated."
- Competitive grant programs were also generally targeted for budget cuts: 56% were slated for decreased funding, while 34% were budgeted at the same level and only 19% were offered for budget increases.
- Block/formula grants were also scored low: 36% were rated ineffective or adequate, and an additional 37% were scored inconclusively as "results not demonstrated."
- Block/formula grants were likewise targeted for budget cuts: 43% for budget cuts, and 30% for static funding.
- Of the programs rated "ineffective" that were zeroed out completely, 89% were competitive or block/formula grants.

Grant programs largely send money to the state and local governments, many of which have countered the administration's attack on public safeguards with progressive regulatory policy initiatives.

Bill Would Place Homeland Security Above All Law

A bill to establish national identification card standards and restrict asylum claims also contains a controversial provision to empower the Secretary of Homeland Security to waive any and all laws in the course of securing the borders from illegal immigration. The provision also includes an exemption from judicial review that not only shields the waiver decisions from court scrutiny but also strips courts of any power to order remedies for anyone harmed by the consequences of such decisions.

Background

The issue that notionally triggered the push for this provision is the desire to complete second and third sets of fencing along the nation's southern border. One 14-mile section of fencing in the San Diego area remains to be completed, because the law requires the federal government and the California Coastal Commission to attempt to reach agreement on the environmental impacts of related construction work. As explained in a Congressional Research Service analysis, that law ultimately allows the White House to waive the restrictions when necessary to national security.

A version of this measure was first introduced in the 108th Congress by Rep. Doug Ose (R-CA), but it failed to advance. Reps. David Dreier (R-CA) and Duncan Hunter (R-CA) tried in conference to sneak the amendment onto the bill to implement recommendations of the 9/11 Commission, but that effort was rejected by Senate conferees. News sources at the time reported that this amendment was one of several that zealous House Republicans pushed so vigorously that they almost derailed any agreement on the 9/11 bill.

About This Provision

The same language that almost derailed the conference committee has returned as section 102 of H.R. 418, the "REAL ID Act of 2005." It has two working parts: (1) the waiver authority and (2) the exemption from judicial review.

Waiver Authority

Under current law, the Department of Homeland Security (DHS), which now has border control responsibilities formerly granted to the Department of Justice, is already exempted from key environmental laws when necessary to speed up construction of additional fences along the southern border. 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), empowers the DHS Secretary to waive 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." This waiver power has not, to date, been used.

The provision in the REAL ID Act would expand this waiver beyond environmental law to include all laws. It would thus place the DHS Secretary above all federal laws, environmental or otherwise, including the following:

- Child labor laws;
- Davis-Bacon wage determinations;
- Open government laws, such as the Freedom of Information Act;
- Ethics laws;
- Workplace health and safety laws;
- Whistleblower protections; and
- Procurement and contracting laws designed to assist small businesses.

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 REAL ID Act provision applies the expanded waiver power not to the geographically-limited IIRIRA section but, instead, to the broader scope of IIRIRA § 102(a).

Text from the "REAL ID Act"

Sec. 102. 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. —

"(1) In general. — 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.

"(2) No judicial review. — Notwithstanding any other provision of law (statutory or nonstatutory), no court shall have jurisdiction —

"(A) to hear any cause or claim arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1); or

"(B) to order compensatory, declaratory, injunctive, equitable, or any other relief for damage alleged to arise from any such action or decision."

This provision 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."

Exemption from Judicial Review

The current version of this measure goes even further than its earlier iteration by adding a clause eliminating judicial review.

This section does not apparently have any limitations; it could shield not only government agencies but also private contractors from any liability for deaths, dismemberments, or any injuries whatsoever arising from border security activities. For example, the waiver authority would empower the DHS Secretary to give no-bid contracts for border construction to private companies and then shield those contractors from all employment discrimination and workplace safety laws. Workers harmed by the contractors would be left with no recourse whatsoever, because the exemption from judicial review would apply to "*any* cause or claim arising from" waiver decisions.

OSHA Must Improve Safety for Meat and Poultry Workers

Recent reports highlight the dangerous and sometimes deadly working conditions faced by workers in the meat industry and the urgent need for the Occupational Safety and Health Administration (OSHA) to take increased actions.

Workers in Danger

At the behest of Sen. Edward Kennedy (D-MA), the Government Accountability Office has released a report on worker safety in the meat industry. The GAO report found that meat plant workers face "hazardous conditions involving loud noise, sharp tools, and dangerous machinery," while a report by Human Rights Watch found that "many workers face a real danger of losing a limb, or even their lives, in unsafe work conditions." The HRW report also found that "companies frequently deny workers' compensation to employees injured on the job, intimidate and fire workers who try to organize, and exploit workers' immigrant status in order to keep them quiet about abuses."

Meat and poultry workers endure some of the most dangerous working conditions of any occupation. Workers often face physically demanding, repetitive work, during which they stand for long periods of time on production lines that move very quickly while wielding knives or other cutting instruments. They frequently work in extreme temperatures from zero to 40 degrees Fahrenheit, in loud, wet, dark and slippery conditions with poor ventilation. According to HRW, "the increasing volume and speed of production coupled with close quarters, poor training and insufficient safeguards have made meat and poultry work so hazardous. On each shift, workers make up to 30,000 hard-cutting motions with sharp knives, causing massive repetitive motion injuries and frequent lacerations."

A 2001 survey from the Bureau of Labor Statistics (BLS) found that 14.7 out of 100 workers are injured on the job. GAO believes that this number is likely to be much higher due to underreporting by employers. GAO found injuries include cuts, burns, repetitive stress injuries, strains, injuries sustained from falls, fractures, amputations and sometimes death. The repetitive motions of meat and poultry work frequently lead to musculoskeletal disorders (MSDs). Exposure to harsh chemicals, blood and fecal matter often produces illnesses, which are "exacerbated by poor ventilation."

OSHA Fails to Act

Despite the overwhelming evidence that worker protection in the meat and poultry industries must be strengthened, OSHA has largely failed to act. For instance, GAO believes that line speed may impact safety. And while OSHA agreed that slowing down the line may reduce injury, they have failed to collect data on the impact of line speed on worker safety and have made no attempts to assess the appropriate speed at which production lines should operate.

Nationwide Problem, But No Nationwide Solution

The GAO report suggests that some regional programs implemented by OSHA may have made an impact on worker safety, but OSHA has failed to apply these successes to the industry at large:

> [Some] evidence suggests that OSHA's cooperative programs have had a positive impact on the safety and health of workers. For example, a program initiated by OSHA's Omaha Area Office, in which it partnered with several meatpacking plants in the state to share best safety practices, has, according to OSHA, improved worker safety and health in plants in Nebraska. The agency has not, however, implemented similar programs in other areas with large concentrations of meatpacking plants or extended the program to poultry plants.

OSHA has set voluntary ergonomics guidelines for the meat and poultry industry, which are unenforceable and a far cry from the real health and safety protections needed.

Injuries Underreported

Human Rights Watch reports that both "OSHA administrators and independent researchers have found a common corporate practice of underreporting injuries of all kinds. One recent estimate puts the undercount of nonfatal occupational injuries across industrial sectors as high as 69 percent." Underreporting is particularly prevalent for MSD injuries.

Despite this high level of underreporting, OSHA's methods for inspecting plants may not discover underreporting problems, according to the GAO. The current method for inspecting worksites mainly targets plants with high rates of illness and injury, while also inspecting a small number of worksites with low or average rates of illness and injury, but "the agency does not consider trends in worksites' injury and illness rates over time. As a result, OSHA may not detect dramatic decreases in these rates that could raise questions as to the accuracy of the figures."

OSHA's data is also incomplete, GAO found, because the agency does not include data about cleaning and sanitation workers who are independently contracted. "These workers are not classified by BLS as working in the meat and poultry industry, although they labor in the same plants and under working conditions that can be even more hazardous than those of production workers," the GAO concluded. For example, cleaning and sanitation workers in the meatpacking industry are frequently injured while cleaning dangerous machinery using severe chemicals.

Further, GAO found that OSHA's method for collecting data leaves tracking injury data at plants difficult. Because "OSHA

does not assign a unique identifier to each plant for which data are collected," it is not possible to compare information about specific plants, and OSHA's success is therefore difficult to assess.

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In This Issue

Negative Reactions to Budget Come from Both Sides of the Aisle

President Bush's release of his budget proposal on Feb. 7 confirmed widespread speculation that its contents would prove unfavorable for a number of important agencies and social programs. The president stated many times in the weeks leading up to the budget release that his proposal for fiscal year 2006 (FY 06) would be "tough." In a bold effort to cut our national deficit in half — the same deficit which is mostly the result of his costly tax policies — Bush proposed slicing and dicing funding for many domestic programs, which would result in the termination of some.

As expected, a range of budget analysts, economists, journalists, and political and nonprofit organizations have spent the last two weeks criticizing the president's budget as detrimental to the nation as a whole. Prominent among the expected critics are OMB Watch, the Coalition on Human Needs and the the Center on Budget and Policy Priorities. However, in a somewhat surprising development, some political leaders within Bush's own party are showing skepticism regarding aspects of Bush's fiscal plan. As Senate Budget Committee Chairman Judd Gregg (R-NH) — himself a supporter of the FY 06 budget proposal — noted, the president's budget is "creating some significant angst among my colleagues."

One notable GOP leader to voice opposition is Sen. George Voinovich (R-OH). Voinovich, along with Sens. Olympia Snowe (R-ME), Susan Collins (R-ME), Robert Bennett (R-UT), and others, is part of the Centrist Coalition, a group of senators interested in working in a bipartisan manner to create more fiscally responsible tax and budget policies. Voinovich is particularly concerned with Bush's demand in the budget proposal that Congress make permanent the 2001 and 2003 tax cuts, estimated to cost at least $ 1.134 trillion from 2006–2015. That is a hefty sum, especially considering the future unknown costs of war efforts, Medicaid and Medicare liabilities, and a potentially very costly overhaul of Social Security. After Bush very strongly publicly encouraged Congress to make the tax cuts permanent, Voinovich responded by saying he would do whatever he can to block the president's tax cuts, including voting against the entire budget.

The concerns of these lawmakers are well-founded. Bush's proposed policies are not only costly now, but will continue to grow increasingly more expensive in the years ahead. According to the Joint Committee on Taxation and the Congressional Budget Office (CBO), both Bush's proposed and enacted tax cuts would cost $ 1.058 trillion from 2006–2010, and more than double that amount — $ 2.453 trillion — if applied through 2015. One *Washington Post* article points out, by the time the next president is in office, there could very little flexibility for any new initiatives, and instead the entire term may need to focus on "figuring out how to accommodate the long-range cost of Bush's policies." This concerns those who may seek the White House in 2008, such as Sen. John McCain (R-AZ). One advisor to McCain, John Weaver, said, "Hopefully some very difficult decisions will be addressed between now and the time we have a new White House resident so that occupant isn't faced with some very expensive chickens coming home to roost."

In addition, lawmakers on both sides of the aisle are questioning the administration regarding its latest request for emergency supplemental war spending. Last week the administration asked Congress to pass $ 82 billion in supplemental emergency war funds to pay for ongoing military and intelligence operations in Iraq and Afghanistan, antiterrorism operations, and tsunami relief. Key congressional GOP leaders are now expressing skepticism in lieu of the deference most gave the administration regarding earlier emergency war funding. Even House Majority Leader Tom Delay (R-TX) noted that Bush's request included expenses "that probably do not qualify as immediate emergencies." Other members questioned Defense Secretary Donald Rumsfeld and Secretary of State Condoleezza Rice during recent hearings as to whether this request tries to falsely cloak some of these expenses as emergencies to minimize scrutiny and help them pass more easily. Sen. Robert Byrd (D-WV) told Rumsfeld, "Mr. Secretary, this seems to me to be an abuse — an extraordinary abuse — of the supplemental process." Democrats and Republicans alike seem to believe the $ 82 billion requested by the White House can be scaled back dramatically, especially concerning costs to build a new, large embassy in Baghdad.

In the next few weeks Congress will decide how much supplemental emergency war spending is necessary to pass at this time. The fact that powerful GOP lawmakers are questioning Bush's spending requests — from Voinovich on the tax cuts to Delay on the emergency funding request — is a continuing sign of the increased difficulties President Bush is encountering so far in his second term. The fiscal health of this country depends on Congress both providing increased scrutiny in funding matters, and being willing to hold the administration accountable for its policies.

'Slow Down' Is the Bipartisan Buzz for Social Security

As President Bush continues his efforts to raise anxiety across the country about the Social Security program, more and more members of Congress, both Democrat and Republican, are starting to speak uniformly on the need for patience in working towards a solution. Even House Speaker Dennis Hastert (R-IL) and Federal Reserve Board Chairman Alan Greenspan urged caution and called for further debate in approaching Social Security reform this past week.

In an interview last week with the *Chicago Tribune,* Hastert said he was unsure how long the debate over reform should last and refused to lay out a timeline for when major legislation would be passed, saying it could take six months or perhaps two years. He warned, "You can't jam change down the American people's throat."

Greenspan expressed a similar sentiment in testimony last week before the Senate Banking Committee. He said the transition to private accounts would need to be done, "in a cautious and gradual way" since it was unclear how financial markets would react to as much as $ 2 trillion in additional debt that creating the accounts would cost taxpayers over the next ten years. "I would be very careful about very large increases in debt," he added.

Perhaps in reaction to these additional challenges to his plan to carve out private accounts in Social Security this year, Bush announced he would consider raising the income cap on Social Security payroll taxes currently set at $ 90,000.

Some members of Congress support raising the cap, including Sen. Lindsay Graham (R-SC), who has urged the White House to consider raising it to as high as $ 200,000. Bush has previously stated firm opposition to raising the tax rate but until now has remained silent on the cap.

The president's announcement opened the door to the possibility of dramatically increasing Social Security revenues. Estimates by Social Security actuaries show that by lifting the cap completely, it may be possible to close the entire funding gap in the program over the next 75 years.

The door seemed to remain open for only a day though, as House Majority Leader Tom DeLay (R-TX) expressed opposition to the idea of increasing the cap the next day. Delay said subjecting more earnings to the payroll tax would be the same as a tax increase and would be unacceptable. Hastert, who wanted to distance House Republicans from the idea, joined him in opposition to the proposal.

The quick and negative reaction from DeLay and Hastert underscores the increasingly difficult time Bush is having promoting his plan to overhaul Social Security, which he has made his number one domestic priority. The president has acknowledged his troubles, saying last week his plan was "going nowhere" unless he could convince Congress and the American public that action was required immediately. That has been the central challenge for the president at the beginning of his second term and it will continue to be as the debate over Social Security moves forward this year.

How Do You Measure Program Results?

For more than five years, the Bush administration has focused a good portion of its rhetoric on performance, accountability and results. To that end, in 2001, the Office of Management and Budget (OMB) began to develop a mechanism called the Program Assessment Rating Tool (PART) to help budget examiners and federal managers measure the effectiveness of government programs.

The PART has been changing and evolving since its inception and recently received a much more prominent place in the release of the president's fiscal year 2006 (FY 06) budget. Page four of the president's overview on the budget states, "the Program Assessment Rating Tool (PART) measures the success of programs in meeting goals and identifies which are achieving their intended results and which are not." The budget claims the PART helps the administration "to reward only those [programs] that succeed."

The president's FY 06 budget states the PART was developed to help consistently evaluate a program's purpose, design, planning, management, results and accountability to determine its overall effectiveness. The PART has been used to review 60 percent of federal programs over the last three years and all programs will have been reviewed once by 2007.

The PART consists of six questionnaires designed for different government activities — competitive grant programs, block/formula grant programs, regulatory-based programs, capital assets and service acquisition programs, credit programs, research and development programs, and direct federal programs. Essentially, it consists of yes and no questions that are used to evaluate the program, although in the results section of the tool there are some additional gradations. The surveys of programs are then submitted to OMB and a resulting rating (ranging from effective to ineffective) is determined by budget managers.

In his recent efforts to further promote a "good-government" approach, the president often referred to a list of 154 programs slated for deep cuts or elimination in his FY 06 budget because those programs were "not getting results." OMB Watch has analyzed this list and other sections of the FY 06 budget and compared program funding requests to the ratings received under the PART. This analysis has yielded some interesting and puzzling results. Out of the list of 154 programs to be cut or eliminated, supposedly for lack of results, more than two-thirds have never even been reviewed by the PART. It is unclear what kinds of determinations, if any, the president used to identify these failing programs when the White House budget staff has yet to assess them.

Of all the programs on that list that have been reviewed, nearly 20 percent of programs receiving an "effective" or "moderately effective" PART score — the two highest ratings — were eliminated. Further, 46 percent of programs receiving the middle rating of "adequate" were eliminated.

A quick review of programs rated under PART since its inception finds no logical or consistent connections with budget requests. Of the 85 programs receiving a top PART score this year, the president proposed cutting the budgets of more than 38 percent, including a land management program run by the Tennessee Valley Authority and the National Center for Education Statistics.

Even stranger, some programs receiving the lowest score were not cut. For instance, the Substance Abuse Prevention and Treatment Block Grant, a program that provides grants to states to address addiction problems, was given the lowest possible rating of "ineffective" but received no reduction in funding. Moreover, the Earned Income Tax Credit Compliance Program — which targets poor people who have claimed the EITC and double-checks their eligibility for the credit — was rated ineffective, yet it received a funding increase. There appears to be no logical or consistent pattern to be found in reviewing program funding requests and PART score results.

However, this is not the only illogical aspect of the PART. Another puzzling situation is how the PART relates to and is integrated with the Government Performance and Results Act (GPRA) of 1993. GPRA, which was fully implemented in 1997, set out to establish a system for measuring each agencies performance — both on a whole and for specific programs — that could be tied to the congressional appropriations process. It requires agencies and departments to develop three plans — a five year strategic plan, an annual performance review plan, and then a performance report, which is submitted to Congress.

The PART and GPRA appear to be redundant functions in the federal government — an ironic twist as each was meant to promote accountability and efficiency in government. A January 2004 Government Accountability Office report detailed the use of the PART and its relationship to GPRA. The GAO found the PART was a parallel and competing approach with GPRA's Performance Management Framework and expressed concerns the emphasis on the PART would shift agency focus and come to drive the strategic planning processes in the federal government. The report concludes, "By using the PART process to review and sometimes replace GPRA goals and measures, OMB is substituting its judgment for a wide range of stakeholder interests." The relationship between the PART and GPRA is not clear and is often confusing to program officials and agency managers and undermines the efforts of both to promote efficiency and accountability.

OMB Watch's current analyses of the PART have produced more questions than answers about its value and purpose. It is unclear how the PART scores impact budgeting decisions within OMB as there are no consistent patterns to follow. It is hard to determine whether the PART is measuring programs accurately, consistently and in a value-neutral way. Even if it achieves these, there has been little attention paid to the question of whether the PART is measuring the right kinds of outcomes. While a lot of emphasis is placed on efficiency and cost-savings measures, the PART does not give any extra credit for equity.

OMB Watch will continue to monitor, analyze, and investigate the PART and its effects on budgetary processes, agency planning, and congressional action. Promoting accountability and efficiency are certainly good goals to achieve, but it is important to achieve them in a flexible, unbiased and transparent way involving multiple actors and stakeholders.

Cornyn-Leahy Bipartisan Bill Would Strengthen FOIA

In perhaps one of the most significant moves to advance openness and accountability within the federal government in the last decade, Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) introduced bipartisan legislation to strengthen the public's hand in obtaining information from federal agencies under the Freedom of Information Act (FOIA).

Entitled the Openness Promotes Effectiveness in our National (OPEN) Government Act (S. 394), the legislation would:

- Allow the public to recoup legal costs from the federal government for improperly withheld documents;
- Expand the list of those eligible for fee waivers to include many nonprofits and blog writers;
- Establish a tracking system for requests, and require agencies to report on their 10 oldest pending requests, fee waivers approved and denied, and other ways FOIA requests are handled;
- Extend FOIA's reach to information held by federal contractors;
- Create a system to mediate disputes between those requesting information and federal agencies through the Administrative Conference of the United States;
- Require annual reporting for the next three years on how often industry gives information to the government voluntarily and declares it to be Critical Infrastructure Information (CII), thus immune from public disclosure; and
- Require an analysis of how effective the CII program is in protecting the country's critical infrastructure.

Plagued by loopholes allowing federal agencies to delay the release of information, charge exorbitant fees, deny fee waivers and post other obstacles to actually releasing documents to the public, FOIA has gone from a hallmark disclosure guarantee emulated around the world to a tool of last resort for those seeking to learn about government actions or obtain information in government's possession.

In 1996, Congress expanded FOIA's guarantees to reach documents stored electronically. Prior to those changes, the law had been amended several times since Congress initially passed it in 1966, although it has now been many years since either the House or Senate held oversight hearings on FOIA.

At a time when the White House has a reputation for being secretive, the OPEN Government Act is especially significant because it came from Cornyn, a Republican, which may foster bipartisan support. At a time when there are few champions of openness, a hallmark of democracy, this legislation is both a welcome sign that sunshine should prevail in government, and a serious proposal to strengthen government accountability and openness.

Nuclear Commission Expands Secrecy Provisions

The Nuclear Regulatory Commission (NRC) is proposing to expand the amount of information that can be withheld from the public as Safeguards Information (SGI). The new rule would amend existing SGI regulations to cover more types of information by inserting language and adding a new category of covered information — Safeguards Information-Modified Handling (SGI-M).

The SGI category was created under the Atomic Energy Act of 1954 for "sensitive but unclassified" information. Regulations required protection of information relating to physical protection at fixed nuclear sites; physical protection when in transit; inspections, audits and evaluations; and certain correspondence. For information such as vulnerability data about a facility, the information could be released to the public after the vulnerability was fixed. However, most of the SGI information was only released on a "need-to-know" basis.

The new regulations broaden the already expansive SGI regulations with the ability to hide more information. The new proposed SGI exemptions would withhold any information about emergency planning procedures, safety analyses, or defense capabilities. Additionally, NRC inserts language to specifically exempt information about the Design Basis Threat, defined by the agency as "[a] profile of the type, composition, and capabilities of an adversary." NRC has received strong criticism from public interest groups that the agency has not sufficiently utilized the Design Basis Threat mechanism to improve security at nuclear facilities. This provision would effectively silence such criticism and prevent any discussion intent on improving the safety of these dangerous facilities.

NRC also proposes the addition of a new sensitive but unclassified designation. The SGI-M designation would allow nuclear materials producers already using the SGI regulations to hide additional types of regulated information. The new category would also extend exemptions to additional manufacturers. Even though NRC estimates that SGI-M data carries a lower risk if released to the general public, the stipulations for access mirror those of SGI information. Similar to SGI, anyone requesting access to SGI-M must demonstrate a "need to know" and must belong to at least one of the prescribed categories, which are almost identical for both safeguards designations.

Under the SGI-M provisions almost any data relating to security activities, security forces, or response procedures would be hidden from the public. Communities neighboring nuclear facilities need this type of information to ensure facilities take adequate steps to protect their health and safety. Without this information, the community cannot hold a facility accountable.

An environmental group's effort last year to access security information resulted in a legal dispute after the NRC withheld the information. The group sought information about a facility that intended to waive certain security measures for shipments of nuclear fuel rods, which could have endangered thousands of people. NRC denied access to the information because the agency concluded that the group did not have a "need to know" and because the information was sensitive.

A recent *Boston Globe* story revealed that a shipment of radioactive cargo was lost in transit. Instead of being shipped from Newark to Houston, the shipment was found in Boston. Because the new proposed regulations are so broad and can withhold so much information, it is unclear just how much information NRC would hide under the modified Safeguards Information, and if stories like this one would be censored.

NRC's new sensitive but unclassified category joins similar efforts from other agencies in a growing epidemic of secrecy. Others include Sensitive Homeland Security Information, Sensitive Security Information, and Critical Infrastructure Information.

DHS Finally Speaks on CII

Almost a full year ago OMB Watch filed a request, under the Freedom of Information Act, to the Department of Homeland Security (DHS) for information on their Critical Infrastructure Information (CII) program. The request sought an accounting of how the program was used thus far including the number of submissions, rejections, and communications, as well as program procedures for handling information. Unfortunately, DHS was not very prompt with answers. In fact, it took a summons filed in the DC Circuit Court to get even a few pieces of basic information about the CII program.

According to documents obtained by OMB Watch, the CII program has received 29 submissions of information for which the submitters requested protections under the CII provisions. DHS approved 22 of those submissions for protection and rejected the other seven submissions as not meeting the program's requirements. To qualify, the information must address a vulnerability of some critical infrastructure, it must be voluntarily submitted, and it must not exist customarily in the public domain. DHS implies that the seven submissions "deemed non-CII or non protected CII" have been destroyed per agency policy.

Most of the submissions appear to be brief, measuring only a few pages in length, however, at least one submission contained over 300 pages of material. Additionally, it should be noted that the length of the documents reveals nothing about the importance of the information contained within those pages. Even the shortest documents may contain vital information about a vulnerability that threatens a community's safety, information that now sits in a locked drawer while nothing is done to fix the vulnerability or ensure the community's safety.

DHS also treated numerous communications between the agency and submitters concerning their CII submissions as protected under the same provisions. This appears to be an extension of the program's protections from what the agency outlined in its final CII rule.

Industry Challenges D.C. Ban on Hazmat Rerouting

The rail company banned from shipping hazardous cargo through the nation's capital has filed a suit to overturn the emergency legislation that was enacted earlier this month. The local law bans rail shipments of hazardous cargo from a 2.2-mile radius around the U.S. Capitol.

Owner of many District of Columbia rail lines, the CSX Corporation filed the lawsuit claiming that it is unconstitutional for D.C. to place restrictions on interstate commerce. Washington is the first city in the nation to enact rerouting as a safeguard to protect against the dangers of transporting hazardous cargo, and it is worried that other cities will pass similar legislation that would have a negative impact on its business. The Department of Transportation concurred with CSX, stating that federal law preempts the ban and that interstate commerce can only be regulated by the U.S. government. Arguments have been scheduled for March 9 in U.S. District Court, according to the *Washington Post*.

Late last year, CSX would not disclose whether it had redirected shipments of cargo around the city. Despite this, the D.C. Council received informal reassurances that CSX was voluntarily rerouting these shipments around the city, and therefore did not originally act on the legislation. As CSX filed suit, the public learned that instead of redirecting shipments around the city, the company had simply changed the rail lines it used within the city, continuing to pose dangers to large numbers of city residents.

Unfortunately, this is not the first time that industry and the federal government have joined in opposing new safety requirements for chemical safety. In the months following the 9/11 terrorist attacks, the Environmental Protection Agency was poised to launch a program requiring chemical plants to reduce their hazards. However, opposition from the chemical industry, with support from the White House, scuttled these efforts. As a result, the United States still has no federal legislation to protect its chemical facilities against terrorism.

FCC Requests Exemption in Open Meetings Law

The Federal Communications Commission (FCC) recently sent a letter to the Senate Committee on Commerce, Science and Transportation requesting an exemption from the open meeting requirements of the Government in Sunshine Act.

The letter's authors, Chairman Michael Powell and Commissioner Michael Copps, assert that the FCC needs the exemption because the open meeting requirements of the Government in Sunshine Act impair the agency's decisional processes by impeding the commissioners' "abilities to obtain the benefit of each other's views, input, or comments." Instead, the letter states, they must "rely on written communications, staff, or one-on-one meetings with each other." It seems troubling that the commissioners have relied on these methods to avoid their legal responsibilities, and now consider these back-door tactics as too difficult and inefficient. Apparently, the commissioners would prefer to be exempt entirely from the law so they can stop secretly avoiding it.

The Government in Sunshine Act ensures that the public has access to government information by requiring open meetings. Under the law, agencies must hold public meetings unless the content of the meetings falls within one or more of 10 exemptions. The exemptions are similar to those under the Freedom of Information Act and protect information exempt from disclosure by other laws; corporate trade secrets; an individual's personal information; and law enforcement information, among others. There are also provisions that allow meetings to be closed under other specific circumstances. Since the many exemption categories allow for closed meetings when necessary, the FCC's push for a blanket immunity seems excessive and irresponsible.

The FCC also states in the letter that the Government in Sunshine Act is not necessary for "ensuring that federal agencies explain their actions to the public." The agency believes that the Administrative Procedure Act (APA), which mandates that an agency explain how it makes each decision, is sufficient for informing the public. However, the APA is not a disclosure law and would not guarantee that agencies provide the public with all the information that it has a right to know. For instance, open meetings allow the public to observe and participate in the agency's process rather than simply being informed about final decisions after the fact. The Government in Sunshine Act is extremely important because it allows the public to participate in government decision making and holds the government accountable for its actions.

It would be in the public interest if the members of the Committee on Commerce, Science and Transportation reject the FCC's push for secrecy, and remind the agency that it has a responsibility to be open to the public.

Bill Proposes Taking Peer Review Away from OMB

Reps. Henry Waxman (D-CA), ranking member of the House Government Reform Committee, and Bart Gordon (D-TN), ranking member of the House Science Committee, introduced the Restore Scientific Integrity to Federal Research and Policymaking Act (H.R. 839) Feb. 16, which would move authority for federal peer review standards away from the Office of Management and Budget (OMB).

Waxman and Gordon's bill addresses increasing concerns about politicization of science in the executive branch under the current administration. For some time, Waxman has tracked instances of political interference with scientific decisions and functions of agencies. The new legislation would prohibit political officials from obstructing federally funded scientific research, censoring findings, or disseminating scientific information known to be false or misleading.

One section of the bill proposes quashing the OMB's bulletin on peer review. The bulletin establishes strict requirements for the type of peer review conducted for influential scientific information and recognized OMB's Office of Information and Regulatory Affairs as the authority on peer review in the federal government. OMB developed the bulletin as part of its role implementing the Data Quality Act, even though the act does not specifically instruct the political office to produce such standards. Waxman's bill would instruct federal science-based agencies to establish applicable standards for peer review.

The bill also addresses scientific advisory committees by barring appointments based on political views and strengthening conflict of interest provisions. Another portion of the bill would increase whistleblower protections for federal employees who uncover political interference with science. Additionally, the bill instructs the White House Science Advisor to annually report to Congress on scientific integrity in the federal agencies.

Iowa Supreme Court Rules Government Cannot Contract to Avoid Disclosure

The Iowa Supreme Court ruled that the fundraising organization hired by the state's three universities must open their records to the public. The court reasoned that the Iowa State University Foundation "is performing a government function, and therefore its records are subject to disclosure." The ruling sets an important precedent that a government agency may not avoid its disclosure obligations by contracting out the collection and management of information.

The lawsuit was filed after donors, ISU alumni, and employees became concerned over the handling of a 240-acre farm bequest to the ISU Agricultural Foundation. Apparently, the property was sold against the wishes of the donor, who requested the land be kept as a farm. The filers of the lawsuit felt the foundation failed to adequately account for how the $ 1.2 million in revenues from the sale were spent.

A lower court dismissed the case in September 2002, ruling that since the foundation was not a government body, it was exempt from the state's open records laws. The Iowa Supreme court decision overturns that ruling and sends the matter back to district court to determine exactly which records the foundation will have to make public.

The case could have serious repercussions nationwide, as contracting out information collection and management has become more common in both the federal and state governments. There are many in the public interest community that have become concerned that such actions would freeze the public out from the data with high fees and use restrictions, information that would have been freely available if the government continued to collect it. For instance, the Government Service Administration recently turned over management of the database on roughly $ 290 billion worth of government contracts to a private company. This court decision might mean that the contractor would still have to provide the data in response to requests under the Freedom of Information Act.

Fish and Wildlife Scientists Oppose Political Interference

A recent survey of scientists at the U.S. Fish and Wildlife Service (USFWS) conducted by the Union of Concerned Scientists (UCS) and Public Employees for Environmental Responsibility (PEER) revealed a disturbing amount of political interference in scientific activities at the agency.

The survey was distributed to more than 1,400 biologists, ecologists, botanists and other science professionals in Ecological Services field offices across the country. The survey inquired about their opinions of the USFWS's scientific integrity, as well as political interference, resources and morale.

Apparently, when USFWS officials learned of the survey, they issued a directive to all employees instructing them not to complete the survey, either while on duty or on personal time. Regardless of the gag directive, almost 30 percent of the scientists who were sent the questionnaire completed and returned the survey.

The results of the survey are extremely troubling. Approximately 70 percent of staff scientists and almost 90 percent of scientist managers knew of cases where political appointees injected themselves into Ecological Services determinations. More than half of the scientists knew of cases where commercial interests had gotten scientific decisions reversed or withdrawn through political intervention. One in five agency scientists revealed they have been instructed to compromise their scientific integrity.

The survey also indicates that political intrusion has undermined the service's ability to fulfill its mission of protecting wildlife from extinction. Three out of four staff scientists think that the USFWS is not acting effectively to maintain or enhance species and their habitats, and more than two out of three scientists do not believe the USFWS is effectively helping endangered species recover.

The survey also indicated significant discouragement of discussion and debate. Around a third of respondents noted that they felt they could not openly express scientific concerns in public or within the agency without fear of retaliation. Indeed, the directive instructing scientists not to respond to the survey appears to be a clear indication that the USFWS officials are not interested in listening to or considering points of view they disagree with.

Missouri Proposes Ignoring 'Annoying' FOIA Requests

On Jan. 31, state Rep. Shannon Cooper (R-Clinton) introduced a bill in the Missouri House of Representatives that would modify Missouri's Sunshine Law to allow a public governmental body to refuse any "vexatious" requests for documents. This bill would allow state agencies to reject any requests for information deemed annoying or frivolous. Unfortunately, a few other states have similar provisions in their sunshine laws.

The bill, H.B. 391, defines vexatious request as "any request for documents which is frivolous, repetitive, or unreasonable and made for the primary purpose of harassing a public governmental body or any member of a public governmental body." However, this definition still seems overly broad and vague. Agencies could easily misuse the authority to reject legitimate requests. For instance, an agency might seek to derail a request for information that would embarrass the agency or government officials. Also an agency might simply not realize the importance or usefulness of the requested data and instead rule the request as frivolous.

If an agency can summarily dismiss a request as vexatious, then a requester's only recourse would be court. Many requestors do not have the financial resources to pursue a court case, even if they believe the vexatious determination to be inaccurate. This in itself would have a chilling effect on requests, reducing the number of requestors willing to proceed with their case, and slowing down those challenges. The bill provides that if a court finds a government agency to have intentionally misused the provision, then the requestor could recoup all costs and reasonable attorney fees from the agency. However, another provision of the bill states that if a court upholds a vexatious determination then the requestor may be charged with costs and attorney fees.

The bill was referred to the state's Judiciary Committee on Feb. 17.

CFC Cites Treasury Guidelines to Justify Anti-Terror List Requirement

The Combined Federal Campaign (CFC) has filed a motion to dismiss a lawsuit challenging its requirement that participating charities check employee names against two government terrorist watch lists. The CFC motion claims the Treasury Department's Voluntary Anti-Terrorist Financing Guidelines as authority and cites activities by private foundations as justification for its actions. These guidelines have been widely criticized and are currently under review by Treasury. The motion provides plaintiffs with partial victory in the suit by stating CFC's intention of conducting a formal rulemaking on the list-checking requirement, giving the public an opportunity to comment. The background information in the motion reveals that the current list-checking rule was developed in a closed process with a coalition representing some of the largest CFC participating charities.

OMB Watch is one of 12 plaintiffs that have sued to block enforcement of CFC's employee list-checking requirement, claiming that it is unconstitutional and was implemented in violation of the Administrative Procedure Act. The motion cites Treasury's Voluntary Guidelines as authority, but misrepresents the suggestions made by the guidelines by equating employee list checking for all participating charities (CFC's requirement) with the guidelines suggestion that foreign recipient organizations be checked. The plaintiffs must respond to the CFC's motion by April 11.

The CFC motion also attempts to justify its employee list-checking requirement by noting that three foundations (Ford, Rockefeller and Charles Stewart Mott) have implemented general certification requirements for their grantees. However, the foundation certification requirements do not require employee list checking. Instead, they contain general language asking grantees to certify that foundation funds will not be used to support terrorism.

Inspector General Reports on IRS Review of Charities' Partisan Activity

The Treasury Inspector General for Tax Administration (TIGTA) has published its evaluation of the Internal Revenue Service's (IRS) process for reviewing referrals alleging illegal political campaign intervention by charities. It describes the process used in detail, and said it found no indications that the random sample of cases it reviewed were handled inappropriately. The IRS requested the review after its audit of the National Association for the Advancement of Colored People (NAACP), announced shortly before the election, raised questions about political motivation. The review did not specify whether the NAACP was included in the random sample of cases it reviewed.

Review of the Exempt Organizations Function Process for Reviewing Alleged Political Campaign Intervention by Tax Exempt Organizations describes a Political Intervention Project (PIP) established in June 2004 to "fast track" referrals and prevent recurring violations by groups exempt under Section 501(c)(3) of the tax code. A three-person committee reviewed the cases and decided which should be referred for further action.

Of the 131 cases the PIP committee reviewed, 10 were dismissed because they did not involve partisan political activities. Of the remaining 121 cases, the committee found that 80 warranted further investigation based on a "reasonable belief" that a violation may have occurred or that examination would lead to discovery of a violation. Of these 80 organizations, 34 are religious. The report found that slightly more pro-Republican groups than pro-Democratic groups were in the pool selected for further investigation.

The report did not address whether the IRS has the authority to "fast track" these cases absent a flagrant violation of the

ban on partisan activity by charities. The NAACP has refused to respond to a summons in its examination, saying the law requires a finding of flagrant violation before expedited review.

Grant Made to Politically Connected Group with Negative Rating

A politically well connected organization that promotes abstinence education received a major federal grant last fall under the president's AIDS program despite its proposal having been rated "not suitable for funding" by an independent review panel. A Feb. 15 letter from Rep. Henry Waxman (D-CA) to Randall L. Tobias, head of the President's Emergency Plan for AIDS Relief (PEPFAR), made public Waxman's repeated requests for basic information on the administration of PEPFAR and demanded information on the unusual grant.

On Nov. 1, 2004 the administration's global AIDS office approved a grant for an unspecified amount to the Children's AIDS Fund, an 18-year-old AIDS service organization that has become a leading proponent of abstinence-based AIDS prevention.

The Children's AIDS Fund originally submitted its grant request as part of an international competition for the funding of abstinence activities. Each grant request was reviewed by a technical panel. On Oct. 5, 2004, the U.S. Agency for International Development (USAID) announced that through a "competitive process" the agency was awarding 11 organizations with HIV prevention grants. The fund was not one of the 11 organizations. The review panel found that the organization had "serious technical issues" that had not been resolved, and that the proposal was "not suitable for funding."

However, on Nov. 1, the administration's global AIDS office secretly approved a grant for an unspecified amount of money to the Children's AIDS Fund. The decision by the panel was overruled by the head of the USAID, a key agency implementing the five-year, $ 15 billion Bush AIDS plan. USAID Director Andrew Natsios defended the grant, stating that Uganda, where the fund does much of its program work, has been a leader in the Abstinence, Be Faithful, Condoms (ABC) approach to HIV prevention. He also argued that the money would be funneled to a group with ties to Janet Museveni, the wife of Uganda's president, Yoweri K. Museveni.

The scope of work and the amount of money the Children's AIDS Fund will get are still under negotiation. Although the work was originally to be done in Zambia and South Africa, the USAID officials said that might change. The amount of money the 11 other groups will get has also not been decided, but USAID has indicated that the 11 organizations will each receive about $ 9 million. The Children's AIDS Fund award is likely to be comparable to the others.

The USAID grants are for efforts to support HIV/AIDS work in other countries. The purpose of the review is to ensure that taxpayer money is directed to programs that are successful. Funding grant requests that have been found "not suitable for funding" is a reckless disregard for taxpayer money. It can undermine the integrity of the entire program and is rarely done.

Some critics complain the grant reeks of political cronyism. Formerly known as Americans for a Sound HIV/AIDS policy, the Children's AIDS Fund is politically well connected. The organization's cofounder, Anita Smith, has close ties to the Bush administration. Two months after the grant was approved, Bush appointed Smith to co-chair the President's Advisory Council on HIV/AIDS. Additionally, her husband, Shepard Smith, is an appointee on the Advisory Committee to the Director of the Centers for Disease Control and Prevention.

The lack of information about membership of the panel is an additional concern. According to the *Washington Post,* USAID would not reveal the membership of the advisory panel, saying it was a "procurement matter," making it secret. Many federal agencies, such as the Food and Drug Administration and the National Institutes of Health turn to committees of outside experts for advice. In most cases, membership is public information. For this program to be truly accountable and transparent, the membership must be made public.

Federal Agency Censors Conference Workshop Title, Then Recants

A federal agency's attempt to remove the words "gay," "lesbian," "bisexual" and "transgender" from the title of a talk given at a federally funded suicide prevention conference is drawing ire from scores of mental health experts and the GLBT community.

The conference, which will be held on Feb. 28 in Portland, OR, is funded by the Substance Abuse and Mental Health Services Administration (SAMHSA). On the agenda was a talk that, until SAMHSA officials stepped in, was titled, "Suicide Prevention among Gay/Lesbian/Bisexual/Transgender Individuals."

Officials from SAMHSA suggested omitting direct reference to GLBT individuals in the title, instead using the term "sexual orientation." Ron Bloodworth, one of the three specialists coordinating the session, objected to the change. In an interview with the *Washington Post*, he stated, "Everyone has a sexual orientation, but this is about gays, lesbians, bisexuals and transgenders." He also noted that transgender people differ from others in terms of sexual identity, not sexual orientation. The agency also told him not to use the term "gender identity."

According to SAMHSA, the suggestion of the term "sexual orientation" is because of its inclusiveness. However, the latitude of their "suggestion" is debatable. Asked by the *Washington Post* how strong the suggestion was, Mark Weber, a spokesperson for SAMHSA, replied, "Well, they do need to consider their funding source."

The session was then re-titled "Suicide Prevention in Vulnerable Populations", but the censorship has already brought increased scrutiny to the agency. Consequently, SAMHSA has backed off its original position and is allowing the talk to proceed with its original title. However, both mental health professionals and activists have become increasingly concerned that this action may be part of a larger pattern of politics undermining the freedom and credibility of the health and science fields.

Study Looks at Independent 527s in 2004 Election

The Campaign Finance Institute has published a draft chapter of its upcoming book, *Election After Reform: Money, Politics and the Bipartisan Campaign Reform Act*, that examines the role of independent 527 groups in the 2004 election. It finds these groups did not replace party soft money, since overall levels of soft money went down in 2004. It also said independent groups overall were "scrupulous" in following the law banning coordination with candidates and parties. The study poses questions that should be carefully examined before Congress moves to regulate this independent political activity.

Authors Steve Weissman and Ruth Hassan found $ 591 million in soft money spent before passage of the Bipartisan Campaign Reform Act of 2002 (BCRA), but a decrease to $ 337 million after the law took effect. This more than offset the $ 254 million raised by independent 527s. The authors reject the view put forward by Sens. John McCain (R-AZ) and Russell Feingold (D-WI), sponsors of the 527 Reform Act of 2005, that these groups acted illegally in 2004, saying, "Although parties and campaigns and their close associates helped foster major 527 groups, there is no available evidence that they did anything illegal. On the contrary, the individuals involved in supporting the 527s appear to have been rather scrupulous in following the letter of the law and its regulations, which forbade parties, candidates and their agents after Nov. 6, 2002 from requesting or spending soft money in federal elections."

The study notes the role of parties in helping form 527s in the 2004 election, but also says key supporters took steps to separate themselves from the parties and "seem to have refrained from coordinating their communications with political campaigns." Weissman and Hassan go on to say, "After all, the 527s are not making contributions to candidates or parties, nor are they coordinating their spending with them. And many of the donors are promoting their ideologies rather than looking for individual favors. Aren't the 527 donors simply furthering independent political expression …?"

The study raises three additional policy questions to be examined in policy debates on what threat of corruption independent 527 groups may represent:

- Would money raised and spent by 527 groups create a feeling of obligation by candidates that become officeholders?
- Should there be special treatment of groups that have both regulated PACs that can make direct contributions to campaigns and independent arms that do not coordinate or communicate with campaigns?
- Do individuals closely associated with campaigns and party leaders that are involved with independent 527s pose a threat of corruption?

This study is a good beginning for discussion and debate on whether independent 527 groups should be regulated in the same way as parties and campaigns. Independent groups that do not coordinate with candidates and parties currently are subject to disclosure rules, filing reports with the Internal Revenue Service.

Faith-Based Roundup

On Feb. 16, the House Committee on Education and the Workforce approved a job-training bill that would allow, if it passes, federally funded religious organizations to discriminate against employees based on their religious beliefs. The committee also rejected an amendment that would have remedied the constitutional concerns.

A $ 5 billion job-training bill, the Job Training Improvement Act (H.R. 27), would combine funding streams for adults, dislocated workers and employment services into a single state block grant. The change would give governors more discretion over how the money is spent, possibly causing some programs to lose funding while others could benefit.

A controversial portion of the bill exempts religious organizations from a current provision that prevents all contractors under the Workforce Investment Act (WIA) from considering religious affiliation when hiring employees for a job-training program that is operated with federal funds. Any religious organization that receives federal funds from the Workforce Investment Act's job-training programs could refuse to hire employees from different religious backgrounds. Currently, all recipients of federal money for job-training programs must not discriminate on the basis of religion. Many religious organizations participate in federally funded job-training programs without difficulty, and are in full compliance with the current regulation.

The committee also rejected an amendment offered by Reps. Robert Scott (D-VA), Chris Van Hollen (D-MD), and Lynn Woolsey (D-CA) to reinstate the civil rights provision found in current law. Scott argued that because many churches are

all white or all black, allowing religious preference in hiring would be tantamount to discrimination based on race. “The idea that we are debating whether you can discriminate with federal money would be a shock to most Americans. It’s surprising that we are discussing this and it is embarrassing that we are losing. I oppose discrimination, so I oppose the bill.”

A lawsuit filed on Feb. 17 by the American Civil Liberties Union (ACLU) of Pennsylvania and Americans United for Separation of Church and State underscores the importance of retaining the civil rights provisions.

The complaint in *Moeller v. Bradford County* alleges the federal funding of the Firm Foundation program at the Bradford County Correctional Facility violates the Constitution by funneling public money to a program that proselytizes and hires only Christians. The county and the ministry operate a vocational training program for inmates in which a significant proportion of inmates’ time is spent on compulsory religious discussions, religious lectures and prayer, rather than on learning job skills. The complaint also alleges that program administrators discriminate in hiring workers based on their religious beliefs and affiliation.

Over 90 percent of the budget for the program comes from federal, state and local government funds. The funding for the program originally came from a U.S. Department of Labor program under the Workforce Investment Act. Currently, The U. S. Department of Justice provides some of the funds that underwrite the Pennsylvania program being challenged.

Emperor Bush?

How the White House and Congress Are Establishing an Imperial Presidency

Analyses of pending and expected antiregulatory proposals have revealed the usual themes from years past — net benefits, regulatory budgeting, sunsets, and so on. An unexpected theme has also been emerging, which is worth noting for anyone committed to a progressive vision of an open, accountable government responsive to public needs: a trend in favor of concentrating power in the White House free of democratic accountability. In short, the creation of an imperial presidency.

Imperial Presidency Proposals

The White House has provided many examples of imperial presidency gestures throughout the Bush administration, from the decision in the first term to constrict the applicability of the Freedom of Information Act to the recent request in the Iraq war supplemental for over $ 5 billion in unrestricted foreign aid that senators from both parties are decrying as a “slush fund.” The consequences of an imperial presidency are tremendous for openness and government accountability, of course, but a few key recent examples of proposed and anticipated measures suggest the consequences for regulatory protections of the public interest.

Raising Homeland Security Above the Law

Track developments on the imperial presidency and more at www.ombwatch.org/regs.

As we reported before, section 102 of the Sensenbrenner immigration bill (H.R. 418) would put the Secretary of Homeland Security above the law when securing the borders and removing obstacles to the detection of illegal immigrants. Superficial reportage in some press organs characterized the provision in passing as though it only enabled the Department of Homeland Security (DHS) to ignore a conflict with the California Coastal Commission that has been holding up construction of additional fencing in a three-mile segment near San Diego. In actuality, the provision as passed by the House would extend far beyond the San Diego area and would empower the DHS secretary to waive any and all laws, without any limit on the secretary’s discretion. Moreover, it is completely unnecessary; the federal law that governs the conflict with the California Coastal Commission already has waiver provisions that allow the White House ultimately to proceed, if necessary, with any needed fencing.

If the Senate agrees to this provision and the White House signs it into law, first in danger would be environmental protections along the border. The provision would allow DHS to waive many more protections of the public interest, such as the following:

- Criminal law — from racketeering to murder and everything in between
- Child labor laws
- Laws that protect workers by ensuring safe and healthy workplaces, preventing unfair contracting through Davis-Bacon Act wage determinations, and banning retaliation against whistleblowers
- Civil rights provisions that bar federal contractors from discriminating on the basis of race and sex
- Ethics laws for clean contracting and procurement policy
- Laws that give small businesses a chance at winning contracts for construction work along the border.

Another component of the DHS waiver authority would make any waivers and any cases arising from waivers unreviewable in any court. This section does not apparently have any limitations; it could shield not only government agencies but also private contractors from any liability for deaths, dismemberments, or any injuries whatsoever. For example, this section would empower the DHS secretary to give no-bid contracts for border construction to private companies and then could shield those contractors from all employment discrimination and workplace safety laws. Workers harmed by the contractors would likely be left with no recourse whatsoever.

Seizing Control Over All Government Operations

The White House is also seeking the power to reorganize the very structure of all government operations and eliminate civil service protections in its management of the workers who serve the public in government agencies. Rep. Tom Davis (R-VA), chairman of the House Committee on Government Reform, has also vowed to reintroduce legislation to empower the White House to reorganize all federal agencies.

Underneath the technical discussion of organizing, streamlining and restructuring government programs is the risk that the White House would use its new powers to weaken government programs that serve the public interest. We have previously documented how the Bush administration's tendency to give in to special interests makes its regulatory record one long pattern of failure; new powers to reorganize and restructure government programs would likely continue that trend. Particularly at risk would be government programs that target highly vulnerable and underserved populations. The Appalachian Regional Commission, for example, was recently criticized in a White House program assessment for doing work that duplicates the work of other government programs, even though the ARC was created precisely because the existing patchwork of government programs was not doing enough to meet the needs of the severely disadvantaged population in Appalachia.

The White House has pushed not just for the power to reorganize government programs but also for the authority to establish new management controls over the government workforce, free to ignore existing civil service law. The White House has already been granted such power for the Department of Homeland Security, and it has announced its intention to seek the same "flexibility" for all other government departments. The government workers whose jobs could be at risk without civil service protections are not merely faceless functionaries — they include such important figures as David Graham, the FDA researcher who discovered that Vioxx put seniors at risk; Sibel Edmonds, the FBI translator who blew the whistle on mismanagement of the so-called "war on terror"; and Jack Spadaro, a mine safety inspector who refused to keep quiet as the Department of Labor botched the investigation of what has been called the worst environmental disaster in decades. "Flexible" management policies without the procedural guarantees of existing civil service protections could threaten not just those who expose mismanagement and fraud but also those who, like Graham, reach conclusions that threaten the bottom line of the industries that exert extraordinary influence over the administration.

Erasing Local Protections of the Public Interest

The press is increasingly taking notice of the Bush administration's campaign to serve corporate special interests by weakening and eliminating protections of the public. In addition to its efforts at the federal level by slashing agency enforcement budgets and weakening or eliminating federal regulations, the administration has mounted a similar attack on regulatory protections at the state level.

One of the most prominent examples has been the Food and Drug Administration's efforts, under former chief counsel Daniel Troy, to argue in court that drug companies should be exempted from state product liability laws whenever a harmful drug has been approved by the FDA. The FDA's record on drug safety has recently been called into question by the Vioxx case and growing concern about adolescent use of antidepressants. The FDA's preemption argument would prevent state and local governments from protecting their residents, even when the FDA's only protective action is inaction.

The White House's attack on block grants, using the rhetoric of "performance" and "results," is another example. In the White House's performance assessment schema (the Program Assessment Rating Tool or "PART"), block grants must, like all other government programs, show "results" acceptable to the Office of Management and Budget. It hardly sounds controversial — who could be against "results," after all? — but the rhetoric of results masks the underlying conflict with the very purpose of block grants, which is to send funds to the states with no strings attached. Most states actually have performance management programs of their own, but the PART essentially holds states accountable to the White House's own measures. Aside from this basic conflict, the PART sets up block grants for failure, thus enabling the president to declare that a program's failure to show results is the reason for proposed budget cuts.

Although the PART could disappear when the Bush administration leaves office, the recently reintroduced Program Assessment and Results Act would effectively codify the PART and enshrine it in law. The White House would therefore be empowered to continue using this tool in its larger campaign to serve corporate special interests by blocking the states from creating protections of the public health, safety, and environment that the administration refuses to provide.

Fundamental Problems of an Imperial Presidency

An imperial presidency spells disaster for regulatory protections of the public interest. As has been shown repeatedly — from the early 1980s, when the White House used the Paperwork Reduction Act to block the FDA from requiring Reye's Syndrome warnings on aspirin, to a more recent decision such as the White House's use of centralized regulatory review to weaken regulations requiring tire pressure monitoring systems — centralizing regulatory policy in the White House facilitates the undue influence of corporate special interests and can produce deadly results. Moreover, an imperial presidency is offensive to the constitutional order, which establishes checks and balances among three coequal branches of government, distributes power among multiple sovereigns in the federalist design, and diffuses federal power within each branch. Just as legislative power is split between two chambers, executive powers are allocated not only to the White House but also to the departments of government, to which Congress can directly delegate specific authorities. Hovering over the potential imperial presidency is the specter of government by fiat, beyond the reach of the very people who constitute the government in a democratic state.

The vision of the imperial presidency is not empire so much as the mythic corporate executive. Enron, Tyco, WorldCom — the list of colossal failures, and devastation to people's lives from unchecked greed, continues to grow. The effort to reshape the presidency in the model of the corporate executive only sets us all up for more harm from the real corporate executives who come calling at the White House, day after day, leaving weakened protections as their calling card.

Budget Slashes Enforcement at FDA, EPA

The White House's fiscal year 2006 budget submission will mean big cuts in food and drug safety inspection as well as state enforcement of environmental protections.

FDA

Amidst mounting concern over the safety of our food supply from threats such as mad cow disease and bioterrorism and after a storm of criticism about FDA's botched inspection of British flu vaccine facilities, which led to a vaccine shortage this winter, FDA's budget proposes cuts to nearly all of its inspection programs.

The new FDA budget proposes major cuts in both foreign and domestic inspection programs, including significant spending reductions of:

- 5 percent for domestic food safety inspections
- 5.8 percent for foreign drug plant inspections
- 4.7 percent for inspections of national blood banks.

According to an agency statement given to *USA Today*, FDA will stretch its meager budget by targeting inspection towards only high risk cases: "Intelligent, risk-based inspections are more important than absolute numbers of inspections." Still, overall inspections will drop significantly if the proposed budget is approved. Despite FDA promises to Congress to increase vaccine plant inspections from once every two years to once a year in response to the flu vaccine debacle, the number of drug plant manufacturing inspections will drop from 1,430 this year to 1,355 next year. Inspections of foreign drug plants will fall from 515 to 485 per year.

The $ 1.9 billion budget provides a 4.5 percent overall increase in the FDA budget. FDA has taken the hint from the storm of public outrage over Vioxx and has asked for increased funding for drug safety reviews. The budget also includes an expansion of bioterrorism food safety programs.

Considering the controversy surrounding FDA this past year, the budget cuts for inspection are particularly ironic. Last fall, contamination at a British flu vaccine plant left the U.S. scrambling for vaccines weeks before the flu season. Congressional hearings and news media coverage revealed that the FDA had failed to frequently inspect the plant, which accounted for half of the U.S. flu vaccine supply.

EPA

Bush's proposed budget for the Environmental Protection Agency not only cuts overall budgetary spending by 5.6 percent but specifically targets money that passes through EPA to the states.

Despite the central role states play in carrying out environmental protections, Bush's budget request has cut $ 271 million of EPA funds that pass through the states. In fact, the cuts to the states are proportionally greater than the overall cut in the agency funding request. The White House asked for $ 400 million less than what Congress allocated to the agency in 2005 and $ 220 million less than the White House 2005 budget request.

The 2006 budget represents the second year in a row that the state portion of EPA's budget has decreased while the agency's portion increased. The ratio of funding that stays at EPA to funding allocated to the states is generally about 5 to

3, which in the past has meant about $ 3 billion of EPA's budget has been funneled to the states. On top of that, states spend another $ 15 billion, approximately, on environmental protections with money that comes from both state sources and permit fees.

EPA delegates 75 percent of its work to the states, and the states are responsible for 90 percent of enforcement efforts. Therefore, as EPA's portion of funding to the states decreases, so will state enforcement and permitting, according to Steven Brown, executive director of Environmental Council of the States (ECOS).

The situation for state environmental protection is made even more dismal by growing state deficits. Currently 26 states are running a funding deficit, forcing state legislatures to cut discretionary spending, which often includes cuts to environmental enforcement.

Over the past five years, EPA has promulgated 160 new rules that have major impacts on the states. Despite the necessity of these rules to protect public health and the environment, dwindling state funding has hindered implementation and enforcement of these important safeguards. At the same time, environmental enforcement has already dropped off significantly over the past several years.

FDA Announces Drug Safety Oversight Board

The Food and Drug Administration (FDA) plans to initiate an independent oversight board to handle drug safety issues, but some lawmakers and consumer groups say the new panel lacks teeth.

Michael Leavitt, secretary of the Department of Health and Human Services (HHS), announced Feb. 15 that FDA will create an independent drug safety oversight board. The board will be responsible for overseeing drug safety policies and resolving internal disputes over drug risks as well as approving information and content for a new government website on drug safety information.

The panel will be appointed by the FDA commissioner and comprised of government officials from FDA, HHS and other government agencies. Medical experts as well as patient and consumer groups will act as consultants to the board.

The panel emerged out of several recent controversies at FDA surrounding drug safety, including the discoveries that antidepressants may lead to increased suicidality in children and that patients on Vioxx faced an increased risk of heart attack or stroke. In each case, FDA was slow to act and ignored or suppressed findings from its own reviewers in the Office of Drug Safety.

Aside from the review panel, the 2006 budget requests a $5 million increase in funding for the Office of Drug Safety. The office will also get an increase of $1.5 million from industry fees. The new money will allow the agency to have more access to industry drug safety information as well as pay for an additional 25 employees.

Lawmakers and consumer groups responded to the news with skepticism, saying the new board needs more independence and authority to fully ensure the safety of FDA-approved drugs. Since all of the board members will come from within FDA, HHS or other government agencies and medical experts will act only as consultants, the board will lack true independence.

"It's really a cosmetic way of dealing with a much more serious problem," Dr. Sidney Wolfe, director of the nonprofit Public Citizen Health Research Group in Washington, DC, told Newsday. "In the absence of any fundamental change, it's a cruel hoax."

Many lawmakers believe the board does not reach to the core of the problems with drug safety reviews. Senate Finance Committee Chairman Charles Grassley (R-IA) and Sen. Christopher Dodd (D-CT) are each developing legislation that would give the Office of Drug Safety more independence from the Office of New Drugs. Congressional hearings last fall on FDA's handling of Vioxx 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 harmful, or potentially fatal, side effects.

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In This Issue

Bush Budget to Increase Deficits $ 1.6 Trillion over 10 Years

The Congressional Budget Office released its estimates March 5 for the cost of President Bush's fiscal year 2006 budget, showing deficits increasing by $ 1.6 trillion over the next 10 years. The CBO report will greatly impact the way the House and Senate budget committees write their FY 06 budget resolutions set for markup this week.

CBO, the nonpartisan agency of Congress that regularly estimates the cost of legislation and policies, projects federal deficits would grow by about $ 200 billion annually for the next decade. It also changed its estimation of the FY 05 deficit to $ 395 billion and FY 06 deficit to $ 332 billion.

CBO also lowered its estimate of how much the president's proposed changes to mandatory spending would save in FY 06, to $ 26 billion from the $ 38.7 billion cited by the president and for savings in Medicaid and State Children's Health Insurance programs from $ 45 billion to $ 27 billion — almost half of the amount projected by the White House. Because the president's budget only considers the next five years, it hides the worst effects of his proposals. Over the next decade, the changes to all mandatory spending proposed by the president, including tax credits, will actually put the government more into debt by $ 16 billion, not save $ 70 billion as the president claimed in his budget.

Perhaps the most damaging conclusion in the report for the president, coming only two months into his second term, is that he will fail to keep his promise to cut the deficit in half by 2009. CBO projects a deficit in 2009 of $ 246 billion, fully $ 40 billion short of his goal. Further, neither Bush's budget nor the CBO report include many expensive policies likely to be enacted in the future, such as costs for overhauling Social Security ($ 1 to $ 2 trillion over 10 years), fixing the Alternative Minimum Tax ($ 754 billion over 10 years), increases in the cost of the 2003 Medicare prescription drug benefit (hovering around $ 750 billion over ten years), or supplemental military costs for the wars in Iraq and Afghanistan this year (currently $ 82 billion for 2005).

Despite this grim forecast, the administration and Republican leaders in Congress are steadfast in their support of making CBO's projections a reality by extending tax cuts to the wealthy without offsets to pay for them. To that end, the House and Senate will most likely push two sets of reconciliation instructions in their budget resolutions this week, one to deal with reductions in mandatory spending and one to extend expiring tax cuts. (See Congressional Leaders Begin Negotiations on Budget Resolution).

In the past, Congress has used reconciliation instructions as a deficit reduction tool — protecting legislation lowering entitlement spending, or raising taxes from being filibustered in the Senate. In recent years, the Bush administration has hijacked this process to fast-track huge tax cuts that are not offset and have consequently caused deficits to soar.

It appears this process will be used again during the 109th Congress to continue cutting taxes for the wealthy and spending on programs such as Medicaid that benefit mostly low-income Americans. This misuse of the reconciliation process by a few in Congress is damaging to the federal government's ability to meet its funding obligations to the American people and should be rejected.

Social Security Debate Takes Dramatic Shift

In a dramatic shift in how the administration has approached overhauling Social Security, Treasury Secretary John Snow stated March 2 the administration is open to considering proposals that would create government-subsidized personal savings accounts outside the existing Social Security system or through means other than a diversion of funds from an individuals' payroll tax. This announcement comes amid speculation that the president's plan for Social Security reform may be less attainable than he and GOP congressional leaders would like to admit.

At the administration's and GOP congressional leaders' urging, Republican lawmakers discussed Social Security reform with their constituents in their home districts over the last recess. Many encountered skepticism about proposals to create private accounts in Social Security. GOP lawmakers are themselves divided and have proposed a variety of specific plans that differ greatly from each other. According to a March 2 *New York Times* article, the Republican leadership differ greatly over the size of the private accounts, whether our economy can sustain trillions of dollars in transition costs to establish them, and whether a tax increase should be included in a reform proposal. Sen. Lindsey Graham (R-SC) and others have publicly broken with their party and supported tax increases by raising the age for Social Security eligibility.

Republicans appear to be in disarray on this issue. For example, Senate Majority Leader Bill Frist (R-TN) said that "in terms of whether it will be a week, a month, six months, or a year before we bring a bill to the floor, it's just too early to tell." Two days later, Frist backtracked, urging his colleagues on the Senate floor to tackle this issue immediately. "This President and this Congress are facing this challenge and the challenge is to fix Social Security…. We need to do it this year. Not next year, but this year," he said.

If reform is pursued this year, it will happen despite strong public opposition. A poll of 1,500 taxpayers conducted Feb. 16–21 by the Pew Research Center found that 46 percent favored diverting a portion of their payroll taxes to pay for private investment accounts — down from 54 percent in December 2004 — and 38 percent opposed it — up from 30 percent in December. The latest *New York Times*/CBS News Poll similarly found 69 percent of respondents thought private accounts would be a bad idea if such accounts would risk reducing benefits in any way, and 45 percent said President Bush's private account plan would actually weaken the Social Security system.

Despite these bumps in the road, the president, vice president, and other senior administration officials began a tour March 3 of 60 cities in 60 days to promote their proposals.

Congressional Leaders Begin Negotiations on Budget Resolution

With the proposed markup date for the budget resolution set for March 9, behind the scenes negotiation involving the budget committee chairmen and members of Congress was in full swing last week and through the weekend. Senate Budget Chairman Judd Gregg (R-NH) and House Budget Chairman Jim Nussle (R-IA) have spent the last few weeks soliciting input from members. While details are still vague, there are some initial indications of the shape and scope of the resolution.

Reports from the Republican Conference meeting March 3 indicate the majority has significant energy and interest to enact most or all of President Bush's proposed cuts to spending as well as extend his tax cuts. House Majority Leader Tom Delay (R-TX) told reporters, "Every chairman stood up and was very confident and excited about doing it."

However, there is less unity on the Senate side, as Gregg continues to resist efforts to include approximately $ 100 billion in tax cuts in reconciliation instructions. At a leadership dinner March 1, House and Senate Republican leaders agreed to include reconciliation instructions for tax cuts in both chambers' budget resolutions, but Gregg has argued this unnecessarily complicates the process. He feels there is no need to do this since none of the tax cuts are set to expire this year. He would rather advance cuts to mandatory spending and save tax cut policies for the future. In his first year as chairman, Gregg is perhaps trying to avoid a situation that occurred last year when four Republican senators joined Democrats in holding out for PAYGO rules in the budget resolution — a condition which ultimately doomed the bill.

Yet the GOP leadership is being insistent and most observers believe the Senate, like the House, will include instructions to protect a certain amount for tax cuts. If tax cuts are included in the budget resolution, the instructions would not specify which cuts would be protected, only the total amount. GOP aides have said $ 106 billion would be sufficient to extend the 15 percent top rate on capital gains and dividends for two additional years through 2010, and to extend a few business tax provisions, including the research and development tax credit and new health tax credits included in the president's fiscal year 2006 request, through the five-year budget window. That number is consistent with a recently released estimate by the Congressional Budget Office, which predicts that extending the expiring tax provisions over the

next five years will cost $ 100 billion (See Bush Budget to Increase Deficits $ 1.6 Trillion over 10 Years.)

Most reports from Congress do not include the $ 30 billion needed to pay for a one-year extension of relief from the Alternative Minimum Tax (AMT), which expires at the end of this year. It is unlikely this tax cut would be included in reconciliation instructions, however, because there is more broad support for extending that provision. When included in reconciliation instructions, extension of the tax cuts would only need a simple majority vote to pass and could not be filibustered. Hence, the strategy is to include the more contentious parts of the tax cut package in the instructions and leave extension of the AMT relief as a stand alone issue.

The most difficult challenge Gregg is likely to encounter will be getting the Senate to pass some of the expected mandatory cuts in reconciliation, especially cuts to agriculture subsidies and Medicaid. Having to tackle the issue of extending tax cuts will only make the process more complicated and difficult. One likely outcome is for the resolution to include two sets of reconciliation instructions: one for tax cuts and another for spending reduction. GOP leaders in both the House and the Senate are likely to adopt this approach because it may help diffuse public perception of the trade-offs being made in the budget — namely cutting programs for low-income Americans to pay for extending tax cuts for the wealthy.

Continuing to pass bills that add to the deficit, such as extending tax cuts without revenue increases elsewhere to offset the loss, is a practice Alan Greenspan once again warned against in his testimony before the House Budget committee March 2. Greenspan told Congress it "cannot continually introduce legislation which tends to expand the budget deficit." He further advocated for a return to the budget rules of the 1990s, supporting a full PAYGO rule that would require both spending increases and tax cuts to be offset elsewhere in the budget.

The budget resolution is scheduled to be marked up in committee on March 9. Both House and Senate GOP leaders hope to have the resolution pass before the Easter recess, which starts March 21.

Federal Spending Cuts, Caps to Hurt States Facing Own Deficits

This week, the House and Senate budget committees are scheduled to mark up their budget resolutions, and spending caps proposed for the next five years, would hurt many states. President Bush sees these budget spending caps as key to reducing the deficit and overall spending by the federal government — but they will do little to reduce the deficit.

It is no secret Bush's budget includes deep cuts in non-defense discretionary spending for FY 06. The decisions members of Congress will make over the next few weeks will immediately affect many government programs and the millions of people they serve across the country. But those decisions will not only affect government funding in the upcoming year, but also would lock in some of those cuts for the next five years through the use of discretionary budget caps.

Five-year caps on appropriations would greatly exacerbate the level of funding cuts programs will see. In fact, if the proposed caps are adopted, by 2010 we will see a 14–16 percent overall real cut in funding for all domestic discretionary programs excluding defense and homeland security.

Americans will feel the effects of these cuts in every state. The National Priorities Project has compiled a state-by-state publication detailing how the budget proposal would affect every state in the nation. The Center on Budget and Policy Priorities has also done a breakdown of how the proposed budget cuts would affect each state. The CBPP report details the extent to which certain programs such as school improvement, special education, child care, and rental assistance would be cut in each state, and how much those cuts would be made worse if Congress adopts five-year spending caps.

The debate over these caps comes at a very difficult time for the states. Twenty-six states already have projected budget shortfalls of their own for fiscal year 2006. With states struggling to balance their budgets while continuing to provide vital services on the local level and Congress negotiating more drastic cuts to states over the next five years, it is a crucial time for service providers, state and local government representatives, and interested Americans to be in touch with their representatives in Washington. This week's markup of the budget resolution will frame the debate for cuts that will directly impact states and municipalities over the next five years.

After this week, the budget bills are scheduled to move to the floor and all members will have the opportunity to vote on the budget resolutions. Both the House and Senate hope to have their budget resolutions passed before the congressional recess starting March 21.

Tell your representatives not to support a budget resolution that makes deep cuts in spending for 2006 or places harmful caps on spending for the next five years.

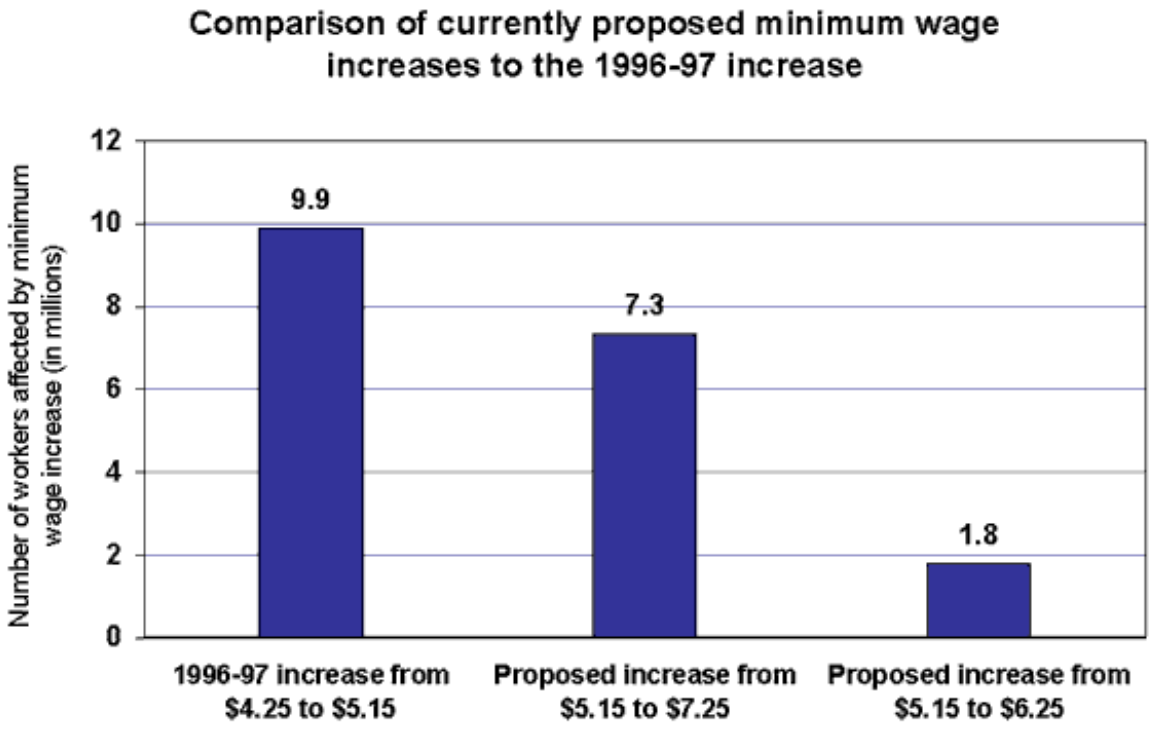
Congress Rejects Competing Minimum Wage Amendments

On March 7, the Senate voted to kill two amendments to increase the minimum wage attached to the bankruptcy bill (S. 256). One offered by Sen. Ted Kennedy (D-MA), to raise the minimum wage from $ 5.15 to $ 7.25 per hour over two years, lost in a close 46–49 vote. The second, proposed by Sen. Rick Santorum (R-PA), and opposed by progressive groups, was soundly rejected 38–61. Santorum's amendment would have raised the minimum wage by $ 1.10 over two years to $ 6.25. Neither got the 60 votes needed to pass.

Santorum's amendment had garnered little support from either party before the vote. Republican lawmakers are generally against raising the minimum wage because of the pressure it puts on businesses. Democrats were apprehensive of Santorum's proposal because it was far more complex than a straight wage increase. The Economic Policy Institute has estimated that even though Santorum's wage increase may have benefited up to 1.8 million workers, the detrimental effects of his plan would have far outweighed the positives. Provisions in the law would have reduced minimum wage eligibility, changed specifics on overtime rights, and overruled state standards for workers who earn tips. In other words, millions of workers would have lost protections they now have under current law.

Santorum's proposal would have weakened protections workers now have under the Fair Labor Standards Act. Employees who work for businesses with revenues of over $ 500,000, as well as workers involved with interstate commerce, currently must be paid the minimum wage and overtime pay when they work more than 40 hours per week. The Santorum proposal would have eliminated these important protections and even abolished the 40-hour work week, replacing it with an 80-hour, two-week work period. This means if a worker puts in 50 hours one week, and 30 hours the next week, they would not be eligible to receive overtime pay. It would not only have lowered accepted fair labor standards, but also allowed employers to overwork their employees in busy periods and then cut their hours when business slows down, shifting control over work hours from employees to employers.

Santorum's wage raise would also have covered less than a fifth of the number of workers who received raises in 1997 – the last time the minimum wage was increased. The Economic Policy Institute chart below shows how ineffective Santorum's proposal would be relative to past minimum wage hikes.



Source: EPI analysis of 2004 Current Population Survey data

Santorum's amendment also contained a controversial provision that would have given business a waiver on first-time regulatory violations of non-compliance with paperwork requirements. See Senate Nixes New Right for Business to Restrict Information, also in this issue.

House Hearing Finds Too Much Secrecy, Seeks Fixes

A member of the 9/11 Commission and a former translator for the Federal Bureau of Investigation (FBI) warned House members that too much government secrecy today threatens the country's ability to keep the nation safe. The comments were made during a House hearing March 2 that focused on the widespread breakdown of the system to help government keep only necessary secrets in a democratic political system.

Rep. Christopher Shays (R-CT), a longtime champion in the battle to rein in overzealous and irresponsible use of secrecy, together with Democrats Carolyn Maloney (NY) and Henry Waxman (CA), led active questioning of witnesses, including Richard Ben-Veniste, a member of the now-defunct 9/11 Commission.

Ben-Veniste noted that in 1998, Congress passed the Nazi War Crimes Disclosure Act that required federal agencies to declassify documents relating to World War II war crimes. In keeping with that law, over eight million pages of previously secret documents were made public without jeopardizing national security. Former FBI translator Sibel Edmonds recounted how secrecy is frustrating her ability to challenge her dismissal after complaining about alleged espionage within the translator's office. Their testimony inspired Maloney to propose the 1998 law be used as a model for new legislation requiring all agencies to declassify documents.

Before the hearing, entitled "Emerging Threats: Overclassification and Pseudo-classification," Waxman asked for a congressional inquiry into whether agencies were using "sensitive but unclassified" restrictions to withhold key documents, noting that the federal government is keeping more secrets than ever, and citing the *Secrecy Report Card* study by OpenTheGovernment.org, a broad-based coalition which OMB Watch co-chairs. Waxman addressed his letter to Shays, chairman of the Subcommittee on National Security, Emerging Threats and International Relations of the House Government Reform Committee, which sponsored the hearing.

"We paid a terrible price on September 11 because too much information was kept secret or otherwise not shared," Ben-Veniste noted, linking the tragic events of 9/11 directly to excessive secrecy. Now in private practice, he is a participant with other former members of the 9/11 Commission in the Public Discourse Project, an effort, in part, to declassify more information from the commission's work. The hearing comes on the heels of bipartisan legislation introduced by Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT). The OPEN Government Act would make it easier for the public to obtain government documents under the Freedom of Information Act.

White House Cuts Entire Chapter from Economic Report

The National Security Council (NSC) had an entire chapter on Iraq's economy deleted from the "Economic Report of the President" simply because it would interfere with the positive tone of the rest of the report. The report is produced annually by the Council of Economic Advisers (CEA), a supposedly independent advisory entity. The unprecedented move is yet another example of the Bush administration's willingness to manipulate expert and scientific information for political reasons.

The CEA consists of economic and budget experts recruited from the top ranks of academia and business. The "Economic Report of the President" is the CEA's primary vehicle for providing economic observations, advice and input. Economists from both political parties considered the decision to delete an entire completed chapter as extraordinary and a sign of the CEA's loss of influence. Outgoing CEA Chairman N. Gregory Mankiw has declined to comment.

The missing chapter addresses the development of the Iraqi banking system, financial markets and other economic institutions. Apparently, the chapter portrayed Iraq's economic emergence positively and it was believed that this would clash with current military difficulties in Iraq, and therefore would undermine the administration's credibility. The White House has downplayed the deleted chapter, explaining that it did not belong in a report on the American economy. Given that the CEA produces the "Economic Report of the President" every year, one would expect that the CEA understands best the appropriate material to cover.

Congress and the public are entitled to a full and unbiased accounting from the CEA experts, but once again are given an incomplete and misleading picture. The CEA's report will be used to make and justify important decisions, including how the U.S. spends billions in Iraq. When the Bush administration filters information from independent experts and scientists — the information no longer belongs to those experts, it becomes the administration's opinion.

Administration officials said the chapter may still be published in some form in the future.

Arizona Looks to Strengthen Freedom of Information

Arizona State Sen. Dean Martin (R-Phoenix) introduced two bills on Feb. 1 that would make it easier for Arizonans to access state-held information. The first bill, S.B. 1499, would create a state funded 'public access counselor' to provide expert advice to citizens and state officials regarding requests for state-held information. The second bill, S.B. 1498, would make it illegal for state agencies to sue a person or group simply because they requested information.

Too often, state officials inappropriately withhold requested information because it may be damaging, or simply because the state official believes the requestor does not have a legitimate right to the information. When an agency does not provide sufficient access, the requestor's only recourse is to take the matter to court. Of course, legal battles are costly and time consuming. S.B. 1499, reference titled simply "Office of Public Access Counselor," would provide frustrated requestors with an alternative to the expensive proposition of court.

The public access counselor position would not have the authority of law to order an agency to release information. However, the judgment of a state expert, which would be admissible in court, could significantly influence an agency to reconsider a request. State officials could also make use of the position by consulting with the public access counselor about a confusing or troubling request.

A similar concept was recently proposed for the federal government by Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) in the OPEN Government Act of 2005. In addition, last December, the Illinois Attorney General appointed a public access counselor to promote compliance with state public-records and open-meetings laws.

Steve Brittle, director of Don't Waste Arizona, thinks a public access counselor might have helped in his recent struggle seeking a state record. In 1993, Brittle and his organization helped citizens in Cottonwood, AZ, defeat Phoenix Cement's bid to burn tires to fuel their plant. In September of 2004, Steve petitioned the Arizona Department of Environmental Quality for those records to help a Minnesota community facing a similar struggle.

Unfortunately, the Arizona DEQ did not provide Brittle with the records until he had consulted with lawyers and threatened to sue. In the meantime, the Minnesota facility had already been granted a permit to burn tires. A public access counselor might have prevented the delay and enabled Brittle to obtain the records in a timelier manner.

Arizona currently has no laws prohibiting a state agency from preemptively filing a lawsuit against a requestor. If a dispute arises over a denied request or information withheld, an agency might seek to settle the matter definitively by seeking a declaratory judgment or decree against a requestor from a court. However, this unfairly forces the requestor to incur legal fees for simply exercising the right to request information. S.B. 1498, reference titled "Public Records; Requestors; Lawsuits Prohibited," would prohibit state agencies from commencing civil actions over requests for public records unless the requestor consents to the civil action.

Both bills were introduced with several co-sponsors and are expected to go through committees and onto the Arizona senate floor within several weeks.

- More on S.B. 1499
- More on S.B. 1498
- Related article

Justice Department Opposes D.C. Anti-Terrorist Measures

On Feb. 25, the U.S. Department of Justice joined the rail company CSX in litigation to derail a new Washington, DC, law which bans hazardous cargo shipments through the district. In a brief filed with the Federal District Court, DOJ asserts that hazardous chemical shipments are part of interstate commerce and therefore may only be regulated by federal law.

Last month, Washington became the first U.S. city to ban hazardous shipments when it passed the Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005. The law imposes a 90-day ban on hazardous cargo shipments within a 2.2 mile radius of the U.S. Capitol.

Almost immediately following the passage of the new law, CSX filed a lawsuit arguing the law was unconstitutional. With DOJ also trying to nullify the law, the law's future is uncertain.

Undeterred, on March 1, just days after DOJ's brief, the D.C. City Council unanimously passed a nearly identical bill that would increase the temporary ban from 90 to 225 days.

Legally, DOJ's argument that local governments may not interfere with interstate shipments may carry the day. However, it does little to answer the much larger questions raised by the district's efforts. Why, more that three years after the 9/11 attacks, has the federal government not implemented a plan to make chemical plants and shipments safer? Why have chemical companies, shipping companies and industry been getting a free pass from the federal government, potentially at the cost of the public's safety?

The federal government was fully aware of the district's efforts long before the city passed the ban and could have worked with industry and D.C. city officials to discuss shipping risks and developed a plan to improve protections of densely populated areas. Instead, the federal government has continually tried to prevent action and stifle discussion on this issue.

See these related *OMB Watcher* articles:

- "D.C. Council Passes Bill to Reroute Hazardous Materials," Feb. 7, 2005
- "Industry Challenges D.C. Ban on Hazmat Rerouting," Feb. 22, 2005

Coalition Opposes Bill to Regulate Independent 527 Groups

A new coalition has formed to oppose passage of the 527 Reform Act of 2005 (S. 271 and H.R. 513). The Coalition to Protect Independent Political Speech sent a letter to Congress signed by more than 100 nonprofits urging rejection of the bill, noting, "These organizations have contributed to the revitalization of American democracy, helping bring millions of people back to the process of governing the country by bringing them back to the polls." The Senate Rules Committee has scheduled a hearing for March 8.

The 527 Reform Act of 2005 proposes to make all groups "described in Section 527" of the tax code regulated political committees unless they fit into a limited number of narrow exemptions. The exemptions would be lost if the group spent more than $ 1,000 on a public communication that "promotes, supports, opposes or attacks" a federal candidate in the year prior to the election. There is no definition of what kind of communication "promotes, supports, opposes or attacks" a federal candidate, so that criticism of elected officials, without mention of an election, could trigger federal regulatory authority. The bill would also subject many state and local political committees to federal regulation.

The broad-based coalition of 501(c) organizations objects to the bill because it would regulate independent groups that do not present a threat of corruption to the political system, and establish a rationale for regulation that could easily be extended to 501(c) groups.

The coalition letter cites the significant role of independent 527s in getting out the vote in 2004, noting that, "The 2004 elections saw the greatest increase in voter participation since 1968, due, in significant part, to the work of these independent organizations." Their funds were used to "knock on doors in communities with some of the lowest historic voter turnouts in the country." 527s are credited with expanding the scope of the debate by raising controversial issues.

The letter said groups signing the letter prefer "to see public policy based on facts, not propaganda," urging Congress to consider facts that show in 2004:

- Candidates and parties outspent independent 527s by ten to one
- Independent 527s must register with the Internal Revenue Service (IRS) and file detailed reports that are publicly available
- 527s that coordinate with candidates or parties face substantial penalties.

On Feb. 28 the coalition held a briefing in Washington, DC, that provided background and analysis on the issues surrounding regulation of 527s. Three election law attorneys noted that:

- The IRS recognizes many different types of groups under Section 527
- Under the bill a politically motivated complaint could be filed at the Federal Election Commission (FEC) that a 501 (c) group is "described in Section 527," resulting in an investigation by the FEC and possible conflicting regulation between the FEC and IRS
- The overall impact of the proposed legislation would be to weaken independent political voices in American politics.

Jones Continues to Misrepresent Rights of Houses of Worship

On March 2, Rep. Walter Jones (R-NC) formally introduced the Houses of Worship Free Speech Restoration Act (H.R. 235). The bill would amend the Internal Revenue Code to allow religious organizations to endorse or oppose candidates and engage in partisan activity as long as it is part of a religious event. Currently, all 501(c)(3) organizations, including houses of worship, are prohibited from intervening in elections. Supporters of the bill claim religious leaders are afraid to speak out on political issues.

In promoting his bill, Jones continues to disseminate the myth that 501(c)(3)s, including churches, cannot engage in issue advocacy or discuss the issues of the day. According to a press statement released by his office, "H.R. 235 was introduced to liberate clergy from the muzzle imposed by the absolute ban on all speech that may be regarded as 'political' and thereby enable them to speak out on vital and moral and political questions of the day."

Jones' position misrepresents current law. Non-electoral advocacy, focused on issues, is always permissible. These activities include lobbying for or against confirmation of non-elected officials, such as judges, lobbying on legislation,

commenting on proposed regulations, participating in hearings held by agencies and litigation.

The tax code allows 501(c)(3)s to engage in issue activities during an election season if it is part of ongoing work and related to the group's mission. These activities cannot be increased or timed in order to influence the outcome of an election.

Many types of election-related activities do not fall under the "campaign activity" prohibition and can be conducted by religious institutions. The key distinction is that voter education and mobilization activities cannot support or oppose a particular candidate, directly or indirectly. Permissible election-related activities include: voter education; publishing candidate responses to questionnaires; nonpartisan voter drives; and sponsoring debates and forums. Campaigns on ballot initiatives and referendums are considered lobbying, not partisan electioneering, because no candidate is involved.

Current law protects the integrity of charitable nonprofits by preventing individuals from using tax-deductible contributions to avoid campaign finance laws. It also prevents individuals from using charitable nonprofit organizations, which by definition are organized for public purposes, to advance their personal partisan political views.

Speakers at the press conference included Senators Sam Brownback, (R-KS) and Tom Coburn, (R-OK), Rep. Joe Pitts, (R-PA), Chairman of the House Values Action Team and Congressman Mike Pence, (R-IN), Chairman of the House Republican Study Committee and a number of minority pastors. Supporters of the bill have set up a website that confuses the issue by failing to distinguish between issue advocacy and partisan electioneering.

Independent Sector Report Urges Nonprofit Accountability

On March 1, Independent Sector's (IS) Panel on the Nonprofit Sector presented its Interim Report on nonprofit accountability, calling for voluntary action by nonprofits, increased enforcement by the Internal Revenue Service (IRS) and action by Congress, to Sen. Charles Grassley (R-IA), chair of the Senate Finance Committee. A hearing on proposals for legislative action is expected this spring. The Panel is expected to publish a final report before summer.

Grassley said the report will "weigh on the thinking of the Finance Committee," and that he plans to add accountability provisions to the Charity Aid, Recovery, and Empowerment (CARE) Act, a measure IS strongly supports. The panel specifically encouraged nonprofits to take voluntary action for better governance, including:

- Adopt a conflict of interest policy
- Have policies and procedures to protect employees who come forward with alleged illegal or unethical behavior in an organization
- Have someone with financial literacy on the board of directors, or get expert advice on financial management.

Recommendations to make nonprofits more transparent include:

- Suspension, but not revocation, of tax-exempt status of any group that fails to file the annual Form 990 with the IRS for two years or more
- Require the chief executive officer or other high ranking official to certify the accuracy and completeness of Form 990
- Phase in mandatory electronic filing of Form 990
- Require an audit for groups with annual revenues of $ 2 million or more
- Require charities that are not required to file Form 990 (with revenues under $ 25,000) to file an annual report with basic information to the IRS.

The panel urged caution before enacting new legislation, noting that Congress can improve enforcement of existing laws and regulations by increasing resources for the IRS, encouraging states to adopt federal standards in their charity regulation and allowing more information sharing between the IRS and state charity officials. The Panel did recommend Congress take action to define the term "donor advised" fund and take steps to prevent personal benefit to donors.

In its next phase of work the Panel will consider:

- Standards for compensation and travel policies for board and staff
- Revisions to the Form 990 series
- Uniform accounting standards
- Valuation of non-cash contributions
- Regulation of charitable solicitations.

Faith-Based Roundup

House Vote on Jobs Act Would Codify Religious Discrimination, Opponents Await Senate Vote

On March 3, the House approved H.R. 27, the Job Training Improvement Act, which would allow publicly funded religious agencies to hire and fire workers based on their religious beliefs. A coalition of organizations had urged the House to reject the bill unless it was amended to ensure that workers could not be discriminated against on religious grounds in federally supported social service programs.

Rep. Robert "Bobby" Scott (D-VA) introduced an amendment to restore civil rights protections to the bill. His proposal was defeated in a 239–186 vote that fell largely along party lines.

The bill now moves to the Senate where it has been referred to the Committee on Health, Education, Labor, and Pensions.

President Bush Pushes Faith-Based Initiative at Leadership Forum

In a speech March 1 at the White House Faith-Based and Community Initiatives Leadership Conference, President Bush promoted three aspects of his faith-based initiative: advocating the right of faith-based charities to discriminate in religious hiring; tax incentives for faith-based charities; and increasing the faith-based initiative at the local level.

In advocating what he called "freedom in religious hiring," Bush said faith-based organizations should have the right to discriminate against people of different faiths when hiring for positions funded with federal dollars.

The president also discussed his proposals for tax incentives on charitable giving, which has always been linked to his faith-based initiative. His fiscal year 2006 budget includes food donation enhancements and provisions to permit individuals to direct a portion of their retirement accounts to a charity. However, the president dropped the largest part of the tax incentives — the non-itemizer deduction. These tax incentives have not yet gained steam even as Sen. Rick Santorum (R-PA) introduced The Family and Community Protection Act of 2005 (S. 6). The bill would provide charitable giving incentives, including the non-itemizer deduction, but it currently has only four cosponsors and no timeline for making it out of committee.

Additionally, the Bush administration is pushing the states to be more active in establishing and implementing grant opportunities for faith-based organizations. The majority of federally funded social services are implemented by state and local government. However, most state and local governments have not followed the Bush administration's example and have not mounted large initiatives to engage in faith-based social services. They have their own, and sometimes conflicting, constitutional and statutory provisions on the relationship between church and state, on hiring rights for employers, and requirements for contractors doing business with government.

The states manage the nation's programs for public welfare, education and training, health care, and public protection, among many other areas. The administration has succeeded in devolving more administrative and financial responsibility for these programs to the states, while decreasing federal funding for them.

Senate Nixes New Right for Business to Restrict Information

The Senate rejected today a controversial amendment to a bankruptcy reform bill that would have given corporate special interests new incentives to refuse to provide information necessary for protecting the public.

Proposed by Sen. Rick Santorum (R-PA) as a late add-on to S. 256, the bill to benefit the credit industry by further reducing the bankruptcy option for people overburdened with debt, this amendment would have endangered public safeguards with new enforcement exemptions from information collection requirements. The amendment would have prohibited federal agencies from fining small businesses for "first-time" violations of paperwork requirements as long as the company complied within six months of notice of the violation (with some enumerated exceptions, such as tax collection paperwork).

The prevailing practice is that agencies almost always waive fines for first-time paperwork violations, but they retain the flexibility to fine first-time violators when circumstances warrant fines — for example, when a business willfully violates a paperwork requirement, or when there is a need for rapid and timely compliance with an information collection requirement. The Santorum amendment would have eliminated this flexibility and actually could have encouraged even more violations, because small businesses would have known they could avoid reporting requirements — without fear of fine — until they were caught for the first time.

Businesses could have *many* "first-time" violations under the Santorum amendment. When determining whether a violator was eligible for the "first-time" exemption, an agency would have been allowed to count violations only of that agency's requirements — and would not have been able to look at a small business's violations of requirements from *other* agencies. A business could thus have failed to comply with a workplace safety requirement for Occupational Safety and Health Administration, a toxic substance report for Environmental Protection Agency, and a pension fund report under the Employee Retirement Income Security Act — each time getting the "first-time" violator exemption.

The Santorum amendment would have endangered public safeguards of the public health, safety, civil rights and environment, because it would have weakened agencies' power to gather the information that can be the very basis of public protection. For example, when a worker safety protection is issued, businesses often need to report information so that agencies know whether or not businesses are actually complying and whether workers are getting the full benefit of the new protective standard. Businesses might also be required to post information so that workers know about their rights or learn about potential hazards and protect themselves on the job. Under the Santorum amendment, corporate special interests would have been allowed to deny us this needed information without consequences.

In response to concerns raised by the public interest sector every time this language has been offered in previous Congresses, the Santorum amendment included an insufficient exception that would have allowed fines whenever "the agency determines that the violation presents a danger to public health or safety." This exception ignored that information-gathering requirements are often the basis for determining whether there is a danger to public health or safety in the first instance. Without this collection of information, an agency would often have been unable to determine whether a paperwork violation actually presented such a danger and, as a result, would not have been able to take preventive measures to head off potential risk to the public.

Although the Santorum amendment was considered a message amendment, primarily as a Republican alternative to the Kennedy minimum wage amendment, it used language that has been circulating since the 1990s. The Santorum amendment failed, on a 38–61 vote, to reach the 60 votes needed to amend the bankruptcy bill.

Studies on Health Risks from Pollutants Verify Need for Safeguards

Several recently published scientific studies on the negative health impacts of depleted uranium, diesel engines, mercury and urban pollutants underscore the need for stronger environmental regulations to protect public health.

In this article:

Depleted Uranium Not Harmless

Although the federal government insists that depleted uranium is essentially harmless, a recent report on a proposed uranium enrichment plant in New Mexico found that "depleted uranium may be mutagenic, tumorigenic, teratogenic, cytotoxic and neurotoxic, including in a manner analogous to the exposure to lead." According to the Nuclear Regulatory Commission, depleted uranium is "uranium having a percentage of uranium-235 smaller than the 0.7 percent found in natural uranium. It is obtained from spent (used) fuel elements or as byproduct tails, or residues, from uranium isotope separation." The possible health risks of depleted uranium took the national stage after the first Gulf War, when soldiers were exposed to depleted uranium used in armor plates.

The study, released by the Institute for Energy and Environmental Research (IEER) and the Nuclear Information and Resource Service (NIRS), looked at research conducted by the Armed Forces Radiobiology Institute in Bethesda, MD, after the Persian Gulf conflict. IEER and NIRS concluded that depleted uranium (DU) poses significant public health risks, despite its classification by the Nuclear Regulatory Commission (NRC) as a "low-level" waste. "The health risks of depleted uranium may be far more varied than is recognized in federal regulations today," said Dr. Bruce Smith, Senior Scientist at IEER and co-author of the report. Currently, the NRC regulates depleted uranium only "through licensing and oversight of licensee operations."

If the plant is built in New Mexico, "it is likely that the people of New Mexico, U.S. taxpayers, and future generations would be stuck with a multi-billion dollar radioactive waste liability," according to the report.

Diesel Pollution Causes 21,000 Premature Deaths Each Year

Particulate matter from diesel engines leads to the premature deaths of 21,000 Americans each year, according to a report by the Clean Air Task Force, a conglomerate of state and local clean air environmental groups.

The Task Force contracted Abt Associates "to quantify for the first time the health impacts of fine particle air pollution from America's diesel fleet." Abt relied on data provided by the Environmental Protection Agency (EPA) to conduct the study, which found that the 13 million diesel vehicles in the United States lead to 3,000 early deaths of lung cancer, 400,000 asthma attacks and 27,000 heart attacks each year.

"Reducing diesel fine particle emissions 50 percent by 2010, 75 percent by 2015, and 85 percent by 2020 would save nearly 100,000 lives between now and 2030," according to the report. Further, the report estimates that in 2010, the toll of premature death and health damage will cost a total of $139 billion.

The EPA has recently promulgated a regulation that will require dramatic reductions in fine particulate matter emissions from diesel engines by 2007. However, the regulation applies only to new engines and does not make any provisions for existing engines. EPA has promoted a voluntary retrofit program to cut emissions from existing vehicles, but such a program is not enforceable. Diesel engines can last as long as 30 years, which means that older vehicles will continue to pollute for the next quarter century.

Though current control technology can reduce emissions by up to 90 percent, EPA has little authority to reduce emissions in existing vehicles. Cutting emissions in current vehicles will require an aggressive strategy of legislation and regulation at the state and national levels.

Mercury Reduces IQs of 300,000 to 600,000 Children Annually

A study by the National Institutes of Health (NIH) found that mercury pollution from man-made sources, including power plants, contributes to diminished IQs in 300,000 to 600,000 American children each year and $8.7 billion annually in lost earnings.

Congress will address power plant emissions in the markup of the Clear Skies bill (S. 131). The markup was supposed to occur March 2, but it was delayed to allow more time for compromise on the measure.

The Clear Skies bill will seek to reduce power plant emissions of mercury 69 percent by 2018, while also reducing emissions in sulfur dioxide and nitrogen oxide through emissions trading. The Clear Skies bill will require mercury emissions to be reduced to 34 tons by 2010, far less than what is required under the Clean Air Act.

Using numbers from last year's Clear Skies bill, which would reduce emissions to 26 tons by 2010, the NIH report estimated that the cost to public health of delaying mercury emissions reductions would exceed the cost to industry of implementing more stringent emissions reductions technology.

EPA is set to promulgate a final rule for mercury control on March 15. The rule will also implement weaker cap-and-trade standards.

Urban Pollution Can Lead to Genetic Alterations, Cancer

A new study by scientists at Columbia University's Center for Children's Environmental Health revealed that exposure to environmental pollutants may actually change the structure of genes in fetuses, making them more likely to develop cancer. The study was the first to show the impacts of pollutions on babies *in utero*.

The study looked at 60 newborns and their mothers in low-income neighborhoods in New York City. Personal air monitoring devices measured the levels of polycyclic aromatic hydrocarbons (PAHs) during pregnancy. These pollutants enter the air through combustion of vehicle engines, residential heating, power generation or tobacco smoke. PAHs can cross the placenta during pregnancy.

The study found that infants who were exposed to high levels of pollutants had an increase of about 50 percent in the level of persistent genetic abnormalities. Separate studies have shown that these abnormalities can increase the risk of cancer.

"While we can't estimate the precise increase in cancer risk, these findings underscore the need for policymakers at the federal, state and local levels to take appropriate steps to protect children from these avoidable exposures," stated Dr. Frederica P. Perera, director of the Center and principal author of the study.

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In This Issue

House, Senate Pass Irresponsible FY06 Budget Resolutions

The House and Senate passed separate versions of the fiscal year 2006 (FY06) budget resolution last week that would allow for additional tax cuts, mostly targeting wealthy families, while cutting back on spending for programs that serve middle- and low-income America. A split within the GOP ranks may spell trouble for reconciling the two budget resolutions, and, as with the current year, would mean Congress would operate without a budget blueprint.

The House GOP has been very critical of the Senate version of the budget resolution because it did not cut spending deeply enough. Two amendments adopted on the Senate floor March 17 only increased the contempt of the House. Sen. Gordon Smith's (R-OR) amendment to protect the Medicaid program from $ 15 billion in cuts and Sen. Ted Kennedy's (D-MA) amendment to raise the discretionary spending ceiling by $ 5.4 billion will be major obstacles to be negotiated during the conference committee and may threaten the bill entirely.

Both resolutions are fiscally irresponsible and threaten the fiscal health of the United States. By solidifying large deficits for years to come, the Senate budget resolution would further weaken the ability of the federal government to meet the great variety of spending priorities affecting millions of Americans in communities across the country.

The chart below summarizes the major aspects of the bills.

Comparison of House and Senate FY06 Budget Resolutions

	House Budget Resolution	Senate Budget Resolution
Discretionary Cap [302(a) Allocation]	$843 billion	$848.8 billion ^
Cuts to Mandatory Programs	$68.8 billion	$17 billion *
Tax Cuts	$106 billion ($45 billion under reconciliation)	$134 billion (all under reconciliation) **
Assumed Supplemental Military Funding		
FY2005	$81 billion	$81.89 billion
FY2006	$50 billion	$50 billion

^ Committee mark set discretionary cap at $843 billion. The Kennedy amendment added $5.4 billion to that level.
* Committee mark included $3.2 billion in savings. The Smith Medicaid amendment removed $15 billion from the bill
** Committee mark included $70.2 billion in tax cuts. The Bunning amendment added $63.8 billion by repealing the 1993 tax on SS benefits.

For more detailed information on the budget resolution debates in the House and Senate, read these analyses:

- Smith, Kennedy Amendments Could Doom Budget Resolution
- Despite Compromise, House Conservatives Could Threaten Budget Resolution

Smith, Kennedy Amendments Could Doom Budget Resolution

The Senate narrowly passed its fiscal year 2006 (FY06) budget resolution late on the night of March 17 by a vote of 51–49. Several amendments from Democrats that would have greatly improved the bill, including one that would have required both spending increases and tax cuts to be paid for, were narrowly rejected. But two amendments dealing with entitlement and discretionary spending, which did pass, could cause irreconcilable differences between House and Senate versions.

The Senate version of the budget resolution would allow for $ 134 billion in additional tax cuts to be protected under “fast track” non-filibuster procedures, would cut $ 17 billion from entitlement spending over the next five years and cap discretionary spending for FY06 at $ 848.4 billion.

Senate Budget Committee Debate

The Senate Budget Committee spent all of Thursday, March 10 working on the budget resolution. The committee debated a variety of amendments throughout the day, ultimately adopting seven amendments before approving the budget resolution and sending it to the floor for debate by a 12–10 party-line vote. Six of the seven amendments adopted were “sense of the Senate” amendments, which are non-binding.

In an attempt to implement the budgeting rules that helped reduce deficits in the 1990s, Sen. Russ Feingold (D-WI) offered an amendment to establish true or “classic” pay-as-you-go (PAYGO) rules that would require both mandatory spending increases and tax cuts to be revenue neutral. Feingold argued this rule is an integral part of any attempt to reduce federal deficits in a responsible and effective way.

Most Republicans and the GOP leadership favor PAYGO rules to only apply to spending increases, not tax cuts. This “one-sided” PAYGO allows Congress to easily reduce spending levels while at the same time pass fiscally irresponsible tax cuts that are not paid for. The tax cuts envisioned in this resolution would negate any deficit reduction achieved by reducing spending and actually would increase deficits over the next ten years.

Feingold’s amendment was defeated 10–12 but he expressed confidence after the markup that it would pass on the Senate floor with the help of a few moderate Republicans. This PAYGO issue emerged during last year’s debate on the budget resolution. With four Republicans supporting Feingold’s position and the House GOP supporting the one-sided PAYGO, no compromise could be reached — and no budget resolution was ever worked out. With Democrats losing Senate seats in the last election, it remained uncertain what would happen on the Senate floor.

Also of note, Sen. Jon Corzine (D-NJ) offered a “sense of the Senate” amendment stating the Senate budget resolution should not achieve savings through cutting spending for the Medicaid program. This amendment was adopted in committee and paved the way for a binding amendment on the Senate floor to protect Medicaid funding.

One item that ended up in the budget resolution was a provision affecting Senate procedures for considering unfunded mandates pushed by Sen. Lamar Alexander (R-TN). Under the Unfunded Mandates Reform Act, certain intergovernmental mandates can be challenged with a point of order which can be hurdled with a simple majority (51 votes). The Alexander provision would require a super majority (60 votes) to waive the point of order. This change could have profound implications for issues from minimum wage to environmental protections and from family and medical leave to civil rights protections.

Senate Floor Debate

The Senate began 50 hours of debate on the budget resolution on March 15. Both Budget Committee Chairman Judd Gregg (R-NH) and Ranking Member Kent Conrad (D-MT) pushed the chamber to finish the bill last week before Congress broke for its two-week spring recess. After much of the debate time was used up the next two mornings, Gregg and Conrad stacked the remaining amendments the afternoon of March 17 one after another. Voting progressed all day and late into the night with little debate before each amendment.

There were a number of extremely close votes on the floor on key amendments throughout the week including another attempt at establishing true PAYGO rules, protecting Medicaid funding, removing harmful tax cut reconciliation instructions, reversing deep cuts to Amtrak, and removing language allowing drilling in the Artic National Wildlife Refuge. Unfortunately, amendments that would have helped to restore fiscal discipline and achieve equitable deficit reduction were not approved. Below is a list with short descriptions of key amendments voted on during the floor debate. (See a complete, detailed list of floor amendments.)

- *Restoring funding to Amtrak:* Sen. Robert Byrd's (D-WV) amendment would have reversed proposed deep cuts to operating subsides for Amtrak at $ 1.4 billion. The amendment was defeated 46–52.
- *Drilling in ANWR:* Sen. Maria Cantwell offered an amendment to remove language from the budget resolution that assumes $ 2.5 billion in revenue from leasing drilling rights in the Artic National Wildlife Refuge (ANWR) in Alaska. The amendment fell two votes short and was defeated 49–51. Opening ANWR has been a goal of conservatives in Congress since the late 1980s and by including it in the budget resolution, Senate GOP leadership was able to get around the roadblock of the filibuster that had previously kept ANWR protected.
- *Establishing true PAYGO:* Sen. Feingold's (D-WI) PAYGO amendment, cosponsored by Sen. Lincoln Chafee (R-RI), would have helped restore balanced deficit reduction measures to the budget process. While his amendment in committee was defeated on a straight party-line vote, four Republican senators had previously supported this amendment in last year's budget resolution floor debate. That year a similar amendment was adopted by one vote and ultimately derailed the conference negotiation with the House. Despite the support of those same four Republicans and the added vote of Sen. George Voinovich (R-OH), the amendment failed 50–50.
- *Protecting Medicaid:* Sens. Gordon Smith (R-OR) and Jeff Bingaman (D-NM) offered an amendment to strike the reconciliation instructions in the budget to cut $ 15 billion from the Medicaid program. The skepticism of many senators about cuts to the Medicaid program and a very harsh backlash from governors around the nation has helped reduce support for these cuts. The amendment passed 52–48 and will be a major point of conflict with the House during the conference.
- *Fighting Irresponsible Tax Cuts:* Sen. Thomas Carper offered an amendment to remove from the budget reconciliation instructions that would protect $ 70 billion in unpaid-for tax cuts. Carper described this amendment during the debate as the last opportunity to impose restraint on unfettered, unpaid-for tax cuts that would add to deficits. The Senate once again refused to choose the fiscally responsible path as the amendment failed 49–50.
- *Increasing Size of Tax Cuts:* Sen. Jim Bunning (R-KY) offered an amendment to nearly double the target level for tax cuts in the budget resolution from $ 70.2 billion to $ 134 billion. This amendment would repeal the 1993 tax on Social Security benefits that was dedicated to the Medicare program. It passed 55-45. But a budget resolution cannot require the tax writing committee to include specific tax cuts in their reconciliation bill. Thus, the Bunning amendment has the effect of simply increasing the size of tax cuts that can be offered under reconciliation.
- *Boosting Education Spending:* Sen. Ted Kennedy (D-MA) surprised many late into the voting on amendments to the budget resolution when he secured support for an amendment to increase education funding by $ 5.4 billion. The amendment passed 51–49. The practical effect of the amendment is to raise the overall discretionary spending ceiling from $ 843 billion to $ 848.4 billion. It is thought this increase will create tensions with the House during the conference committee.

Potential Impediments to House/Senate Compromise

The House and Senate passed very different budget outlines and it is expected to be very challenging to resolve those differences during the conference committee. In particular, both the Smith Medicaid amendment and Kennedy amendment to boost education spending could be particularly troublesome in brokering a compromise between the House and the Senate. Adoption of the Smith amendment slashes mandatory savings almost in half in the Senate version to $ 17 billion. The House has included $ 69 billion in savings in their bill. The increase in the discretionary spending cap due to Kennedy's amendment may be difficult to accept for some conservative House Republicans who already expressed displeasure with the House level of spending.

Earlier this month, a small group of conservative House Republicans threatened to withhold support for the budget resolution unless it cut spending more and included mechanisms to enforce those cuts. Lead by Rep. Mike Pence (R-IN), approximately 18–20 members of the Republican Study Committee threatened to vote against the House budget resolution because they felt GOP leaders were not serious enough about enforcing spending cuts. A last-minute compromise between House GOP leaders and the revolting Republicans was reached, but balancing the concerns of those Republicans and senators seeking a smaller level of cuts will be very difficult for the conference committee.

It could cause a situation similar to last year where a budget resolution was never passed when the two chambers were unable to come to a compromise on PAYGO rules. If no compromise is reached and Congress is unable to pass a budget

resolution this year, it will be a major setback for Republicans in Congress and President Bush as entitlement cuts and tax cuts could not be protected by fast-track reconciliation rules.

Despite this possibility, the Senate budget resolution is irresponsible. It sets the stage for increased deficits and misleading budgeting for years to come. The Senate has failed to include proven deficit reduction rules that would greatly increase the effectiveness of the budget in reducing deficits in a responsible way. Instead, it opted for rules that would allow permanent extension of tax cuts causing serious damage to the budget and the fiscal stability of the United States.

Despite Compromise, House Conservatives Could Threaten Budget Resolution

On March 17, the House debated and passed the fiscal year 2006 (FY06) budget resolution by a vote of 218–214, one week after the House Budget Committee voted along party lines to report out the resolution. House GOP leaders managed a last-minute compromise with a number of conservative Republican members of the House Study Committee who threatened to vote against the bill in the weeks leading up to the vote — but final passage will still be very difficult.

The revolt began with a small group of Republican Study Committee leaders, including Reps. Mike Pence (R-IN), Jeff Flake (R-AZ), and Jeb Hensarling (R-TX), and then grew to include over 40 Republican representatives, including some members of the "Tuesday Group" — a caucus of about 30 centrist House members.

While House GOP leaders were eventually able to broker a compromise and pass the budget resolution, the fact that there was dissention from so many conservatives over the budget will likely make negotiations with the Senate during a conference committee particularly precarious. Pence and other conservatives wanted to include a provision requiring a separate floor vote to waive a budget point of order on any appropriations bill that exceeded its spending cap. This would be similar to the procedures used by the Senate. Although GOP leaders argued this provision would tie the leadership's hands and empower House Democrats, they eventually relented when it became clear they did not have sufficient votes to pass the budget resolution.

During the day-long debate on the resolution March 17, the House soundly rejected three alternative budget amendments offered by Budget Committee ranking minority member John Spratt (D-SC), (165-264), Rep. Mel Watt (D-NC), (134-292) and Rep. Jeb Hensarling (R-TX), (102-320).

The version eventually passed by the House sets discretionary spending levels at $ 843 billion for FY06, assumes $ 68.6 billion in cuts to mandatory programs and $ 106 billion in unpaid-for tax cuts. The resolution would cut discretionary programs by at least $ 216 billion over the next five years. This decrease in non-defense discretionary funding will hurt a diverse array of programs, and will impact veteran's benefits, environmental protection, and education spending particularly hard.

President Bush and Republicans in Congress have stated these cuts to mandatory and discretionary spending are necessary to reduce the deficit and have repeatedly claimed this budget would cut the deficit in half by 2009. But under the House's plan, deficits will actually increase by approximately $ 126 billion over the next five years, and then explode after 2010.

Effect of the House Chairman's Budget Plan on Projected Deficits *

Cumulative deficit increases (+) or reductions (-) relative to CBO's March baseline projection, over the five-year period 2006-2010, in billions of dollars

Cost of tax cuts.	+105.7
Reductions in entitlement benefits.	-67.0
Expenditure reductions from $216 billion reduction in funding (appropriations) for domestic discretionary programs.	-144.0
Expenditure increases for defense and international discretionary programs.	+201.9
Increased interest costs resulting from the policies above.	+30.3
TOTAL increase in projected deficits.	+126.9

* Source: Center on Budget and Policy Priorities

The main reason for this increase in deficits is due to the fact that the House chose to permanently extend the 2001 and 2003 tax cuts at a cost of $ 106 billion over five years in the budget resolution. Of that amount, $ 45 billion was set aside under reconciliation instructions – a fast-tracked budget process that protects certain bills affecting mandatory funding levels or tax policies by limiting debate and prohibiting filibusters. Yet after the five-year window, from 2011 to 2015, the cost of those tax cuts explodes to over $ 1 trillion, according to the Congressional Budget Office.

Notably, the House budget resolution proposes cuts in entitlement spending ($ 68.8 billion) which are much deeper than

those proposed by the president in his budget ($ 51 billion). Although it does not designate specific cuts to programs, the resolution does include instructions to the Energy and Commerce Committee to make reductions of $ 20 billion over five years to programs under the committee's jurisdiction. These cuts are expected to come mostly out of the Medicaid program.

It is the Medicaid cuts in particular that could create problems during negotiations with the Senate. On March 17, the Senate passed an amendment offered by Sen. Gordon Smith (R-OR) on a vote of 52–48 striking reconciliation instructions that would force cuts in Medicaid. Smith's amendment reduces the amount of mandatory savings in the Senate budget resolution from $ 32 billion down to $ 17 billion. The House resolution proposes cutting $ 69 billion from mandatory spending — a difference of nearly $ 50 billion.

With GOP leaders in the House having sufficient trouble holding on to support from conservatives (12 Republicans voted against the House resolution because it did not make deep enough spending cuts), it will be very difficult to give much ground to the Senate in compromising on levels to cut mandatory and discretionary spending. House Budget Chairman Jim Nussle (R-IA) believes it will be "very challenging" to find an acceptable compromise between the House and Senate and many members of Congress are predicting it will take involvement from the White House to pass a budget resolution this year.

If no agreement is reached in conference, spending levels for FY06 will be set at levels equivalent to FY05, and more importantly, it would remove the possibility of progressing reconciliation bills for spending cuts or tax cuts that would be protected from filibuster in the Senate — a major blow to the Republican agenda.

Bush Pushes Private Accounts as Public Support Drops

President Bush has recently increased his efforts to sell the American public on his plan to privatize Social Security despite continuing evidence that more and more Americans are rejecting his proposals. Yet even while launching a "60 cities in 60 days" tour, the president and other administration officials have been carefully maneuvering to allow whatever reform is adopted to be seen as a victory for the administration.

Congress began a two-week recess on March 18 and many senators and representatives will devote much of their time in their respective districts to the Social Security issue. Republicans in particular will continue to gauge their constituents' feelings on reform options. The president's failure to generate overwhelming support for his proposal among the general public has increasingly made congressional Republicans nervous.

Recent polls have shown very weak public support for the president's approach to Social Security reform. An ABC News/ *Washington Post* poll conducted from March 10–13 revealed that only 35 percent of respondents approve of the way Bush is handling Social Security, and 55 percent stated they "oppose" Bush's proposals on Social Security. Forty-nine percent of the respondents in opposition were between the ages of 18 and 29 a key demographic group from which Bush hopes to receive tremendous support. (See more poll details.)

Another poll conducted by *USA Today*/CNN/Gallup from Feb. 25–27 found similar results; only about 35 percent of respondents approved of the way Bush is handling Social Security. This poll shows a marked drop in support from one conducted three weeks earlier which had found that 43 percent of respondents — eight percent more — had supported the president on Social Security then. Bush continues to stress that with increased education on social security and the problems the program faces in the future, the public will come around to his plan. Reiterating his standard Social Security tagline, Bush recently said, "I've got a lot of educating to do to convince people not only that we have a problem, but we need to come together and come up with a solution to Social Security."

Democratic congressional leaders are all too happy to have the president continue his public education campaign. House Minority Whip Steny Hoyer told reporters, "The president says he wants to educate the public. God Bless him — keep at it. The education is working. [The public] is learning more about his proposal and liking it less."

Many believe that by raising the Social Security debate this year, Bush has provided a spark to Democrats by galvanizing the Party and outside groups opposing the president's plans around a central issue. It may be helping the public perception of the Democratic party and hurting the president's ability to succeed in other areas of his agenda.

In addition to polls of Americans from around the country, the president has suffered two recent setbacks in his attempt to sway members of Congress. On March 3, 41 Democratic senators and Sen. James Jeffords (I-VT) sent a letter to Bush saying his plan for private accounts was "unacceptable" and called on him to "unambiguously announce that you reject privatized accounts funded with Social Security dollars." In addition, two Democratic senators who did not sign the letter have publicly stated they will not support private accounts under the scenarios outlined by the White House.

The second setback came last week during the floor debate of the Senate budget resolution. Sen. Bill Nelson (D-FL) amassed 50 supporters, including five Republicans, for his amendment expressing the sense of the Senate that any Social Security reform should avoid benefit cuts and massive increases in debt — two main consequences of the president's proposal.

Both Democrats and Republicans will be holding numerous town-hall style events over the next two weeks where much of the focus will be on Social Security. Democrats will be continuing to emphasize that responsible, bipartisan Social Security

reform must be devoid of private accounts that would divert a portion of payroll taxes.

Republicans also appear at odds with the president's agenda. Some have created their own reform plans and others support bits and pieces of proposed reforms including raising payroll taxes or the retirement age. Some support Bush's proposal. But it is clear the GOP does not have a consistent point of view on reforming Social Security.

Even though Bush continues to be optimistic about the possibility of his reform plan succeeding, he has gradually shifted his rhetoric on private accounts. On March 16, he twice stated during a news conference that private accounts would not solve the fiscal problems of Social Security. This statement could signal a new flexibility on the president's part and a realization that his proposals may be running out of political steam.

Bush, Congress Hide True Costs of Permanent Tax Cuts

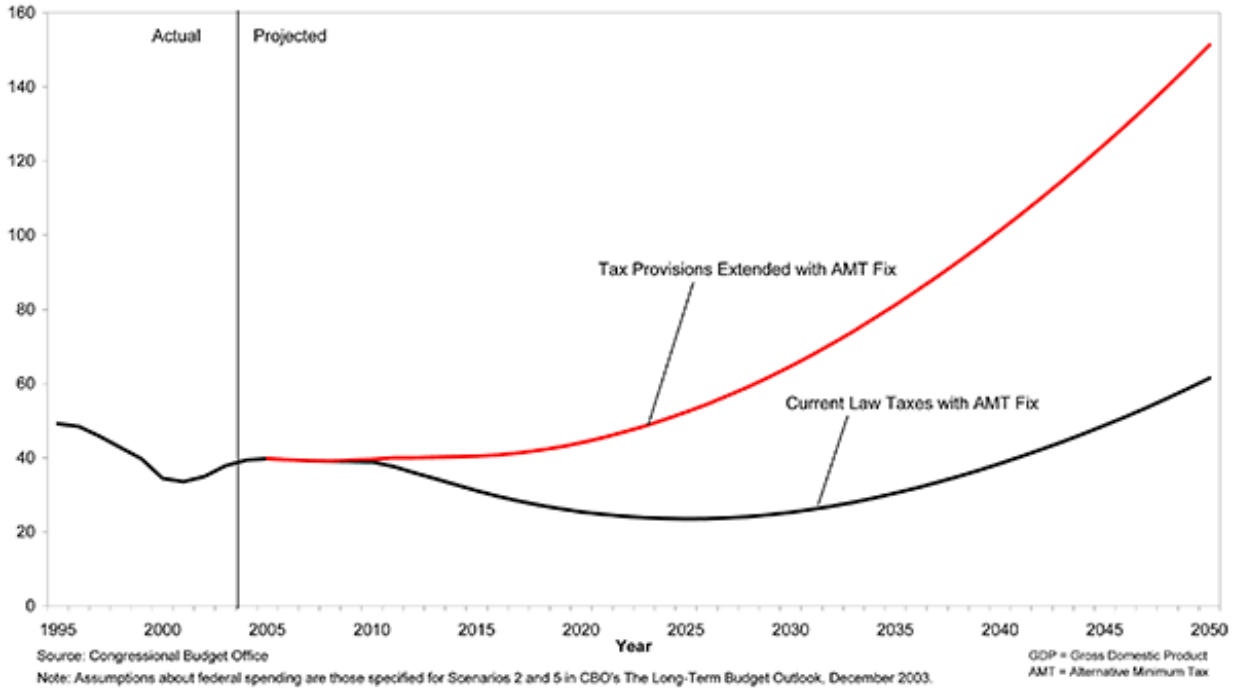
Both the president and Congress have advanced five-year budget plans in 2005. These plans help to mask the true cost of policies to extend the president's first-term tax cuts permanently, which explode after the current proposed budget window ends in 2010.

House Minority Leader Pelosi (D-CA) requested the Congressional Budget Office (CBO) simulate the effects of two different tax policies. The first simulation assumes current tax policy would remain unchanged — or that tax cuts passed in 2001 and 2003 would expire as scheduled. Under this simulation, the tax cuts include all provisions except the Alternative Minimum Tax (AMT). In the simulation, the AMT would have all of its parameters indexed to inflation and the exemption currently in place would be extended permanently. The second simulation assumes all of the tax cuts from 2001 and 2003 would be extended permanently, including the AMT.

CBO found that under the first tax policy, revenues would slowly climb back to 20 percent of gross domestic product by 2015 from their historically low levels of approximately 16 percent of GDP today. Under the second simulation, it would take until 2050 for revenues to grow to 20 percent of GDP. The difference between these two options, according to the CBO, is an enormous amount of debt for the American people.

The graph below compares the two different tax policies and their effect on the debt held by the public as a percentage of GDP. If current tax policies are made permanent without revenue offsets, as the president and many Republicans in Congress would like, the debt held by the public will explode to well more than 100 percent of the total economic output of the country before 2050. What is interesting about the CBO graph is there is hardly any noticeable difference between the two policies before 2010. This is exactly the reason why both the president and Republican leadership in Congress have planned a five-year budget for this year. By doing so, they are intentionally misleading the American public about the true cost of their current tax and budget policies.

Federal Debt Held By Public Under Certain Long-Term Budget Scenarios
(Percentage of GDP)



Freedom of Information Legislation Moving Forward

The week of March 14 was an important week for open government, with the introduction of two pieces of legislation to improve the Freedom of Information Act (FOIA) — the Faster FOIA Act, and the Restore FOIA Act. Additionally, the Senate Judiciary Committee held the first oversight hearing on FOIA since 1992.

Faster FOIA Act Moves to the Full Senate

Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) introduced the bipartisan Faster FOIA Act March 10, the second FOIA bill which the two senators have introduced in the 109th Congress. On Feb 16, Cornyn and Leahy also introduced the OPEN Government Act, which seeks to strengthen citizens' ability to use FOIA.

The Faster FOIA Act (S. 589) aims to alleviate the long delays which many FOIA requesters experience at federal agencies. The FOIA itself requires agencies to respond to requests within 20 working days, but often requesters receive answers weeks, months, or even years after that deadline. As the National Security Archive reported in 2003, the oldest pending FOIA requests date back to the late 1980s. Significant backlogs are common among agencies, and the problem is not getting better.

The legislation would create a 16-member Commission on Freedom of Information Act Processing Delays, which would study how to lessen delays in the FOIA process. Identified members of Congress would appoint 12 of the Commission members, and at least four of these members must have experience using FOIA in the nonprofit, academic, or media sectors. The Attorney General, the Director of the Office of Management and Budget, the Archivist of the United States, and the Comptroller General would designate the four remaining members.

The Judiciary Committee reported out the Faster FOIA bill on a unanimous voice vote March 17, and the bill now moves to the full Senate for a vote.

Support for FOIA Legislation Voiced at Hearing

Witnesses appearing before the Senate Judiciary Committee's subcommittee on Terrorism, Technology and Homeland Security March 15 expressed tremendous support for the OPEN Government Act, and argued that reforms to the Freedom of Information Act are necessary to ensure an open, accountable and democratic government.

As previously reported in the *Watcher*, the OPEN Government Act (S. 394) would improve the current FOIA legislation so that the public could recoup legal costs of suing for improperly withheld records, extend fee waivers to nonprofits and bloggers, require tracking of requests, and mandate reporting on the Critical Infrastructure Information program. (The full analysis is available at OpenTheGovernment.org .) The measure is an important bipartisan effort, and has picked up Sens. Johnny Isakson (R-GA) and Lamar Alexander (R-TN) as cosponsors.

In his opening statement for the hearing, Cornyn stressed the need for bipartisan support and action on open government legislation, stating, "This is a bipartisan problem – and we need a bipartisan solution to solve it. As Senator Leahy and I have both noted on occasion, openness in government is not a Republican or a Democratic issue. Any party in power is always reluctant to share information, out of an understandable – albeit ultimately unpersuasive – fear of arming its enemies and critics."

Meredith Fuchs from the National Security Archive testified that the current FOIA backlogs are a problem. "A key part of empowering the public, however, is giving them the information they need in sufficient time for them to act." She noted, "The OPEN Government Act of 2005 will go far to motivate agencies to process FOIA request and to process in a timely fashion."

Thomas M. Susman from Ropes & Gray LLP told the subcommittee that "establishing an Office of Government Information Services (OGIS), is the most important provision in the bill. The OGIS will assist the public resolving disputes with agencies as an alternative to litigation, review and audit agency compliance activities, and make recommendations and reports on FOIA administration."

Lisa Graves from the American Civil Liberties Union noted the importance of the bill's assistance in establishing a strong presumption in favor of disclosure, and clarifying existing interpretations of FOIA's nine exemptions.

The hearing coincided with Sunshine Week, a project of newspapers, journalists and media outlets to promote open government that ran last week. As the first FOIA hearing held by the Senate since 1992, the session was a strong indication of the rising importance of freedom of information issues. Full testimony from the panel is available through the Judiciary Committee.

Restore Freedom of Information Act Reintroduced

Leahy also chose Sunshine Week as the opportunity to reintroduce the Restore FOIA bill, which would amend the Homeland Security Act of 2002 to limit "Critical Infrastructure Information" provisions in the law that create new exemptions from FOIA. The bill, S. 622, is cosponsored by Sens. Carl Levin (D-MI), Russ Feingold (D-WI), and Joseph

Lieberman (D-CT), but lacks the bipartisan support of the two other FOIA bills.

The language of the bill is identical to the previous version of the legislation introduced during the 108th Congress. It would fix the language in the Homeland Security Act that provides a FOIA exemption for "critical infrastructure information" (CII). Companies that voluntarily submit information about critical infrastructure vulnerabilities receive an overly broad and vague exemption from disclosure. It allows for corporate immunity and prevents the government from acting on the information to protect the public. Since its inception, the CII program has resulted in 29 submissions of information of which the details are unknown. OMB Watch unearthed the CII numbers as a result of a summons submitted in the District of Columbia Circuit Court to force the Department of Homeland Security to respond to a FOIA request for the information.

The provisions in the Restore FOIA Act derive from compromise language that Leahy, Levin and Sen. Robert Bennett (R-UT) developed during 107th Congress in 2002 when the Homeland Security Act was under discussion in the Governmental Affairs Committee. Although the Senate passed the compromise language, more restrictive House language made it into the final version of the bill. Among other provisions, the language would:

- remove restrictions on the government's ability to use the information to fix vulnerabilities;
- eliminate criminal penalties for whistleblowers that reveal CII when reporting waste, fraud and abuse; and
- narrow the FOIA exemption to specific records submitted as CII.

Differences between the Homeland Security Act and the Restore FOIA Act are detailed further in this chart.

Healthy Californians Biomonitoring Program

On Feb. 18, California State Sens. Deborah Ortiz (D-Sacramento) and Don Perata (D-East Bay) introduced SB 600, a biomonitoring bill entitled "The Healthy Californians Biomonitoring Program." The bill proposes establishing a statewide program to measure toxic chemical exposure levels of state residents by testing blood, tissue, and urine samples from Californian volunteers. If passed, California will be the first state in the nation to track and report on the presence of toxic chemicals in its citizens.

Recent research showing industrial chemicals in our bodies provide a strong argument for biomonitoring programs. For example, a January 2003 study by the Mount Sinai School of Medicine, Environmental Working Group, and Commonweal tested nine adult Americans and found an average of 91 industrial compounds, pollutants, and other chemicals in their blood and urine.

The U.S. Centers for Disease Control manages a limited biomonitoring study that annually analyzes blood samples from individuals nationwide to project the toxic exposure for the population as a whole. These studies consistently find carcinogens, neurotoxins, reproductive toxins, developmental toxins, and endocrine disruptors in people, although in most cases below traditional levels of toxicological concern.

The Healthy Californians Biomonitoring Program will provide the public and lawmakers with more information on toxic exposure in the state. The bill requires the state to make the testing results publicly available, while keeping volunteers' identities confidential. This new approach to tracking chemicals could reinforce the need for increased chemical testing and improved regulatory protections.

Ortiz, one of the bill's sponsors, explained that "the bill will enable us to know just which toxic pollutants are in our bodies and move accordingly to improve everyone's health and safety."

While the chemicals tracked in biomonitoring studies are known toxins, current U.S. chemical regulations do not require companies to test the safety of tens of thousands of other synthetic chemicals on the market. The public and decision-makers lack basic health and environmental information on the majority of chemicals in everyday items such as fabrics, toys, paints, and other consumer products. In fact, the U.S. Environmental Protection Agency lacks basic safety data on more than 85 percent of chemicals in commerce.

The current bill is a narrowed version of a more aggressive biomonitoring bill of the same name that was introduced in California last year, which failed to move. Several public interest groups have already stepped forward to support the latest version of the bill including the Breast Cancer Fund, Commonweal, National Environmental Trust and the California Interfaith Partnership for Children's Health and the Environment.

The bill has been referred to the Senate Health Committee, for which Ortiz is the chairman. The committee has scheduled a short hearing on the biomonitoring bill for March 30. The committee only allows two witness in support of the bill and two in opposition of the bill to testify for three minutes a piece.

Sunshine Week Shines Surrounded by Secrecy's Shadows

Government secrecy has become so pervasive and overgrown that journalists last week used newspapers, TV, and radio to focus public attention on the problem and promote open government as part of the first-ever national Sunshine Week.

Over 1,000 stories ran in newspapers across this country, including a week-long series of editorials and op-eds in the USA Today, a wide-ranging series of stories in the Atlanta Journal-Constitution on how local citizens use open records laws to make their communities safer and many stories on how the public uses public records to become involved in local land-use and other community decisions. The Journal-Constitution ran stories analyzing local governments' response to an average citizen's request for public records, the federal government's problems putting safety ahead of parochial secrecy and political cartoons on the topic. And a poll commissioned for Sunshine Week found that 7 of 10 Americans are concerned about excessive government secrecy and support for open government is as high today as it was before 9/11. In addition, the University of Florida donated print advertising created to highlight how laws that guarantee the public ability to examine government records help citizens make informed decisions.

This effort represents a coup of sorts, as freedom-of-information issues rarely find their way into news stories. Ironically, journalists rely heavily on freedom-of-information laws, such as the federal Freedom of Information Act (FOIA), to prepare significant news stories, but rarely do they focus stories on the laws themselves. That, however, is changing. Following up on a speech last year in which Associated Press (AP) President Tom Curley decried excessive government secrecy today, the AP has directed its organization to cover freedom-of-information issues much more. In addition, Cox News has created a news beat on secrecy, and other newspapers are paying greater attention.

Whether this will translate into greater public pressure to strengthen open government remains to be seen. The major national daily newspapers did not participate in Sunshine Week this year, although the success of the effort this year makes it harder for them to ignore the story next year.

For its part, the nation's most diverse open government coalition, OpenTheGovernment.org (co-chaired by OMB Watch), is running banner advertising which can be seen at the National Journal website.

Data Quality Act Debated

Data Quality Act experts, featuring OMB Watch's Sean Moulton, will be debating the faults and merits of the Data Quality Act (DQA) at a March 30 discussion hosted by the Environmental Law Institute (ELI). Among the law's aspects to be discussed are judicial review, and its implications for environmental protections.

Since its passage as an unnoticed rider on an appropriations bill, which underwent no debate in Congress, the DQA has been criticized as an unnecessary bureaucratic requirement that unfairly allows industry to delay, dilute and derail environmental, health and safety protections. The act, and its subsequent guidelines developed by OMB and federal agencies, allow affected parties to challenge and recommend corrections of information disseminated by agencies. However, the DQA itself does not specifically address whether challengers may take their complaints to court if unsatisfied by an agency's response after all administrative avenues are exhausted.

Public interest groups view the prospect of judicial review as another method to delay agencies from enacting important environmental protections. Groups also contend that court review would allow companies to shift responsibility for complex scientific information from the most experienced officials to less knowledgeable and less experienced courts in hopes of getting a more favorable decision. Industry advocates claim that judicial review is an essential tool in achieving transparency and accountability on DQA.

A recent court ruling found the DQA is not judicially reviewable, and prompted ELI to hold this discussion. The U.S. Chamber of Commerce and the Salt Institute sued the National Heart, Lung, and Blood Institute under the DQA regarding agency statements that recommend lower sodium consumption will improve the health of all individuals. The U.S. District Court for the Eastern District of Virginia dismissed the case, ruling both that the DQA is not judicially reviewable and that the plaintiffs lacked legal standing to file the lawsuit.

OMB Watch's Senior Information Policy Analyst, Sean Moulton, will participate in the initial panel debate. The other panel members will be Jim Tozzi of Center for Regulatory Effectiveness and Rena Steinzor of the Center for Progressive Regulation and the University of Maryland's Environmental Law Clinic. Tozzi, a former OMB official, is often credited with writing the DQA.

ELI's announcement has more details including RSVP details and how to listen to the discussion by phone.

527 Reform Legislation Heats Up in the Senate

On March 8, the Senate Rules Committee held a hearing to consider the 527 Reform Act of 2005 (S. 271). The hearing revealed the complexity of issues raised by the proposed extension of federal election regulations to independent political committees (527s). The testimony and questions from senators highlighted the likely consequences of passing the bill in its current form, including migration of soft money to 501(c) groups, who, unlike 527s, do not disclose donors. Rules Committee Chairman Trent Lott (R-MS), a co-sponsor of the bill, said he wants to move the bill quickly, in order to prevent a "train wreck" in the 2006 federal election. Meanwhile, an alternative 527 bill was introduced in the House of Representatives.

Witnesses include the bill's sponsors, Sens. John McCain (R-AZ) and Russell Feingold (D-WI), the chairman of the Federal Election Commission (FEC), Scott Thomas, and FEC Commissioner David Mason. Expert testimony was provided by attorney Bob Bauer, Fran Hill, a consultant to the Campaign Legal Center, and Michael Malbin, executive director of the Campaign Finance Institute.

McCain testified he believes federal campaign finance contribution limits should apply to any group that engages in partisan activities for the purpose of influencing a federal election. FEC Chairman Thomas echoed this view, saying, "I have philosophically always taken the approach that these kinds of groups, given their tax status [527], should be reporting to us and regulated as federal political committees ...." Michael Malbin of the Campaign Finance Institute said there is no rationale for not having contribution limits.

Other witnesses discussed constitutional concerns. The potential for corruption by independent groups, which do not have direct ties to candidates or parties, was questioned. Commissioner Mason said, "And so, when you are regulating organizations that only make independent efforts, that are not controlled by parties, not controlled by candidates, not coordinating, there is a live and open constitutional question as to whether or not that can be limited."

Malbin told the committee he thinks 527 contributions will grow rapidly in the future if not regulated, since only one out of eight soft money donors from past elections gave to 527s in 2004, noting "there is a lot of room for growth in this sector." The result would be that donors to large 527s would be able to get attention from officeholders and parties after the fact, creating a potential "nexus of reciprocity" resulting from officeholders being aware of major donors to 527 groups that support them.

The bill's sponsors responded to criticism that the bill will have negative impacts on 501(c) organizations, saying their intention is to limit the impact to 527s. Feingold indicated a willingness to make changes to clarify the bill's language if necessary. Most of the discussion during the hearing focused on where money that now goes to 527s will go if federal contribution limits are imposed. The primary focus was on groups exempt under 501(c) of the tax code, including charities, social welfare organizations, unions and trade associations. One witness predicted contribution limits on 527s would steer donations toward the political parties because of negative gift tax consequences of large donations to 501(c)(4) groups.

Sen. Mark Dayton (D-MN) warned about the "law of unintended consequences," saying, "to take this action as it applies to 527s and leave the door open for these activities to go elsewhere where we can identify in advance where that is likely to be, the 501(c)(4) or 501(c)(6), if that is the case it seems to me to be missing half the boat ... So I would urge, Mr. Chairman, that we look at this comprehensively and look at the functions being performed that this bill addresses and rather than limit it to one particular category of the IRS or whatever that we apply it to any organization that is engaged in those purposes and apply that standard to them."

Although Lott wants to move quickly, it is likely the committee will be considering a series of amendments addressing issues raised at the hearing. Given Feingold's repeated statements that the sponsors are open to changes, and the complexity of the issues, it may be impossible to move the bill by June.

Two days after the hearing, on March 10, Reps. Mike Pence (R-IN) and Albert Wynn (D-MD) introduced the 527 Fairness Act, which takes the opposite approach of S. 271 by expanding the ability of both 527s and political parties to operate. A news release from Pence's office said the bill would:

- Repeal part of the "electioneering communications" provision in the Bipartisan Campaign Reform Act of 2002 so that all types of nonprofits, not just 527s, can use individual contributions to pay for broadcasts that refer to federal candidates within 60 days of a federal election or 30 days of a primary;
- Remove the aggregate contribution limits that BCRA imposed on individuals giving to influence federal elections, thus allowing them to avoid having to choose among donations to parties, candidates and federally regulated independent groups;
- Remove limits on how much the parties can spend in coordination with candidates;
- Allow state and local parties to spend soft money on voter registration drives for elections, including those involving federal candidates; and
- Eliminate the taxes nonprofit 501(c) organizations pay on communications that do not include "express advocacy" for the election or defeat of federal candidates.

IRS Asking Justice Department to Step in on NAACP Audit

The Internal Revenue Service is referring to the Justice Department the refusal by the National Association for the Advancement of Colored People to respond to an IRS summons, according to BNA. The case arose in the fall of 2004 when the IRS notified the NAACP it was conducting an examination into whether a speech by Chairman Julian Bond that criticized policies of President Bush constituted prohibited campaign intervention. NAACP has requested the examination be closed, and the IRS has told the NAACP it has made no conclusions about whether illegal partisan activity took place, and that the group is unlikely to lose its tax-exempt status.

In January, the NAACP challenged the legality of an IRS summons and refused to respond, claiming the IRS investigation into alleged prohibited political activities during the 2004 election was politically motivated and procedurally deficient. On Feb. 23, IRS attorneys wrote attorneys for the NAACP saying, "There is ample judicial and statutory authority to support the Service's action in commencing the examination into the NAACP's activities, as well as supporting enforcement of the summons at issue." They set a March 11 meeting for the NAACP to respond to the summons, and suggested a March 2 meeting to discuss the case.

In a March 10 letter to the IRS, Marcus Owens, of Caplan and Drysdale, attorney for the NAACP, stated the NAACP's continuing objection to the summons and declined to attend the March 11 meeting. The letter asked the IRS to close the case immediately and issue a letter stating the NAACP continues to be exempt under 501(c)(3) of the tax code.

The discussion at the March 2 meeting, held by conference call, apparently clarified the IRS's view of the likely outcome of the case. Owens' letter summarized the call saying, "Specifically, during our conference call, you assured us that the Service has not drawn any conclusion regarding whether Mr. Bond's speech at the annual convention in July 2004 constituted prohibited political campaign intervention. Moreover, we understand that the Service is not taking the position that 'flagrant' political expenditures were made, and ... that the NAACP's exempt status likely is not at risk."

Referral of the case to the Justice Department escalates the situation.

Court Says AmeriCorps Teachers in Catholic Schools Allowed to Receive Subsidies

On March 8, the U.S. Court of Appeals for the District of Columbia ruled that taxpayer funds can subsidize volunteer instructors that teach in religious schools. The ruling reversed a July 2, 2004 decision by U.S. District Judge Gladys Kessler, who admonished the government for failing to monitor programs sufficiently to ensure compliance with the law and called the line between secular and religious activities "completely blurred." The American Jewish Congress (AJC) may appeal the decision.

AJC filed the suit in 2002, alleging that AmeriCorps, a network of national service programs that engage more than 50,000 Americans a year, had crossed the line between church and state by funding participants who taught religion as well as secular subjects in Catholic schools. The suit, *American Jewish Congress v. Corporation for National & Community Service*, claimed that three AmeriCorps grantees were using program funds to teach Christian values. The three grantees were the University of Notre Dame's Alliance for Catholic Education, known as ACE; the Catholic Network of Volunteer Service; and the Nebraska Volunteer Service Commission.

AmeriCorps receives federal funds that are given as grants to nonprofits, such as Habitat for Humanity, the American Red Cross, and Boys and Girls Clubs, as well as many small faith-based and community organizations. These groups help recruit, place and supervise participants.

Participants in the AmeriCorps Education Awards Program are required to perform 1,700 hours of community service at a pre-approved school in exchange for $ 4,725 in financial aid for college tuition and student loan repayment.

The March 8, 3-0 ruling by the U.S. Court of Appeals for the District of Columbia reverses a lower courts decision. In the lower court decision, Kessler noted that "direct government involvement with religion crosses the vague but palpable line between permissible and impermissible government action under the First Amendment." The appeals court disagreed. Judge A. Raymond Randolph, writing for the appeals court, observed that the participants, who are chosen without regard to religion, teach religion as a matter of personal choice, and are not compensated for doing so.

Randolph commented, "The AmeriCorps program creates no incentives for participants to teach religion. They may only count the time they spend in non-religious activities towards their service hours requirement. And if they teach religious subjects, they are prohibited from wearing the AmeriCorps logo when doing so." This means that if AmeriCorps participants did spend time teaching religion or participating in religious activities, such as attending Mass, that time cannot count towards the 1,700 hours of community service that qualifies for financial aid.

Randolph further compared the AmeriCorps arrangement to school voucher programs in which the government provides an education subsidy to individuals, who in turn decide whether to use the vouchers at a religious or secular institution. However, in voucher programs, any school that wants to participate is eligible to do so. There is no government selection of schools. In this case, the government is pre-approving the schools which will receive government funds.

The government made the case that religious and secular services were always kept separate. However, the AJC alleged that there is very little monitoring of the program, and any current monitoring is a result of the lawsuit. According to Marc

Stern, AJC's assistant executive director, "We have documents from a Freedom of Information Act request, which shows AmeriCorps people listed as teaching religion and nothing else." While Stern did not indicate whether AJC would appeal the decision, this may be a factor in deciding whether to appeal. AJC has 90 days to appeal the decision.

According to AJC, the government is relying on the children knowing the distinction between the AmeriCorps volunteer teaching a secular class and the same individual not representing AmeriCorps as a religious teacher. The Supreme Court, in *Grand Rapids City Board of Education v. Ball*, held that children cannot be expected to know that in one period teachers are religious school employees, and in another period they are secular employees who are not able to teach religion.

OMB Rejects Findings on Propaganda Using Federal Funds

On Feb. 17, David M. Walker, the Government Accountability Office's (GAO) Comptroller General, issued a letter to all federal agencies reminding them that Congress banned use of federal funds for propaganda, and during 2004 "several prepackaged news stories produced and distributed by certain government agencies violated this prohibition." On March 11, the Bush administration rejected these findings by sending a contradictory memo to agency heads.

The memo from GAO notes cases of broadcast news videos distributed by the Department of Health and Human Services and the office of National Drug Control Policy that failed to inform viewers that the government was the source of the information. The letter notes that the law has prohibited use of federal funds for propaganda since 1951. It says, "Statutory limits on the domestic dissemination of U.S. government-produced news reports reflect concern that allowing government to produce domestic news broadcasts would infringe upon the freedom of the press and constitute (or at least give the appearance of) an attempt to control public opinion."

Joshua Bolton, director of the Office of Management and Budget (OMB), sent the March 11 letter to agencies informing them that the Department of Justice's Office of Legal Counsel "has interpreted this same appropriations law in a manner contrary to the view of GAO," and agencies are bound to follow that legal opinion. Bolton said the GAO, as an arm of legislative branch, cannot give the agencies, part of the executive branch, legally binding advice. A supporting memorandum from Steven Bradbury, principal deputy assistant attorney general, says purely informational material that does not include advocacy, does not need to disclose government as the source.

Walker responded in a *Washington Post* article by noting, "This is more than a legal issue. It's also an ethical issue ...." He went on to say, "Congress may need to provide additional guidance with regard to their intent in this overall area." Sens. Frank Lautenberg (D-NJ) and Edward Kennedy (D-MA) said they will propose an appropriations rider to provide clarification, stating, "Whether in the form of a payment to an actual journalist, or through the creation of a fake one, it is wrong to deceive the public with the creation of phony news stories."

Bush Budget Fails to Support Non-itemizer Deduction

The Bush Administration has indicated that it will no longer push for passage of the non-itemizer deduction, even as a new study shows the provision would increase charitable giving. However, the non-itemizer provision remains a centerpiece of legislation introduced by Sen. Rick Santorum (R-PA) and a priority for Republican leadership.

For the first time since taking office, Bush's FY 2006 budget does not contain the non-itemizer deduction, and he has dropped it from his speeches promoting the Faith-Based Initiative. The non-itemizer was once the centerpiece of his "Compassionate Conservative Agenda." It is not clear why the president has dropped the tax break, but the provision may be too costly now that earlier Bush tax cuts have passed and the president is calling for additional tax cuts.

The Family and Community Protection Act of 2005 (formerly the CARE Act) re-introduced on Jan. 24, contains the non-itemizer provision. Under this provision, single tax filers who currently use the standard deduction could deduct contributions over $ 250 up to a ceiling of $ 500. Joint filers would be able to deduct contributions over $ 500 up to a ceiling of $ 1,000. This is much less costly than the president's original plan, which allowed many more non-itemizers to deduct charitable contributions.

According to a new United Way of America study, the proposed non-itemizer deduction could result in an additional $ 217 million — a 26.7 percent increase in giving to United Way through non-itemizers — in annual revenue to United Way. This represents an 8.4% increase in overall individual giving to United Way or a 6.0% increase in total giving to United Way.

The vast majority of their donors give less than $ 500, and 94 percent of United Way donors give an average gift of $ 101. Consequently, 41 percent of these donors do not itemize their contributions, and therefore receive no tax break from their donation. The proposed non-itemizer may spur charitable giving, and increase the likelihood of new donors, United Way claims. According to a 2002 Congressional Budget Office (CBO) paper, extending deductibility to people claiming the standard deduction should increase contributions.

However, the amount of the increase is debatable. The CBO study found that allowing nonitemizers to claim a deduction for charitable contributions would be unlikely to increase the level of giving by more than 4 percent. The findings are similar to an earlier Congressional Research Service report earlier this year.

The Senate's Family and Community Protection Act of 2005 requires the Treasury Department to study the effect of the non-itemizer deduction on increased charitable giving, and of taxpayer compliance (by comparing compliance by itemizers and non-itemizers). The Treasury would be required to report to the Senate Finance and House Ways and Means committees by Dec. 31, 2006.

Although the Family and Community Protection Act of 2005 still remains without a House counterpart, Republican leadership has indicated that the legislation is a priority in the 109th Congress. The legislation passed both houses of Congress last year but failed to be brought to conference.

Study Shows Business Outspends Nonprofits 5-1 on Issue Ads

The Annenberg Public Policy Center has published new research examining legislative issue ads, focusing on the Washington, DC, area during the 108th Congress. They found "Corporate interests outspent citizen/cause interests by more than five to one," and that advertising on many issues was one-sided. Not surprisingly, the side that spent more was more likely to have a favorable outcome.

Studies of sham issue ads in elections have dominated discussion of issue advocacy over the past few years. The Annenberg study is a welcome change of focus to look at the impact of "pure" issue ads in the legislative arena. The study focused on both print and broadcast media in the Washington, DC, area, and looked at air time or newspaper space cost only, excluding the cost of production.

During the 108th Congress, $ 404.4 million was spent on 67,653 print and television ads by 914 groups. The top 1 percent of groups spent 57 percent of the overall total. Corporate interests spent 79 percent of the total, while spending by citizen groups represented only 14 percent. The remainder was spent by groups with "ambiguous or potentially misleading names."

The top three issues were the economy, health care and energy/environment, which accounted for 59 percent of overall spending. Half of the issues identified had ads on only one side of the issue. Where spending did occur on both sides it was uneven, with only 6 percent having competitive spending levels.

Appeals Court Rejects Right of Action in Open Government Law

A federal appeals court has ruled that the Federal Advisory Committee Act (FACA), an open government statute designed to guarantee that committees advising federal agencies are not biased, does not create a private right of action.

The Ninth Circuit Court of Appeals ruled on Mar. 17 in *Manshardt v. Federal Judicial Qualifications Committee*, No. 03-55683, that an attorney seeking appointment as a U.S. Attorney could not use FACA to challenge the validity of a committee created by California Sens. Diane Feinstein (D) and Barbara Boxer (D) to recommend names to the White House for federal district court nominees and U.S. Attorneys in California. The court held that FACA, which has no express right of action, creates no implied right of action for private enforcement in the courts.

Legal Context

There are essentially three ways that private citizens can litigate to enforce statutory law.

1. The easiest case is an *express right of action*, meaning that the statute explicitly allows for litigation. The Freedom of Information Act, for example, has an express right of action for citizens to sue when their FOIA requests are unjustly denied. *See* 5 U.S.C. § 552(a)(4)(B).

2. An *implied right of action* exists when a statute does not explicitly create a right of action but its text is written in such a way that a private right of action is implied by the statutory language. For example, Title IX (which promotes gender equity in higher education) does not expressly create a right of action, but it does include a command that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" — language that indicates Congress's intent to confer a specific benefit, private enforcement of which would not frustrate the purposes of the statute. *See Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

3. The third way is to use some other statutory right of action as a vehicle to enforce unrelated commands. The two most used are 42 U.S.C. § 1983, which is a vehicle for vindicating rights arising under federal constitutional or statutory law, and the Administrative Procedure Act, which confers a right to force federal agencies to conduct the regulatory process appropriately.

Although many courts, including the Supreme Court, have assumed that FACA creates an implied right of action to challenge advisory committees that are biased or conduct their proceedings in secret, *see, e.g.*, *Public Citizen v. United States*, 491 U.S. 440 (1989), the Supreme Court has not directly addressed the question. When faced with FACA most recently in the dispute over its applicability to the National Energy Policy Development Group, commonly called the Cheney Energy Task Force, the Court concentrated on separation-of-powers questions and the proper scope of discovery

against the vice president, again assuming without addressing the private enforceability of FACA. *See Cheney v. United States Dist. Ct.*, 124 S. Ct. 2576 (2004).

The *Manshardt* court attacked the private enforceability of FACA based on two recent Supreme Court decisions addressing the enforceability of other statutes. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court held that the disparate impact regulations promulgated under section 601 of Title VI of the Civil Rights Act of 1964 did not create private rights of action. Section 601 of Title VI confers an implied right of action to vindicate intentional discrimination, and section 602 authorizes agencies to promulgate regulations enforcing the antidiscrimination principles of the act. The regulations have barred not only intentional discrimination but also practices with an adverse effect on minorities. The Supreme Court had ruled in a 1974 case that the statute likewise proscribed disparate impact discrimination, but many subsequent decisions narrowed the ruling until section 601 itself appeared to bar only intentional discrimination. The *Sandoval* plaintiffs attempted to pursue a disparate impact claim on the basis of the regulations enforcing section 601, but the Supreme Court destroyed that argument by noting that the regulations did not merely interpret the statute but instead regulated conduct beyond the specific terms of the statute.

The more recent case of *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), harmonized the standards for enforcing statutory rights through section 1983 with the standards for finding implied rights of action. The *Gonzaga* Court rejected a claim that a university violated a student's right to privacy of educational records under the Buckley Amendment, arguing that the statutory clause cited was not written with the sort of "right-creating language" that unambiguously created rights that could be vindicated under section 1983. The opinion, authored by Chief Justice Rehnquist, was not a model of jurisprudential scholarship; it seemed, in fact, to rely on an antiquated Langdellian ontology of legal entities, in this case "rights." (Moreover, it is not clear why there should be any merger of the doctrine of implied rights of action and the standards for finding statutory rights that can be pursued under section 1983; the combination of an implied right of action and the *Ex parte Young* doctrine would make section 1983 superfluous as a vehicle for litigating rights arising under federal statutory law.) Because the statute was written only to mandate that "[n]o funds shall be made available" to any school with a "policy or practice" of failing to guard student privacy, the Court held that the language was "two steps removed from the interests of individual students and parents" and thus failed to phrase the claimed right in terms of an individual entitlement, in contrast with the Title IX guarantee of gender equity in higher education that the Court approved in *Cannon*.

About This Decision

The *Manshardt* decision follows the trend of narrowing rights from *Sandoval* and *Gonzaga* without carefully applying the rules of those precedents, much less other Supreme Court precedents such as *Cannon*. The opinion is only a cursory eight-page treatment that does not even bother to quote specific language from FACA or identify the basis for applying *Sandoval*.

The *Manshardt* court is in fact so hostile to private enforcement of FACA that it appears to be on the verge of holding that there can never be any implied rights of action at all:

> *Sandoval* requires more than mere congressional intent to create a private right; a private right of enforcement exists only if the statute also reveals congressional intent to create a private remedy. Our examination of the text and structure of FACA reveals nothing to indicate Congress intended a private remedy. FACA contains no express private right of action, nor does it include any provision for judicial review. Indeed, FACA is entirely silent as to the appropriate remedy for violation of its requirements.

Slip op. at 3339. Here, the court teeters on the brink of rejecting any possibility of implied rights of action. The very basis of implied-right-of-action jurisprudence is that there are some statutes, such as higher education's Title IX and Title VI of the Civil Rights Act, that grant rights but do not expressly provide for judicial review and citizen suits. If Congress explicitly creates judicial review provisions, it thereby creates express rights of action; there would be no need at all for any doctrine of *implied* rights of action. The *Gonzaga* Court did not require express rights of action across the board; it only held that both rights enforced by section 1983 and claims pursued under implied rights of action are created by statutory language drafted in terms that, like Title IX, create a clear mandate to protect specific beneficiaries. Moreover, there can be no *right* without a *remedy*; they are one and the same. Congress can use the language of rights in a merely precatory manner, as with the patient's "bill of rights" in the Developmentally Disabled Assistance and Bill of Rights Act, *see Pennhurst State Sch. & Hosp. v. Haldeman*, 451 U.S. 1 (1981), but this inquiry — in which there is no real right, and thus no remedy at law — is completely separate from the doctrine of implied rights of action.

The *Manshardt* court also completely ignores the binding precedent of *Cannon* by arguing that FACA cannot create a private right of action because "FACA . . . appears to contemplate that monitoring and oversight of compliance with its requirements will be achieved, not through private enforcement, but rather by governmental regulation." Slip op. at 3339. Again, the opinion verges on rejecting implied rights of action altogether, because statutes from which rights of action may be implied invariably provide for some sort of regulatory oversight but do not specifically mention private suits. Moreover, the Supreme Court in *Cannon* found an implied right of action in Title IX even though the statute directly contemplated only regulation.

In many ways, the decision directly steps into not only the narrowing doctrines of private enforcement of statutes but also the larger questions of litigating against the government in the era of the modern administrative state. Similar questions splintered the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), in which Justices Kennedy, Souter, and O'Connor disagreed in various ways with Justices Scalia and Thomas and Chief Justice Rehnquist over standing to pursue claims of procedural insufficiency in the regulatory process. Private enforcement of FACA, as with private enforcement of any statute, converts the citizenry into private attorneys general, holding the government itself accountable to its own laws. In times of one-party dominance, private enforcement is particularly important if the law will mean anything. As this administration has shown time and again with its biased advisory panels, private enforcement of

FACA is more important now than ever.

The decision — authored by a Reagan appointee and joined by a Reagan and a Clinton appointee — could still be subject to a petition for rehearing and, ultimately, Supreme Court review.

GOP Threatens to Turn 'Unfunded Mandates' Into Roadblock

Republican lawmakers in both the House and the Senate have fired the first shots in an upcoming battle to turn the Unfunded Mandates Reform Act into an insurmountable obstacle to legislation designed to address unmet needs.

House Republicans fired first by launching a series of hearings, and Senate Republicans followed up with an under-the-radar section in the budget resolution that uses UMRA to make it harder to pass laws such as an increase in minimum wage or improvements in civil rights protections.

The Government Accountability Office is expected to produce this month a report on its study of UMRA, requested by Sen. George Voinovich (R-OH) on the occasion of UMRA's 10-year anniversary. The request for the study has been interpreted as a warning sign that Republicans and state and local government groups will seek to realize the original vision of UMRA: a "no money, no mandate" policy making important federal safeguards contingent on federal funding. Fortunately, the final version of UMRA ultimately only called for cost estimates and a parliamentary procedure in Congress that is rarely used.

Two recent events in Congress confirm that suspicion: a hearing held March 8 before the House Government Reform Committee, and the passage on March 17 of the Senate budget resolution, which contains a measure that could be step one in the GOP's UMRA reform plan.

Government Reform Hearing

The focus of the hearing was on developing recommendations for "strengthening" UMRA. Suggestions included lowering the cost threshold for mandates that fall under UMRA, conducting more research on the burden of federal mandates on state and local governments, and expanding UMRA to include categories now considered exempt, such as civil rights mandates and entitlements.

The state and local governments who spoke at the hearing, all of whom were picked by Republican representatives, repeatedly demanded expansions of UMRA. They all reiterated the same point, that the states consider any federal mandate from the government that is not fully funded to be an unfunded mandate, whether or not it falls in the scope of UMRA.

Most laws that include mandates fall below the UMRA threshold. State officials brought up a broad array of mandates exempt from UMRA which they believed were nonetheless mandates and unduly burdensome:

- The Help America Vote Act
- Clean Air Act
- Clean Water Act
- Medicaid
- Individuals with Disabilities Education Act

In preparation for the hearing, Government Reform Committee Chairman Tom Davis (R-VA) asked the National Association of Counties to provide a "snapshot survey" of the local costs of unfunded mandates. The survey found that for 30 counties, the three-year total cost of an average of six mandates is $ 1.5 billion dollars. If all federal mandates were included, NACo claims nationwide the cost of unfunded mandates could reach in the hundreds of billions. The survey was not scientific; it did not discount the costs of programs that counties would undertake even without the federal mandates, nor did the survey identify the benefits counties receive by linking to the federal government.

Senate Budget Resolution

Senate Republicans launched their own initiative to inflate UMRA, not with a hearing but with a sneak legislative attack. The Senate budget resolution contained a section, reportedly inserted at the behest of Sen. Lamar Alexander (R-TN), that turns a relatively harmless procedural mechanism into an insurmountable roadblock. UMRA currently requires the Congressional Budget Office to estimate the costs to the states of complying with new legal mandates. For mandates on the states that reach a cost threshold ($ 50 million in the original text, which has been indexed for inflation to $ 62 million), a member of Congress can raise a point of order. The point of order can be waived by a simple majority vote under current law, but the Alexander provision of the Senate budget resolution increases the required vote count in the Senate to a 60-vote supermajority, which would make it much more difficult to pass mandates in the Senate. The section was never subjected to debate, and many senators on both sides of the aisle were too distracted by the draconian budget cuts for important programs that they did not focus attention on the UMRA provision.

If there is a final budget resolution that contains this provision, the measure will effectively alter Senate rules with this supermajority requirement through 2010. Immediately at stake would be new environmental protections, which typically

either rely on state and local governments as partners in enforcement activities or call on the local governments to modify their own behaviors (as polluters, as managers of water systems, sewers, and waste facilities, etc.). Also at stake would be any improvements for workers, such as a real increase in the minimum wage, if the costs to states for applying new safeguards for their own employees reached $ 62 million or more. (One of the few statutes ultimately enacted that met the UMRA threshold was, in fact, the minimum wage increase from the mid-1990s.)

One-Two Punch

The hearing and the Senate budget resolution suggest a two-pronged approach for transforming UMRA into the envisioned "no money, no mandate" reform: erect a supermajority roadblock for UMRA with its current, limited definition, to be followed up with an expansion of UMRA's coverage so that it reaches the entitlement and other Spending Clause programs that establish important public protections.

Alexander's role in particular suggests a larger scheme at play. Alexander has also introduced legislation that would give extraordinary support to state and local governments by forcing sunset periods onto consent decrees and settlement agreements that resolve civil rights cases. Alexander has apparently set about building up a states' rights portfolio that would sacrifice public protections, whether won in the courts or in the halls of Congress, as a sop to the states.

His focus on federalism suggests that there may be another, even larger two-pronged plan. This administration's budgets have been devastating to the states, and the administration has also shown no compunctions against trampling over the states' power to protect their citizens with safeguards that are stronger than the federal government's anemic safeguards. This year's budget is shaping up to be just as harmful to the states. A high-profile effort to strengthen UMRA could be a ploy to rehabilitate the GOP's weakened states' rights credentials while continuing to starve the states of needed resources, with the added benefit of weakening public protections and thus benefiting the GOP's sponsors in corporate America.

White House Endorses Parts of Anti-Regulatory Hit List

The White House released the final version of its 2004-05 anti-regulatory hit list, with a report detailing 76 out of 189 items from the industry-nominated list that received the endorsement of the White House and agencies.

The report, released March 9, is the culmination of a process that began last spring when the White House Office of Information and Regulatory Affairs invited suggestions from the public for a hit list of regulations to be weakened or eliminated in order to benefit the manufacturing sector. OIRA followed up in December 2004 by summarizing the suggestions from the public, appending its own suggestions for anti-regulatory changes, and instructed the agencies to submit their reactions to OIRA.

The new report lists suggestions from the public that are endorsed by the agencies and OIRA as the administration's regulatory "reform" priorities. It reiterates each of the endorsed hit list items with a brief summary of the protections targeted for weakening and a series of deadlines for agency follow-up actions.

The White House declined, however, to release any similar follow-up for the two other lists in the December report: the White House's own hit list, and the White House's fast-track list of items in early stages of the rulemaking process which OIRA pushed the agencies to propel to the top of their agendas.

The vast majority of the items endorsed for the final hit list would weaken environmental protections. These hit-listed protections include weakening standards for safely disposing of PCBs and reducing the amount of information that companies are required to report under the Toxics Release Inventory, a database that enables communities to know what toxic substances have been released in their own backyards.

Workers' rights under the Family and Medical Leave Act were also attacked from multiple fronts. Other protections on the final hit list include weakening of safeguards against Listeria in ready-to-eat meat products and a rule change to increase the maximum number of hours that truck drivers can be forced to work without rest and without overtime pay.

In order to secure some positive spin for an otherwise completely anti-regulatory hit list, the White House included two items suggested by Public Citizen. One, regarding protections against passengers being ejected from vehicles in accidents, is already underway in part at the National Highway Traffic Safety Administration. The other, addressing vehicle compatibility problems (or the problem posed by aggressively designed SUVs when they collide with smaller passenger cars with different bumper heights, etc.), was not even given a deadline for real action — only a promise from NHTSA to report to the White House on the status of research in the area.

House Committee Approves Government Performance Rating Bill

The House Government Reform Committee favorably reported out of committee the Program Assessment and Results Act, a bill that would have the effect of codifying the administration's controversial tool for rating program effectiveness. The bill is expected to move to the House floor this spring.

The committee voted 18-14 to send the bill to the House floor during a March 10 markup session, after rejecting every amendment offered by committee Democrats.

The bill requires the Office of Management and Budget, working with federal agencies, to assess programs at least every five years. OMB is to develop the criteria for assessing programs as well as which programs to evaluate. At least three months before completing the assessments, OMB is to post to its website and send to Congress a list of the programs to be reviewed and the criteria to be used in assessing the program. OMB is to establish a process for allowing the public to comment on the OMB list and criteria. The results of the performance review are to be published in the president's annual budget submission to Congress.

The bill largely codifies a controversial procedure OMB started a few years ago, called the Program Assessment Rating Tool (PART). The PART has proven to be a controversial tool. The OMB budget "desk officers" have too much authority and too little experience to properly evaluate a program, and they often judge programs based on criteria that directly contravene the statutory basis for the programs. For example, OMB budget officers criticized the Occupational Safety and Health Administration for failing to use cost-benefit analysis when crafting regulatory protections for workers' health and safety, even though the Occupational Safety and Health Act and Supreme Court precedent have forbidden the use of cost-benefit analysis. Block grants in particular have suffered from PART, even though the fundamental idea of block granting — sending funds to the states with no strings attached — is incompatible with PART's use of uniform federal criteria for assessing the effectiveness of the states' use of block grants.

In a lengthy statement at the markup, Rep. Henry Waxman (D-CA) described the failures of the White House's PART, which purports to measure agency effectiveness but often uses measures that directly contradict the law governing an agency's work. Waxman offered an amendment to address the gap between measures and purpose and to harmonize the Program Assessment and Results Act (PARA) with the Government Performance and Results Act, the underlying statute that the PARA will amend, by having agencies rather than OMB determine the measures to be used for assessing performance. The amendment failed, 15 to 16.

Rep. Edolphus Towns (D-NY) offered an amendment to have OMB put public notice in the Federal Register, rather than just a posting on the OMB website, soliciting comment on the programs to be measured and the criteria to be used. The Towns amendment would also have inserted a sunset clause, so that later there can be an assessment of the results from the results measurement initiative itself. The Towns amendment failed on a 15-17 vote, but Rep. Todd Platts (R-PA), the sponsor of the bill, indicated his willingness to work on a sunset clause, possibly for a manager's amendment when the bill goes to the House floor.

The bill is expected to go to a floor vote in the first week of April.

See more information on the PARA and PART.

Bill for DHS to Waive All Law Rides on Iraq War Supplemental

The House of Representatives voted to attach H.R. 418, the REAL ID Act — a bill that includes a dangerous provision empowering the Secretary of Homeland Security to waive all law when securing the nation's borders — as a rider to the Iraq war supplemental, which passed the House and now is moving to the Senate.

The House decided on March 16 to attach H.R. 418 as a rider by voice vote and subsequently voted out the must-pass supplemental with a vote of 388-43.

Some in the Senate had expressed skepticism about the REAL ID Act, which includes not only the controversial proposal empowering DHS to waive all law but also establishes nationwide driver's license standards and makes asylum claims more difficult to pursue. By attaching the REAL ID Act to this must-pass spending bill, the House Republicans are attempting to avoid a heated debate on the REAL ID Act itself.

The REAL ID Act already passed the House on Feb. 10, in a 261-161 vote.

Get more information about the significant threat to the public interest from the REAL ID Act, and take action.

Is Cost-Benefit Analysis Needed?

Cost-benefit analysis (CBA) is often touted by the administration and conservative think tanks as a neutral tool in policymaking, but recent studies by legal scholars show that CBA is inherently political and may even advise against what we consider our most immutable public protections.

CBA is a policymaking tool by which the costs of imposing a regulation are weighed against the potential benefits of reducing the harm. For example, in the case of pollution regulation, cost is generally construed as the cost of implementing technology to comply with regulation. These costs are more easily quantifiable than other factors, although some evidence exists that costs are often inflated.

The benefits of a regulation require two separate analyses: an assessment of the risk posed by the harm in question as well as a monetization of the potential benefits. Both factors prove to be difficult to calculate; many benefits resist monetization, and risk assessments can be hindered either through incomplete datasets or a large degree of indeterminable factors. In order to estimate the health effects of a regulation, for example, agencies generally must rely on laboratory data on other species or on human experience with much higher levels of exposure. To extrapolate from this data the potential benefits of a regulation requires a large degree of guesswork, and agencies often come up with wide ranging numbers on the potential health benefits.

Proponents of CBA believe that regulators are irrational in their policy decisions and that CBA is necessary in developing regulations because it acts as a neutral, rational tool, evenly weighing all considerations, but many public interest advocates have argued that cost-benefit analysis unfairly targets environmental, health, safety and other social regulation and will always favor lowering costs rather than creating more stringent protections. If cost-benefit analysis really is a neutral tool, then it must be equally capable of siding with more stringent regulation as it does weaker regulation. Three recent articles examine the neutrality of CBA both in theory and in practice and analyze the arguments of CBA's greatest proponents. Lisa Heinzerling, Frank Ackerman and Rachel Massey's "Applying Cost Benefit Analysis to Past Decisions: Was Environmental Protection Ever a Good Idea?," David Driesen's "Is Cost-Benefit Analysis Neutral?," and Richard Parker's "Is Government Regulation Irrational? A Reply to Morall and Hahn" all find that neither in theory nor in application is cost-benefit analysis a neutral tool. Moreover, this "simplistic scorecard" fails to embody our national regulatory priorities.

The "Simplistic Scorecard"

Advocates of cost-benefit analysis claim that regulation is irrational and that cost-benefit analysis is necessary to rein in costly, burdensome measures. Yet as Richard Parker points out in "Is Cost Benefit Analysis Irrational?," the arguments of CBA's biggest supporters are themselves irrational, relying on fuzzy numbers and misguided assumptions to prove the case for this weak policy tool.

Some of the most compelling cases for the necessity of cost-benefit analysis is necessary in policy-making have come from John Morrall, an economist at the Office of Management and Budget (OMB), and Robert Hahn, of AEI-Brookings Joint Center for Regulatory Studies. Both have argued, after applying cost-benefit analysis to the totality of government regulation, that the costs of federal regulation far outweigh the benefits, proving, they assert, that government regulation is fundamentally irrational and overzealous. They point to what appear to be egregious examples of overly-cautious regulations, citing cases in which regulation costs up to $72 billion for every life saved. Yet, as Parker easily points out, their arguments are based on shaky assumptions that fail to take into account the full range of considerations necessary for an agency to make a rational policy decision.

Irreproducible Results

For all the lip service on hard numbers, both Morrall and Hahn's data contained many undisclosed assumptions, and calculations and methodologies were often not revealed. Parker observes that Hahn's gaps are particularly noteworthy: "Hahn's original studies do not so much as *list* the rules in his database." Hahn also offers no documentation of his calculations. After soliciting Hahn, Parker finally received Hahn's data, but his Excel spreadsheet only gave a tally of costs and benefits and his final calculation, without indicating any of the assumptions Hahn made to arrive at numbers he used.

Even without being able to reproduce the results, it is clear that Morrall and Hahn make assumptions that are biased against regulation. In fact, as Parker points out, the data set that Morrall chooses to work with focuses on some of the most extreme cases of costly regulation. Morrall chooses an arbitrary set of 16 highly costly regulations in order to make his claim that regulators make irrational choices. Most of these regulations have to do with just a handful of pollutants, which have, as Parker notes, "generated some of the most heated and heavily litigated controversies in all of environmental law." Clearly Morrall's case examples do not represent a neutral dataset.

Shaky Numbers

Morrall and Hahn also choose to use a very high discount rate, which discounts the future costs and benefits of a regulation using a constant exponential rate. Though many scholars disagree on the practice of discounting benefits at all, there is little consensus on a discount rate higher than three percent. Yet Morrall chooses a discount rate of 10 percent and Hahn uses discount rates at three, five and seven percent. Such rates can dramatically reduce the potential benefit of a regulation. As Parker points out, "discounting a constant stream of benefits over 25 years will reduce its present value by 30 percent at a three percent discount rate, or 50 percent at a seven percent discount rate."

Morall and Hahn also assume a latency period in the calculation of certain benefits. For risks such as cancer which may not manifest themselves for a number of years, they add in a latency period to their calculation of benefits, which greatly reduces the present benefit of avoiding a future harm. As Parker points out, if one assumes "that the stream of cancer risk reduction benefits (which dominate many of the health and environmental rule benefit numbers) only begins to accrue after a latency period of some 15-35 years, the impact of discounting can become truly enormous. Discounting a constant dollar annual benefit accruing over 25 years -- beginning 35 years out -- will effectively shrink benefits by a factor of four at a three percent discount rate, and a factor of twenty at . . . [a] seven percent rate." This assumption distorts their calculation of benefits, and once again, the distortion favors the regulated community.

Morrall also arbitrarily chooses to reduce benefits. Rather than relying on agency calculations to calculate benefits, Morrall chooses numbers from published studies that significantly reduce benefits. When agencies present a range of possible benefits, he arbitrarily chooses from the bottom of the range, without explaining his methodology. Morrall adjusts agency numbers on health effects, risk assessments, and effectiveness, in each case swaying the balance in favor of less regulation. That Morrall should do independent analysis of factors is not the issue, but Morrall's choice to manipulate the equation without an explanation or rationale leaves observers guessing as to how the numbers were attained.

Ignoring Unquantified or Non-Life-Saving Benefits

Morrall and Hahn also choose to ignore benefits that agencies did not quantify or benefits that can be quantified but not given a dollar value. For instance, Morrall gives OSHA's formaldehyde rule a price tag of $72 billion per life saved. Though the formaldehyde rule may only save one life a year, it has many other significant benefits that are not included in Morrall's calculation, including, according to Parker, "reduced or avoided burning eyes or noses, sore or burning throats, asthma attacks, chronic bronchitis, allergic reactions, dermatitis and skin sensitization. OSHA notes that over 500,000 American workers are regularly exposed to formaldehyde at concentrations that have been found to cause one or more of these illnesses or discomforts." By focusing only on lives saved, Morrall's calculations miss the harm that a regulation is actually averting, one that resists his simplistic calculations.

Hahn ascribes "a zero value to any benefit which the government's regulatory impact assessment did not quantify and monetize." Hahn also ignores benefits that were quantified and monetized by agencies "but which failed to fit within his Procrustean categories of recognized benefit -- reduction of cancer, heart disease, lead poisoning and accidents, and benefits of reduction a handful of air pollutants -- even as he insisted that he was using the government's numbers." Hahn wrongly asserts that leaving out these "non-standard" benefits will have no impact on his calculations.

Parker gives the example of EPA's *Great Lakes Water Quality Guidance*, which reduces "the discharge of persistent, toxic and bio-accumulative pollutants" in the Great Lakes. The compounds reduced by the regulation are associated with very serious risks, including "neurotoxicity, fetotoxicity, endocrine disruption, hematological impairment, reproductive dysfunction, sensory and equilibrium disturbances," among others. Despite the clear benefits of such regulation, this measure fails cost-benefit analysis because a great many of its benefits cannot be monetized. These non-cancerous risks are difficult to quantify:

> Unlike cancer, which is widely assumed to have a linear dose-response down to a zero exposure level (making the calculation of population risk from aggregate exposure data relatively simple), non-cancer endpoints generally have non-linear risk thresholds -- which means that, to calculate a population risk from any given discharge, you have to know not only the exposure of the population to the pollutants issuing from the sources targeted by the particular regulation. You also have to know the cumulative exposure to individuals in the population to these and other interacting pollutants from other sources.

According to Hahn, the only benefit from this regulation is the reduction of fatal cancer to sports anglers and Native American subsistence fisherman.

Looking just at the cost-benefit analysis, the cost of the regulation would seem to far outweigh the benefit. An entirely different picture emerges with knowledge of the health effects of the hazards the guidance addresses. Fortunately, EPA's consideration of the rule was not limited to quantified benefits.

Accounting for such benefits requires a more in-depth dynamic analysis, which cost-benefit analysis cannot capture, leading Parker to refer to the methodologies of CBA's greatest proponents as a "simplistic scorecard."

Not a Neutral Tool

Even given the many uncertainties of cost-benefit analysis, proponents still argue that it acts as a neutral tool. Yet, as David Driesen points out, "if CBA only makes regulation weaker, and never strengthens overly weak regulation, it cannot improve priority setting and consistency in the manner its proponents envision." Driesen lays to rest the argument of CBA's neutrality by dissecting the use of CBA both in practice and theory. Driesen finds that both in OMB's implementation of cost-benefit analysis as well as in the assumptions of the cost-benefit analysis itself, CBA is weighted in favor of the regulated industry and against health, safety and environmental protections.

In Practice

Driesen focuses his look at cost-benefit analysis on the role of the Office of Information and Regulatory Affairs (OIRA), a subagency of the Office of Management and Budget (OMB) charged with carrying out cost-benefit analysis through Executive Order 12866. According to a Government Accountability Office (GAO) report, between June of 2001 and July of

2002, OMB "significantly affected 25" environmental, health and safety regulations. If cost-benefit analysis is in practice a neutral tool, then OIRA's use of cost-benefit analysis to review regulation would sometimes strengthen protections and sometimes weaken them. Driesen found that none of OIRA's changes made environmental, health or safety protections more stringent, and 24 out of the 25 weakened protections. Even if cost-benefit analysis is theoretically a neutral tool, in the hands of this administration, it is certainly biased against strong public protections.

Further evidence comes from the records of agencies whose statutes demand the use of cost-benefit analysis. Courts have interpreted the Toxic Substance Control Act (TSCA) and the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) to require CBA. The result has been a nearly complete halt on regulatory activity. According to Driesen, "EPA has not banned a single chemical under TSCA since the United States Court of appeals for the Fifth Circuit interpreted the statute as requiring that bans pass a cost-benefit test." FIFRA has suffered much the same fate. Cost-benefit analysis has put the breaks on needed regulatory protections.

For other statutes governing EPA, including the Clean Air Act and the Resources Conservation and Recovery Act, cost-benefit analysis is used in an "indeterminate position," meaning it is considered when forming regulation but does not serve as a specified criterion. For regulations promulgated under these statutes, OMB historically has applied cost-benefit analysis unevenly, providing lengthy analysis when considering a new regulation but quickly approving deregulatory actions. Driesen uses the example of regulating particulate matter. For example, notes Driesen, "OMB engaged in protracted argument with EPA in the early 1980s over whether EPA must prepare a CBA of a possible tightening of the particulate matter National Ambient Air Quality Standard (NAAQS), but it cleared EPA revocation of the hydrocarbon NAAQS in two days with no formal CBA."

Though overall OMB generally approves agency rules without changes, when it comes to reviewing EPA rules, "OMB often significantly changes between 45 and 75 percent of the rules it reviews." This high rate shows that at least in practice OMB is hostile to environmental protections.

Driesen was able to find only one case in which cost-benefit analysis has led to increased regulation: the reduction of lead in gasoline. Yet in this case, the initial implementation of the regulation occurred without performing cost-benefit analysis. CBA was only applied after the regulation had been in place for a number of years in order to support a more stringent standard. Heinzerling, Ackerman and Massey have shown that if the regulation had not already been in place, the empirical evidence would not have existed to justify the further reduction of lead in gasoline.

In Theory

Cost-benefit analysis can be used in a variety of ways by regulators. Some agencies use cost-benefit analysis in what Driesen calls an "indeterminate position," meaning the agency considers cost-benefit analysis but does not use it as a criterion for determining regulation. OMB tends to see cost-benefit analysis as a criterion under which the cost of implementing a regulation can never exceed the benefit. Another option is that cost-benefit analysis is used as a criterion under which cost must always equal benefit, optimizing the efficiency of the regulation. Driesen shows that in each case cost-benefit is not a neutral tool and will always favor the regulated community over the health, safety and environmental regulation.

The Indeterminate Position: Even if cost-benefit analysis is used in an "indeterminate position," weighed equally with other factors, it will still side against health, safety and the environment because cost-benefit analysis requires a greater expenditure of government resources and a delay in implementation of important safeguards. In lieu of cost-benefit analysis, agencies consider regulation based on the technological feasibility of implementing a regulation (including the cost of compliance) or an assessment of the health effects of a given regulation. "Cost benefit analysis combines all of the difficulties of both of these forms of analysis and creates an additional complication -- it requires quantification of benefits and, whenever possible, the assignment of monetary values to each of those benefits," according to Driesen. This method is inevitably more costly and time-consuming for the agencies and delays enforcement.

Delays in regulation are not neutral. They always benefit the regulated community at the expense of those exposed to the potential hazards by increasing the amount of time individuals are exposed to adverse conditions while giving the regulated community a longer time to avoid compliance.

Benefit Cannot Outweigh Cost Criterion: The criterion that benefit cannot outweigh cost is inherently not neutral. It acts as a one way ratchet, reducing benefit when cost is too great but never demanding an increase in benefit. If cost falls below benefit, this criterion does not require a more stringent standard. But if cost outweighs benefit, agencies are forced to weaken their standard in order to comply. This understanding of cost benefit is the one generally employed by OMB and the administration.

Cost Equals Benefit Criterion: If benefits are optimized, then cost should always equal benefit. CBA using this criterion at first appears to be a neutral tool. It could create either more or less stringent standards based on the conditions. If marginal benefit is greater than the marginal cost, it could recommend a stronger, more costly standard. Optimizing benefit may be more neutral overall, but it is not neutral compared to existing standards. Key provisions in the law require full protection of public health and the environment. In comparison to this standard, optimizing benefit is not a neutral theory because, as Driesen says, "this optimization criterion would not make regulation that already fully protects human health and the environment more stringent, but it would sometimes make it less stringent, so it is certainly not neutral relative to a health-protective standard." By maximizing efficiency, this criterion could also allow for the death of innocent life or allow harms to go unabated.

Even if cost-benefit analysis is applied in a relatively neutral way, the underlying methodology involves value choices that cannot be neutral. A cost-benefit analysis requires choosing a specific methodology to make a comparison of benefits and

costs. Various ways of calculating benefits can have drastically different outcomes. Driesen explains:

> For example, CBA proponents do not ask how much would a company have to pay a victim to get her to agree to die of cancer contracted after breathing in the fumes from the company's plant. Rather, they asked how much would a potential victim pay the factory to avoid a risk.

Choosing a methodology involves a non-neutral value judgment.

Misguiding Our Priorities

Not only is cost-benefit analysis not a neutral tool; it fundamentally gets it wrong. Cost-benefit analysis does not reflect our country's values or priorities. In Lisa Heinzerling, Frank Ackerman and Rachel Massey's "Applying Cost-Benefit Analysis to Past Decisions," the authors seek to show what would have happened if cost-benefit analysis had been applied to some of our landmark environmental, health and safety regulations. They investigate the reduction of lead in gasoline, a proposed regulation that would have allowed damming in the Grand Canyon, and the regulation of occupational exposure to vinyl chloride, a chemical used in producing PVC. Their conclusion in all three cases is that cost-benefit analysis would have gotten it wrong, depriving us of some of our most important health, safety and environmental protections.

One of their most compelling examples is that of vinyl chloride. Vinyl chloride is a known carcinogen used in making PVC. In 1974, when OSHA sought to regulate vinyl chloride, substantial evidence existed about vinyl chlorides toxicity, especially its link to a rare form of liver cancer, angiosarcoma, but little was known about the safe level of exposure or how many people had or would die from angiosarcoma through exposure to vinyl chloride. At the time, there were only 13 known cases of angiosarcoma deaths from vinyl chloride exposure. Still, OSHA chose to take a precautionary stance and sought to lower the allowable exposure level to 1 ppm over an eight-hour period. Previously, industry had allowed an exposure of 200 ppm "time-weighted average" with a maximum allowable exposure of 500 ppm.

By statute, OSHA does not perform cost-benefit analysis and must enforce the most stringent policy "feasible." If it had performed CBA when determining an exposure limit for vinyl chloride with the knowledge they had at the time, CBA would have come out in favor of a much weaker standard. Heinzerling, Ackerman and Massey compared the estimated cost of compliance at the time with the estimated value of a life in order to determine how many lives OSHA would have needed to think it was saving to justify the stringent regulatory standard.

The estimated cost of compliance with the vinyl chloride regulation was thought to be $200 million per year (though it turned out to be much lower). For the value of a human life, the authors used two different estimates: the highest value of a life based on current EPA calculations and adjusted for inflation, which is $1.81 million, and the much lower value of life used in the Ford Pinto controversy that occurred around the same time, which estimated the value of a statistical life at $200,000.

Only 7,000 people worked in the vinyl chloride industry. Using the Ford Pinto value, one out of every seven workers would have had to die to justify the stringent standard. That means that 1,000 people would have had to die each year to justify OSHA's regulation. If you take into account discount rates, the picture becomes even more dismal. At a 3 percent discount rate, 200 people using the high estimate for life value or 2,000 people using the lower estimate would have had to die each year for OSHA to justify the costs. At a 10 percent discount rate, 700 people would have had to die using the former estimate and 7,000 using the lower. Thus they conclude, "using a 10 percent discount rate and the value of life estimated in the 1970s, it would be necessary to show that every worker in the industry, every year, would have died in the absence of the standard, in order to justify the regulation in cost-benefit terms."

This dramatic example adds to the overwhelming evidence that cost-benefit analysis is not only a weak tool for determining public protections, but its "impartial" calculations can have severe and damaging impacts. In no way is it a blind arbitrator, equally weighing both sides of an issue. Rather it is a political tool, weighted to favor the regulated community that does not adequately address our regulatory priorities.

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In This Issue

Despite Colorado's Disaster, More States Consider Restrictive Budget Rules

In 1992, the Colorado legislature passed a constitutional amendment locking in restrictive budget and tax provisions. This amendment, known as the Taxpayer Bill of Rights (TABOR), has resulted in a structural cycle of drastic disinvestment in public services across the state. This result is not unique to Colorado and if TABOR amendments are adopted in other states -- as could happen in 18 states across the country -- the effect would no doubt be similar.

TABOR is a complex law, but is based on two very simple concepts: cut taxes when there is a surplus, and cut the budget when there are deficits. It was adopted in Colorado to codify strict tax and spending limitations in the state constitution, thus making it harder for the legislature to respond to the constantly changing economic and budgetary health of the state. The Colorado amendment:

- Requires voters to approve all increases in either taxes or state debt
- Limits growth in state revenue to a formula based on population growth plus inflation rate
- Places separate revenue limits on school districts and local government
- Mandates that all taxes above those limits be refunded to taxpayers.

There is widespread agreement among economists and budget and tax experts that the amendment has a) made the economic cycle of state revenues and spending extremely volatile and b) made social investment by the state government very difficult in Colorado by constitutionally enforcing both tax cuts and stringent spending levels.

This structure prevents the state from adopting a rainy-day mentality as it does not permit coffers to expand during "boom" years to give the legislature flexibility to cope with increased need and unexpected crises during "bust" years. By instituting tax cuts during times of surplus, and then requiring reduction in services as the only solution to reducing deficits, TABOR fundamentally hinders the ability of the legislature to respond to evolving state priorities and unforeseen needs. TABOR essentially institutes a habitual cycle of reductions in public investments.

TABORs are also bad policy because they treat problems within complex economic systems with simple, "one size fits all" solutions. By forcing tax cuts during surpluses and spending cuts during deficits, TABORs ignore the complexities of communities and economic environments and ties the hands of legislators in their ability to innovate. In continually promoting balancing the budget as the sole priority in constructing the state's economic policy, it ignores and undermines one of the fundamental roles of government: serving the greater good.

The tangible effects of the TABOR law in Colorado have been felt across the state. After the law was instituted, a booming Colorado economy triggered the tax limit and sent $ 3.25 billion in refunds to Colorado households over five years (about $ 3,200 per family). However, in 2002 when the state was hit with a terrible recession and the state budget went into deficits, TABOR prevented the legislature from responding to increased need caused by the economic downturn. The deficits caused stringent budget cuts, especially on social services. (This is made even more complicated by limits on growth within programs; in essence, locking services into levels that do not fit current needs.) This only aggravated the difficulties citizens in Colorado faced due to a struggling economy.

The results of this cycle are devastating for Colorado. It ended $ 55.6 million in annual property tax credits for elderly homeowners, drained $ 128 million of aid from public universities and community colleges, and cut $ 550 million in extra aid for highways. Feeling the financial pressure, the state also placed limits on the number of poor children covered by state-subsidized health care. Many social service and community investment programs, particularly education programs, have never recovered from these cuts.

Budget policies mandated by TABOR have had the net effect of leaving behind the state's most vulnerable citizens. It ranks 47th in K-12 education funding as a share of state income. It ranks 48th for state funds invested in higher education and 44th in the nation in terms of the share of low-income individuals enrolled in Medicaid. In 1991-1992, 15 percent of low-income Colorado children lacked health insurance. In 2002-2003 that figure rose to 27 percent. And since 2001, Colorado has eliminated all state support to local and regional health agencies.

This is just a glimpse of how public services have eroded in Colorado over the past decade under TABOR. For more detailed information on the impact of program cuts in Colorado, see the following reports: "Public Services and TABOR in Colorado" and "Is Colorado's TABOR Creating Jobs?"

The problems caused by the decreased role of state government have not gone unnoticed. Colorado state legislators agree overwhelmingly that TABOR has been devastating to state services and in turn, the citizens of Colorado. In fact, they spent much of their time in 2004 discussing possible reforms. State Sen. Ken Gordon (D) is one critic of the amendment. "TABOR has been a disaster for this state," he said. "If we don't change it, we will be the first state to de-fund higher education."

Although they spent significant time discussing TABOR reforms, state politicians were not able to come up with any solutions, and thus TABOR still exists in full force, quietly continuing the cycle of de-funding government. The experiment with TABOR in Colorado illustrates the dangers of putting untested fiscal constraints directly into state constitutions since changing these binding amendments later is much more difficult.

Despite the myriad problems experienced in Colorado, other states are considering adopting state tax and expenditure limiting amendments (TELS) similar to Colorado's TABOR into their constitutions. In the first two months of 2005 alone, 13 state legislatures introduced 17 different TELS bills. Other states, such as California, have coalitions of organizations and state politicians sponsoring initiatives either to limit spending or to restrict appropriations through changes to the state constitution.

These states are blindly moving forward despite the fact Colorado legislators are still struggling 13 years later to find a fix for the problems caused by their TABOR constitutional amendment. Some public figures, including Colorado Gov. Bill Owens (R), are perpetuating this trend, touting TABOR as a low-tax, limited-government success story. Yet it is the people of Colorado who have absorbed the negative consequences of the TABOR amendment.

Efforts across the country to install TABORs at the state level come when states are already suffering through fiscal crises. Twenty-six states are struggling to reduce budget deficits while continuing services in a less than robust job market (news coverage | analysis). As Bert Waisanen of the National Conference of State Legislatures said in March 2006, "Governors have to run programs like Medicaid, No Child Left Behind, homeland security. But there is less and less money coming from Washington to pay the bills."

The fiscal strain on states will continue to grow as President Bush and congressional leaders are pushing policies to reduce the huge federal deficit by severely cutting domestic discretionary funding, including funding going directly to states -- all while passing trillions of dollars worth of unpaid-for tax cuts. As Washington is cutting spending, entitlement liabilities are increasing every year and are predicted to explode as baby boomers begin to retire in 2011. These factors will further squeeze state budgets and make it far more difficult to continue current service levels.

The unfortunate trend is one of states shouldering an increasing percentage of the fiscal burden, and often finding they are unable to meet the demands of these programs. The result is millions of people who rely on Medicaid, Medicare, and other government programs are being left behind, cut off from services.

Some states, such as Indiana and Washington, are exploring policies to deal with their budget crises while still providing essential services. Even though this is a welcome change to the current accepted thinking about tax and budget policy, the fact so many other states are contemplating adding TELS to their state constitutions is alarming, especially in light of Colorado's negative experience with TABOR.

This trend does have a silver lining. Various state and national groups are forming coalitions to fight TABOR-like bills and initiatives. In Oklahoma, for example, the coalition was able to mobilize strong public opposition to TABOR through promoting awareness of problems in Colorado under TABOR. This helped to diminish enthusiasm for instituting TABOR

amendments in Oklahoma. Based on Oklahoma, educating the public and state legislators about the effects of these provisions is key in stopping the expansion of harmful state tax and expenditure limiting laws.

For more information on TABOR, check the following websites:

- Center on Budget and Policy Priorities
- *Milwaukee Journal Sentinel* (JSOnline)
- The Bell Policy Center
- coloradobudget.com

President's Tax Panel Hits the Road

President Bush's Advisory Panel on Tax Reform has hit the road over the past month and a half holding six public meetings in their efforts to reform the country's tax code. The panel, which will submit suggestions to Treasury Secretary John Snow by July 31, has heard testimony from a variety of experts. The panel is charged with reforming the federal tax code to make it simpler, fairer, and more conducive to economic growth and job creation.

The panel began its public hearings with two meetings in Washington, DC, and has since held forums in Tampa, FL, Chicago, New Orleans, and San Francisco. (See a full list of witnesses and all public testimonials and statements.) The panel has heard from a wide variety of sources including noted academics Leonard Burman and Bill Gale of the Urban Institute-Brookings Institution Tax Policy Center, Federal Reserve Board Chairman Alan Greenspan, representatives of the small business community, various other tax experts, and citizens.

The first two meetings in Washington, DC, focused on the history of the federal income tax system, consumption taxes, the complexity of our current tax system, and the alternative minimum tax (AMT). The AMT was designed to ensure wealthy Americans could not take advantage of tax incentives to avoid paying taxes. Because the tax was not indexed for inflation, it is increasingly forcing middle-income Americans to pay extra taxes -- an unintended consequence.

Both Snow and Greenspan made statements at the meetings in Washington. Snow briefly discussed the complexity of the code and the resulting loopholes in the system, while Greenspan spoke of lessons that can be learned from past reform efforts and the importance of having certainty in the tax code.

After the initial meeting in Washington, the tax panel began a series of meetings around the country designed to give credence to the panel through publicity in the states as well as to solicit testimony from sources around the country. The four meetings that have taken place to date have rotated through a variety of topics including how the tax system affects businesses and entrepreneurs, decisions by taxpayers and investment alternatives, public perception of fairness in the code and its impact on families, and how the tax code spurs economic growth and international competitiveness.

The president established the panel by executive order on Jan. 7 to help accomplish an overhaul of the tax code, one of his top second-term priorities. The panel is co-chaired by former Sens. Connie Mack (R-FL) and John Breaux (D-LA). Other members include former Rep. Bill Frenzel (R-MN); Charles Rossotti, former Internal Revenue Service commissioner; Liz Ann Sonders, chief investment strategist for Charles Schwab & Co.; Elizabeth Garrett, Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science at the University of Southern California; Edward Lazear, a senior fellow at the Hoover Institution; Timothy Muris, former Federal Trade Commission chairman; and James Poterba, economics professor at Massachusetts Institute of Technology.

To date the panel has not extended the opportunity to the general public to testify (although all the meetings are open to the public), but anyone may submit written comments. The Center for American Progress, a progressive think-tank in Washington, DC, submitted their comprehensive tax reform plan to the panel.

The Center's tax plan would tax all income sources evenly, reduce dependence on payroll taxes, and enhance the take-home pay of lower-income taxpayers. To simplify the tax code, the plan reduces the number of income tax brackets from six to three, taxing the three at 15, 25, and 39.6 percent. To increase economic opportunity, the plan restores fiscal discipline by reducing the large budget deficit by addressing the fiscal gap and offers Americans new opportunities to save and create wealth for their retirement years. Notably the revenue-neutral plan reduces taxes for 70 percent of Americans and provides an average tax cut of approximately $ 600 to those making less than $ 200,000 annually (read the Center's comments).

OMB Puts Children's Health at Risk with Data Quality Act

The Environmental Protection Agency (EPA) released new guidelines for assessing cancer risk March 29 after years of deliberation. These guidelines officially recognize for the first time that children are particularly vulnerable to certain cancer-causing chemicals. However, the Office of Management and Budget (OMB), while reviewing the guidelines, inserted two requirements, including that any EPA cancer evaluation meet the standards of the Data Quality Act (DQA), which will have the effect of putting more children at risk.

These guidelines determine how EPA regulates cancer-causing chemicals. The agency released the draft policy for these guidelines two years ago, March 2003. Supplemental guidelines for assessing cancer risks to children were included in the draft. The EPA's Scientific Advisory Board reviewed the draft and recommended finalizing the guidelines as written. Then the guidelines were sent to OMB for review.

EPA's guidelines estimate that children under two years of age are 10 times more likely to get cancer from certain chemicals than adults who are similarly exposed. Many would consider this vulnerability a cause to use the precautionary principle and strictly regulate any substances for which even partial evidence shows children at risk. However, OMB elected to require that the data meet rigorous standards established under the DQA before the agency can act to protect children.

The DQA has been accused of being a wolf in sheep's clothing, an industry tool for delaying and derailing regulatory protections posing as a good-government policy. Most agencies, including EPA, were cautious with the DQA and wrote a degree of flexibility into their guidelines for implementing DQA. Apparently this flexibility displeases OMB as it attempts to reduce EPA's discretion by writing the requirement directly into agency guidelines such as these. The DQA requirement coupled with another provision added by OMB, which permits "expert elicitation," could easily be used by industry to challenge and delay agency actions.

This delay means that children at risk of exposure to dangerous chemicals will need to wait for protection while EPA does further study and analysis. Such regulatory delays often benefit industry because the cost of implementing controls and restrictions can be put off.

This isn't the first time that OMB has used data quality to delay public protections. In the 1980s evidence arose that aspirin given to children with flu symptoms could cause a potentially fatal condition called Reye's Syndrome. The Department of Health and Human Services recommended requiring warnings on aspirin containers, but OMB sent the proposal back to the agency dissatisfied with the evidence and demanded further study. Eventually court decisions forced the labeling to be put in place, but in the intervening four years nearly 200 children died from Reye's Syndrome.

Transportation Agency Hides Vital Data as 'Sensitive Security Information'

The Transportation Security Administration (TSA) is invoking its little-known secrecy powers to hide a variety of information from the public, labeling the information as Sensitive Security Information (SSI). The agency's excessive and unreasonable use of the power is troubling, with recent examples defying common sense, and revealing that TSA withholds information from those who use it for safety reasons or even for their jobs.

TSA has demanded that airplane pilots avoid flying near nuclear power plants, in what seems like a reasonable request. If pilots pass near the facilities, fighter jets will intercept them and force a landing. However, the agency then refused to provide locational data for the nuclear plants so the pilots could comply. In an effort to help pilots abide by the order, the Aircraft Owners and Pilots Association spent several days compiling a list of facility locations from public information and posted it on the Internet. TSA demanded that the group take the information down because the agency believed it could assist terrorists. This publicly available information, when compiled into one place, was now SSI.

The U.S. Naval Research Laboratory estimates that if a railcar carrying chlorine through the District of Columbia exploded, up to 100,000 people could be killed. The D.C. Council wanted to know if trains containing hazardous chemicals were being re-routed to protect against attacks. TSA refused the council access to the information, again claiming it was SSI. Unsatisfied with the safety of its citizens being an unknown, the council passed legislation forcing the re-routing of trains carrying hazardous materials. A court battle has ensued, and TSA continues to assert it cannot release such information to local and state governments or civil litigants.

Finally, the Occupational Safety & Health Administration investigated work-related hazards faced by employees at the Portland International Airport in 2004, after the agency received safety complaints. However, in the end the agency refused to release its report publicly because TSA considered the document SSI.

The above examples illustrate how the TSA is overusing the SSI designation to hide information from concerned citizens. The Homeland Security Act of 2002 expanded SSI significantly. TSA altered it again in May, 2004, to include information exempt from open government laws, including the Freedom of Information Act. Those granted access to SSI by TSA must sign non-disclosure agreements.

Many complain that TSA uses its ability to categorize information as SSI excessively and inconsistently. Last September, two House members asked the Government Accountability Office to investigate the agency's use of SSI, citing numerous examples of its misuse. The members acknowledged the need to protect certain types of information, but emphasized that

it must be done in concert with ensuring the public's right to know.

The former chief security officer at the Department of Homeland Security, Jack Johnson Jr., has expressed a conflicting opinion stating, "When it comes to choosing between the public's right to know and the safety of the country, I will err on safety every time."

While everyone can agree that the safety of U.S. citizens is a high priority, government agencies such as TSA underestimate how much public disclosure can contribute to ensuring safety. The aforementioned cases show that reasonable access to information could improve safety conditions for communities and workers. Disclosure means that instead of a handful of government employees working to solve security and safety problems, knowledgeable and empowered citizens can participate in insuring a safe country.

Take Action: Chemical Security Long Overdue

A recent accident at a Texas oil refinery reminds us of the need for Congress to pass chemical security legislation that identifies hazardous chemical-using facilities and requires company plans both for reducing chemical hazards and improving site security through safer materials or processes wherever feasible.

Thousands of facilities around the country place millions of Americans at risk from the potential release of deadly chemicals. For several years, Congress has considered and reconsidered chemical security legislation that would encourage companies to reduce chemical hazards at these facilities. Sen. Jon Corzine (D-NJ) has repeatedly introduced bills that would require facilities that use large quantities of hazardous chemicals to evaluate safer chemicals and technologies to reduce safety and security risks. Companies that pursue these opportunities would have less severe accidents when problems occur and pose less tempting targets for possible terrorist attacks. Unfortunately, Congress has repeatedly failed to act on this issue.

A March 23 accident at BP Amoco's Texas City refinery, which killed 15 employees and injured over 100 people, illustrates the high cost of inaction. According to reports BP filed with the Environmental Protection Agency, the accident could have been even worse. The Texas City refinery stores 800,000 pounds of deadly hydrofluoric acid onsite, threatening the lives and health of more than half a million people in its 25-mile "vulnerability zone." However, oil refineries can replace hydrofluoric acid with sulfuric acid, a much safer chemical that many other refineries are already using.

While Corzine has not yet reintroduced his legislation to Congress this session, the Texas City accident demands that Congress finally take action. More than three years since the 9/11 attacks, there is still no national policy to assess and reduce chemical vulnerabilities wherever practical.

Urge your representatives to support chemical security legislation.

NY Town Scraps Restrictive FOIA Policy

On March 28, open government advocates in Spring Valley, NY, a village just north of New York City, won the day when town officials agreed to scrap a five-year old policy that restricted access to Freedom of Information (FOI) requests. While state law requires public access to FOI requests during regular business hours, Spring Valley's policy only permitted access from 10 a.m. to noon on Tuesdays and from 1 to 3 p.m. on Thursdays.

Joseph Jacaruso, who implemented the policy five years ago, asserts the policy was designed to help manage processing FOI requests, not to restrict access to government information. However, according to Robert Freeman, executive director of New York's Committee on Open Government, "the Spring Valley policy was a failure to comply with the Freedom of Information Law." The Committee on Open Government, an organization in New York's Department of State, was created under the state's FOI law to oversee and advise state agencies with regard to the Freedom of Information, Open Meetings and Personal Privacy Protection Laws.

New York's state FOI law, passed in 1974, received a positive review from a recent audit by more than 50 New York reporters. For an event connected to Sunshine Week, the reporters submitted FOI requests to local government agencies throughout the state, and received requested information from 90 percent of the agencies. The New York state legislature is also considering legislation to strengthen its FOI law. The proposed bill would require state and local government agencies to reply to FOI requests within 25 days. Delayed responses and massive backlogs are common. Freeman believes the bill will pass because it has Republican support in the Senate and Democratic support in the Assembly.

CFC Shifts Position on Terrorist List Checking

In a proposed regulation published in the *Federal Register* on March 29, the Combined Federal Campaign (CFC) shifted its position away from last year's requirement that participating charities check their employee's names against government terrorist watch lists. Instead, the proposed rule uses a certification that charities are in compliance with the law. The proposed rule appears to be a major step in the right direction. Public comments are due in late May.

The CFC is the federal government's workplace charitable giving program. In 2004 CFC added language to its funding agreement that required participating organizations to certify that they do not "knowingly employ individuals or contribute funds to organizations" listed as terrorists on various U.S. government watch lists. CFC interpreted this to impose an affirmative obligation for charities to check their employees' names against the lists. On Nov. 10, 2004, OMB Watch and 12 other nonprofits filed suit challenging this policy.

The proposed rule seeks public comment on a new approach for the fiscal year 2006 program. It has three elements that apply to federations and unaffiliated organizations:

- A certification by the charity that it is in compliance with all laws, Executive orders and regulations that bar transactions with groups or individuals subject to sanctions by the Treasury Department
- Acknowledgement of awareness of lists of blocked entities and individuals on Treasury's website, and
- A promise to notify CFC if the group "becomes noncompliant" after the certification.

The Supplementary Information in the *Federal Register* announcement says, "A pattern of abuse of U.S. and foreign charities has become evident in recent years." It goes on to cite instances where charities have been shut down, investigated and leaders prosecuted, and notes that these cases "underscore the importance of due diligence within the charitable sector." The proposed certification would be a condition of participation for charities wishing to get contributions through CFC.

In seeking public comment CFC specifically asks how its proposal would work for organizations that also get federal funds from the U.S. Agency for International Development (USAID), which uses a different certification. The USAID certification is much more restrictive, requiring list checking, use of public information and monitoring and oversight procedures.

The proposed rule says that, in the event a participating charity notifies CFC that it is not in compliance with the certification requirements, CFC can "take such steps as it deems appropriate under the circumstances," including suspension from the program and recouping funds already disbursed.

The proposed rule is being analyzed by attorneys for nonprofits, including OMB Watch's, who sued the CFC challenging the constitutionality of the employee list checking requirement.

FEC Seeks Comment on Internet Regulation

Under orders from a federal court to reconsider its exemption of Internet communications from campaign finance regulations, the Federal Election Commission (FEC) proposed new rules on March 24, seeking public comment on a variety of issues. The proposed rules, which provide more questions than answers, were preceded by an outcry from bloggers, members of Congress and others concerned about possible over-regulation of Internet political activity. Comments are due in late May and a public hearing will be held in later June.

The proposed rules take a generally limited approach to FEC regulation of Internet communications. The primary provisions include:

- Treatment of campaign ads on the Internet under the same rules as off line ads, which would require they be paid for with funds subject to contribution limits.
- Possible simplified disclosure rules for regulated Internet political communications.
- No disclosure by bloggers paid by candidates or campaigns (although the FEC asks for further comment on whether such payments should be disclosed).
- Links to candidate sites and re-publication of campaign materials through websites or e-mail would only be a regulated contribution if paid for.
- Extension of the media exemption to online journals, but the FEC asks whether it this should only apply to publications that also appear offline.
- Exemption for individual volunteers if using a personal computer, or one available at a public site, such as a library or Internet café. Isolated, incidental or occasional use of computers by individuals at their place of work would be permissible if it did not exceed one hour per week.
- Disclaimers stating the funding source for unsolicited e-mail to more than 500 recipients that solicit contributions or expressly advocate election or defeat of a federal candidate if the e-mail addresses are purchased.

The proposed rule was preceded by widespread alarm among bloggers and others after a March 3 C/Net News.Com interview quoted FEC Commissioner Bradley Smith as saying, "I think grassroots Internet activity is in danger." Concern increased after FEC Chairman Scott Thomas gave a speech at the Politics Online conference on March 11 that warned of possible "massive evasions of the prohibitions on party soft money and corporate and union resources in federal elections"

if the new regulations are "done sloppily." Since corporate contributions to campaigns are already prohibited by campaign finance law, the point of further Internet regulation was not clear. Thomas also raised the possibility of bloggers becoming regulated political committees if their major purpose is to influence federal elections, and noted that many Internet-based services could be exempt as media communications.

That same day the Online Coalition sent a letter to Thomas expressing concern about the potential impact the rulemaking could have on Internet based political speech. The bipartisan coalition, whose tagline reads *"from left to right, preserve our rights"*, said, "The Internet is a fundamental tool in the American political process. Just this week, we learned that 75 million Americans used the Internet to gather news, read commentary, discuss issues, register to vote, and generally join in the democratic process during the last election cycle. We believe the Internet is the primary driving force behind the increased participation among traditionally under-represented groups of voters ...." The letter also expressed concern that the FEC's media exemption may not provide sufficient protection to bloggers and asked that the definition of prohibited coordination with campaigns be clarified. It has nearly 3,000 signatories.

Members of Congress also joined the public discussion prior to publication of the draft rule. On March 17, Senate Minority Leader Harry Reid (D-NV) introduced S. 678, a bill that would exempt Internet communications from FEC regulation. Reid also sent a letter to Thomas saying, "Congress did not intend to regulate this new and growing medium in the Bipartisan Campaign Reform Act (BCRA) .... Regulation of the Internet at this time, with its blogs and other novel features, would blunt its tremendous potential, discourage broad political involvement in our nation and diminish our representative democracy."

On March 11, Rep. John Conyers (D-MI), ranking minority member of the House Judiciary Committee, and 13 other representatives sent a letter to the FEC urging caution, saying the FEC should "make explicit in this rule that a blog would not be subject to disclosure requirements, campaign finance limitations or other regulations simply because it contains political commentary or includes links to a candidate or political party website, provided that the candidate or political party did not compensate the blog for such linking."

Public statements by the FEC commissioners, as well as the many questions posed in the proposed rule, makes it clear no decisions about the final approach to Internet regulation have been made. Among the many difficult issues to be debated is whether bloggers that are paid to post statements that support or attack candidates should disclose the payment. On March 4, the *New York Times* reported that in the 2004 South Dakota Senate campaign two bloggers were paid $ 27,000 and $ 8,000 by the ultimate winner, Sen. John Thune (R-SD), to post information attacking then Sen. Tom Daschle. There were also reports that the Howard Dean campaign paid $ 12,000 to bloggers during the Democratic primaries.

Santorum Amendment Encourages Relief for Charitable Giving

On March 1, Sen. Rick Santorum (R-PA) introduced an amendment to the 2006 Senate Budget Resolution. The amendment, a "Sense of the Senate" about charitable giving, notes the bipartisan popularity of the 2003 Charity Aid, Relief and Empowerment Act (CARE Act). The amendment passed by unanimous consent.

The resolution notes that the CARE Act passed the Senate on April 9, 2003 with a vote of 95-5. The House passed similar legislation 408-13 on Sept. 17, 2003. The bill enjoyed huge bipartisan support and was supported by 1,600 charities. However, due to party differences, a House-Senate conference never met to consider the legislation. Consequently, the CARE Act did not become public law.

The Sense of the Senate, which is legislative language that offers the opinion of the Senate, but does not make law, stated that a relevant portion of tax relief in the resolution should be used for charitable aid. The legislation observes the need for the non-itemizer deduction, gifts from Individual Retirement Accounts to charity, increased deduction for food donations, and greater charitable deductions for corporate donors.

The resolution is notable because President Bush dropped his support for the non-itemizer deduction in his budget request to Congress this year. In the past, the president has called for those who do not itemize their taxes to have the option of taking a tax deduction for charitable contributions. But the cost of the tax break compared with other favored tax breaks may be why the president dropped the support.

Florida Church Is Subject of IRS Inquiry for Political Activities

On Feb. 15, the Internal Revenue Service (IRS) notified a Liberty City, FL, church that it is under investigation for engaging in partisan political activity. The investigation stems from an October 2004 appearance at a service by Democratic presidential candidate Sen. John Kerry (D-MA). If the church is found to have engaged in prohibited political activity, it could lose its tax-exempt status.

In a 10-page letter to the Friendship Missionary Baptist Church, the IRS wrote, "a reasonable belief exists that [the church] engaged in political activities that could jeopardize its tax-exempt status as a church." Included with the letter is a 21-question inquiry regarding the pastor's alleged endorsement of Kerry, coordination with the Kerry campaign, and solicitation of contributions.

The inquiry was prompted by an Oct. 13, 2004, request to the IRS by watchdog group Americans United for Separation of Church and State (Americans United). The IRS, in their letter to Friendship Missionary, also noted the publication of an Americans United press release in *Tax Analyst*.

Federal tax law prohibits all 501(c)(3)s, including churches, from intervening in political campaigns. They may not "participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of or opposition to any candidate for public office". The prohibition has been interpreted very broadly in order to avoid use of tax deductible contributions for electioneering, which would result in a taxpayer subsidy for campaigns.

The Rev. Gaston Smith informed his congregation about the inquiry. He stated that "visits by political candidates are nothing new and the 75-year-old church did not violate the tax code." He noted that during the previous week, Miami-Dade mayoral candidates Jimmy Morales, a Democrat, and Carlos Alvarez, a Republican who was later elected, made campaign stops there.

According to Friendship Ministry, the service was nothing out of the ordinary. The service schedule consisted of praise and worship, followed by Smith's sermon and altar call. Kerry then spoke for approximately five minutes and was followed by the Revs. Jesse Jackson and Al Sharpton.

However, a conflicting report by Americans United stated, "During the service, the church's pastor ... introduced Kerry as 'the next president of the United States' and told the crowd that 'to bring our country out of despair, despondency and disgust, God has John Kerry.'"

In determining whether a 501(c)(3) activity constitutes impermissible campaign intervention, the IRS will examine an activity based on all the surrounding "facts and circumstances," examining the content and timing of the message, the intended audience for the message, and the organization's history of engaging in similar activities.

While Friendship Ministry declined to ponder the motivation of the IRS inquiry, Rep. Kendrick Meek (D-FL) charged that the complaint came from outsider groups that may be specifically targeting black churches. In a *Miami Herald* article, he stated that two other Miami-area churches received inquiry notices last year, but declined to name them or discuss the probes.

Last year, the IRS was criticized for investigating whether a speech by Julian Bond, Chairman of the National Association for the Advancement of Colored People, criticizing Bush administration policies, violated the prohibition on 501(c)(3) electioneering. The NAACP has said that the probe was politically motivated and meant to discourage the organization's efforts to register black voters.

Doggett Introduces Lobby Disclosure Bills

On March 13, Rep. Lloyd Doggett (D-TX) introduced two versions of his "Stealth Lobbyist Disclosure Act of 2005" (H.R. 1302), a proposed amendment of the Lobbying Disclosure Act of 1995 (LDA), and H.R. 1304, which modifies the Internal Revenue Code to treat lobbying coalitions as political organizations under Section 527 of the tax code and require more disclosure of their lobbying activities.

H.R. 1302 provides that, in the case of a coalition or association that employs or retains other persons to conduct lobbying activities, each individual member of the coalition or association is the client for whom a registration must be filed. Current law only requires the coalition or association to register and file reports.

The legislation creates a total exception for 501(c)(3) organizations. Other 501(c) organizations, such as social welfare organizations, unions and trade associations, are also exempt if they have "substantial exempt activities other than lobbying with respect to the specific issue for which it engaged the person filing the registration statement." The term "substantial" is not defined. This exemption creates a potential hazard for these 501(c) organizations if their focus is on a specific issue.

Members of a coalition or association are also exempted if the amount they reasonably expect to contribute toward specific legislation-influencing activities of the coalition or association is less than $ 1,000 per any semiannual period.

H.R. 1304 amends the tax code to treat any coalition or association that is identified as a client on any registration filed under the LDA as a political organization under Section 527 for purposes of disclosure, whether it is a political organization or not.

The proposal would require any coalition or association to notify the Secretary of the Treasury of: (1) its existence within 72 hours after one of its lobbyists makes an initial legislative contact; and (2) any change in membership within 72 hours. It also requires the notice to include a general description of the business or activities of each member of the coalition or association and the amount reasonably expected to be contributed by each member toward coalition or association activities for influencing legislation. Additionally, a penalty tax for failure to give required notices would be imposed.

H.R. 1304 has the same exemption for 501(c) groups as H.R. 1302, but exempts members of a coalition or association who contribute less than $ 2,000 per year for lobbying activities, rather than using the $ 1,000 per semiannual period standard.

Doggett has introduced identical bills in the last two congresses. A member of the tax-writing Ways and Means Committee, Doggett became interested in the issue because of the number of groups he calls "stealth coalitions," which he has seen lobbying on provisions of tax law.

Sunset, Results Commission Proposals Likely

Both the White House and congressional Republicans have vowed to introduce legislative packages that would force programs to fight for their lives every 10 years and would link controversial performance ratings to decisions about the very structure of government.

As we reported before, the White House's fiscal year 2006 budget submission announced two proposals for creating unelected commissions with far-reaching powers to weaken protections of the public health, safety, civil rights, and the environment. One, for a "sunset commission," would force all government programs to plead for their lives on a periodic basis, such as every 10 years. The other would allow for ad hoc "results commissions" charged with reviewing administration proposals for restructuring or eliminating programs in order to "improve performance and increase efficiency." Clay Johnson, deputy director for management at the Office of Management and Budget, recently told the *Federal Times* that OMB will soon submit legislative proposals to create these sunset and review commissions.

Bills in previous congresses put forward similar proposals, and a recent article by the industry-funded think tank Mercatus Center reports that Republican lawmakers are planning to reintroduce those bills in the 109th Congress. Rep. Kevin Brady (R-TX) introduced the Abolishment of Obsolete Agencies and Federal Sunset Act in every session of Congress since 1997, and Sen. Sam Brownback (R-KS) introduced in the 108th Congress the Commission on Accountability and Review of Federal Agencies Act (CARFA) that would terminate or realign government programs viewed as "ineffective." Both Brady and Brownback are expected to introduce their legislation again this term, according to the Mercatus Center article.

CARFA

CARFA was first introduced by Rep. Todd Tiahrt (R-KS) in 2002. Tiahrt's original proposal called for the creation of a 12-person commission, appointed by the president. The commission would have two years to review federal programs and agencies and propose legislation to realign or eliminate programs based on their assessment. In making its recommendations, the commission would look at all programs but those in the Department of Defense. CARFA would create a fast-track for the resulting bill, requiring Congress to take up the bill immediately and requiring a straight up-or-down vote with no possibility of amendments. Debate would be limited to only 10 hours. The bill made no provisions to protect programs that safeguard public health, safety the environment, or civil rights.

CARFA was modeled on the Defense and Base Closure and Realignment Act (BRAC), which was first used during the Kennedy administration in the 1960s and then resurfaced in the late 1980s to close unneeded military bases while avoiding political skirmishes among representatives. CARFA, however, had important differences from BRAC. First, while BRAC required a bipartisan commission, comprised equally of Republicans and Democrats, the CARFA bill would have allowed the president to choose all the members of the commission. Further, while a straight up-or-down vote saved the closing of military bases from political infighting, voting up or down on CARFA proposals would play only into special interests; by selecting programs to be eliminated but never addressing unmet needs, CARFA would act as a one-way ratchet, slashing needed government programs without addressing gaps in protection. Whereas a commission more closely comparable to BRAC would recommend closures of specific program sites, such as one Head Start center, a CARFA commission would recommend the elimination of entire programs, such as Head Start itself.

In the last Congress, Brownback put forth the same legislation, but with several important changes. First, Brownback's legislation, which was also introduced in the House by Tiahrt, excluded entitlement programs as well as those operated by the Department of Defense from review by the commission. Second, the bill would have required the president to develop a review methodology, present it to the commission for approval, and conduct reviews of at least half of all government programs. The Brownback version would have required program assessments to be "based primarily on the achievement of performance goals."

Already the White House's Office of Management and Budget uses the Performance Assessment and Rating Tool (PART) to assess government programs. The clear intention of this proposal, as evinced by both the language of CARFA and Senate

testimony on the bill, is to use tools like the PART assessments to justify eliminating government programs and agencies. Though PART appears to be a neutral tool to assess government productivity, we have shown elsewhere that PART is highly political and fails to capture the real successes and failures of government programs. PART is so flawed that some programs actually receive point reductions for following the law. Using this tool to remake government could have dangerous consequences for the health, safety and security of Americans.

Sunset Commission

Brady's Abolishment of Obsolete Agencies and Federal Sunset Act (originally titled simply the Federal Sunset Act) sought to require agencies and programs to justify their continued existence or face elimination. The bill would establish a 12-person bipartisan commission comprised of four members of the House, four members of the Senate, and four individuals who are not members of Congress but have expertise in government affairs and operations. The commission would review federal agencies on a set 12-year cycle. Each agency reviewed by the commission would be abolished within a year of the review unless Congress voted to reauthorize the agency.

Each agency up for review would be evaluated on a laundry list of criteria, including cost-effectiveness, number and type of beneficiaries, continued need for the program, extent of public participation, and coordination with state and local governments. The commission would be required to hold public hearings and request public comment on each agency under review and to work with the Government Accountability Office, OMB, and chairmen and ranking members of any relevant congressional committees. The commission would then report to Congress on its findings and make recommendations in the form of legislation. The commission would also be required to monitor and report to Congress on any legislation creating new agencies or programs. The model for this commission is based on the Texas Sunset Advisory Commission.

Critics of the Brady proposal have argued that the prospect of reviewing every federal program to this level of detail would be timely and costly. This massive undertaking would also be duplicative of systems of accountability and oversight already in place, such as congressional oversight committees. In a 1998 hearing on Brady's bill, Ed DeSeve, then OMB's deputy director of management, argued that "the proposed structure and process in H.R. 2939 would substitute the conclusions of a 12-member commission for the judgment of congressional committees, the full House and Senate, and the president. It would effectively put eight members of Congress in a preeminent role over all other duly elected members and provide no role for the president."

Any Chance of Success?

Fortunately, neither of these bills gained much traction in previous Congresses. In fact, neither one ever made it out of committee. The White House apparently had not consulted with members of Congress when it first announced its plans for sunset and results commissions, and it is unknown if the White House is now working with Brady and Brownback or if its proposals will be unrelated initiatives. Whether or not these bills garner support on the Hill, they will likely surface in the months to come.

Agencies Continue to Abandon Protective Plans

Key agencies charged with protecting public health, safety and the environment continued to abandon work on long-identified priorities for new or improved regulatory safeguards, according to the fall 2004 Unified Agenda released last December.

According to the fall 2004 edition of the Unified Agenda, a special feature of the *Federal Register* that projects agency regulatory priorities every six months, the Environmental Protection Administration (EPA), Food and Drug Administration (FDA), and National Highway Traffic Safety Administration (NHTSA) continued to abandon work on proposals for improved regulatory safeguards -- some of which had been on agency agendas since Bush I, while others were proposed to improve security in the aftermath of 9/11.

EPA withdrew 12 items from its agenda, four of which predated this administration. Among the withdrawn items were the following:

- A 1997 proposal to increase fees for pesticide tolerance actions, to counter the problem of "costs substantially exceeding the fees currently charged" (RIN 2070-AD23);
- A 2003 proposal to unbundle contracts in order to create more opportunities for small businesses (RIN 2030-AA86); and
- A 2003 proposal to require background checks of contract and subcontract workers at federal facilities and sensitive locations such as Superfund removal sites (RIN 2030-AA85).

NHTSA withdrew six items from its agenda, of which all predate this administration and one in particular dates back to Bush I. That proposal would have required improved radiator caps to prevent the accidental scalding of motorists and service station attendants who hastily remove caps from still-hot radiators (RIN 2127-AE59).

FDA withdrew only one item from its agenda, although it was originally proposed in the aftermath of 9/11. Congress passed a law to improve the security of the food supply, repeatedly using a key term -- "serious adverse health consequences" -- to describe the scope of FDA's duties to protect the food supply against potential bioterrorist attack. FDA

added the task of defining that term to its fall 2003 agenda, but it removed it from the fall 2004 agenda with no explanation.

Neither the Occupational Safety and Health Administration nor the Mine Safety and Health Administration withdrew more items from its agenda.

Examples of Proposals Withdrawn from Agendas

	Why We Needed the Agency to Act	**Excuse for Not Acting**
EPA On-Site and Off-Site Background Checks Performed by EPA and Contractors	*from the December 2003 Unified Agenda:* The events of September 11, 2001, have heightened both Government and private industry awareness relative to protecting facilities and the personnel who work therein. EPA has a large number of contracts that require contractor (and subcontractor) employees to access federally-owned or leased facilities and space, federally-occupied facilities, and Superfund, Oil Pollution Act, and Stafford Act sites. Although such access is often necessary for contract performance, it nevertheless creates significant potential risks for EPA. While background checks provide no guarantee as to a person's loyalty, trustworthiness, or suitability for contract performance, they provide valuable information that may prove useful in determining an individual's suitability to perform on-site services for the EPA.	*from the Federal Register:* The public comments EPA received objected not only to the proposed clause's broad application, but also to its key substantive provisions. EPA has decided to withdraw this proposed EPAAR clause, and plans instead to incorporate a narrowly tailored background check requirement in the Agency's emergency response contracts' statements of work. Currently, this category of contracts consists of Superfund Technical Assistance and Removal Team (START), Emergency and Rapid Response Services (ERRS), and Response Engineering and Analytical Contract (REAC). In the future this requirement may be included in other types of contracts.
FDA Definition of "Serious Adverse Health Consequences" from Bioterrorism	*from the December 2003 Unified Agenda:* The events of September 11, 2001, highlighted the need to enhance the security of the U.S. food supply. Congress responded by passing the [Bioterrorism Act, which uses] the term "serious adverse health consequences" to describe the standard [for] many of the new authorities provided therein. Together with the final rules implementing [other sections] of the Bioterrorism Act . . . , a definition of the term will further enable FDA to act quickly and consistently in responding to a threatened or actual terrorist attack on the U.S. food supply or to other food-related, public health emergencies. A definition of the "serious adverse health consequences" term will promote uniformity and consistency across FDA in understanding of the term and determining an appropriate response. In addition, a definition of the term will inform the public and stakeholders about what FDA considers to be a serious adverse health consequence under the Bioterrorism Act.	No explanation provided

	from the November 1992 Unified Agenda:	*from the December 2004 Unified Agenda:*
NHTSA Fixing Radiator Caps to Prevent Scalding	The purpose of the thermal locking radiator cap would be to prevent the accidental scalding of motorists and gas station attendants who hastily open the cap on a hot radiator of a motor vehicle.	However, based on current cost estimates and reduced incidence of injuries, the agency decided to withdraw the rulemaking.

White House Adds Rule to Hit List After Calling it 'Accomplishment'

Just three months after touting an interim rule controlling Listeria in ready-to-eat meats as a "regulatory reform accomplishment," the White House added that same rule to a list of regulations that should be weakened or eliminated.

Corporate special interests nominated the Listeria rule for rollbacks in response to a call from the White House's Office of Information and Regulatory Affairs, which used its annual draft report on the costs and benefits of regulations last February to request industry's nominations for regulatory protections to be weakened or eliminated.

When OIRA released the final version of that report in December, it summarized the public's nominations and submitted them to the agencies for their review. In addition to a separate list of the White House's own suggestions for rollbacks and a list of anti-regulatory initiatives that it wanted moved to higher priority status, OIRA included a list of what it called "regulatory reform accomplishments." The Listeria rule was on that list.

OIRA released a new report on March 9, announcing 76 of the industry-nominated rollbacks that the administration was endorsing as its regulatory reform priorities. Incredibly, the same Listeria rule touted in December as an accomplishment appeared on that list of regulatory protections to be weakened or eliminated.

Listeria monocytogenes is a deadly pathogen that has the highest hospitalization rate and the second-highest fatality rate of all foodborne pathogens. Pregnant women who contract Listeria poisoning will almost always miscarry or bear a child with severe developmental disabilities. Because Listeria outbreaks have been traced to ready-to-eat meat products such as hotdogs and lunch meats, the Clinton administration began work on a performance standard with related requirements to test the final products as well as food-contact surfaces.

When the Bush administration took office, however, the Department of Agriculture made an about-face and abandoned the idea of a strong performance standard, issuing instead an interim final rule that favored the food industry and weakened the USDA's power to enforce any protections against Listeria in ready-to-eat meats. As the Consumer Federation of America has documented in a recent report, the Bush administration has campaign finance ties to the big food companies, in particular ready-to-eat meat producer Pilgrim's Pride. After holding a meeting with food industry representatives, OIRA ordered the USDA to make changes in the rule.

The case of the Listeria rule is not the first in which OIRA has sent inconsistent signals in its anti-regulatory hit lists. OIRA called for a similar hit list in its draft annual report in 2001, with similarly confused results. One of the hit list nominations that OIRA designated that year as a "high priority" for weakening or elimination was a rule requiring labeling of trans-fatty acids in food products -- the same rule that OIRA had urged the Food and Drug Administration to develop. That same high-priority list included the rescission of the Clinton administration's standards for arsenic in drinking water, although in a matter of months OIRA administrator John Graham delivered a speech to the National Economists Club in which he characterized the Clinton arsenic standard as having been well-founded in science and thus deserving of OIRA's deference.

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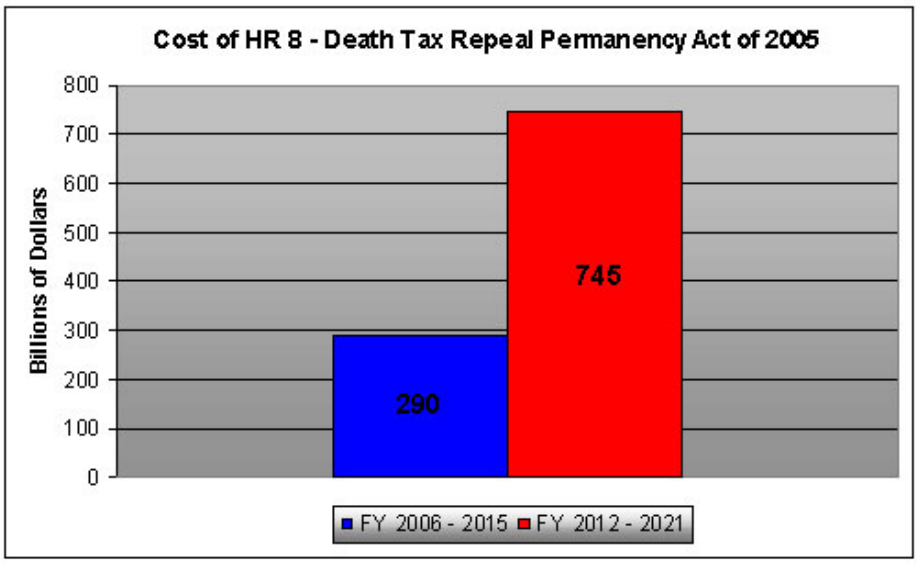
In This Issue

House Again Passes Irresponsible Estate Tax Repeal

For the third time in four years the House of Representatives passed a bill last week to permanently repeal the estate tax. The irresponsible and dangerous bill (H.R. 8) will cost $ 290 billion over the next 10 years but hidden within it are astronomically higher costs after the first decade.

The House passed H.R. 8, sponsored by Rep. Kenny Hulshof (R-MO), by a vote of 272-162, with 42 Democrats and all but one Republican supporting the bill. The tally showed little change from the last House vote on estate tax repeal. In 2003, a bill passed 264-163, with 41 Democrats supporting it.

The Joint Committee on Taxation has estimated H.R. 8 will cost $ 290 billion over the next 10 years. But this estimate really only measures four additional years of full repeal because the bill does not change estate tax law until after 2010. For the first 10 years of full repeal, from fiscal years 2012-2021, the cost of H.R. 8 will be $ 745 billion without including the increased debt burden.



The House also voted on an alternative proposal sponsored by Rep. Earl Pomeroy (D-ND), which failed 194-238. Instead of fully repealing the estate tax, Pomeroy's bill would have raised the exemption level to $ 3 million ($ 6 million for couples) in January 2006 and set it permanently at $ 3.5 million ($ 7 million for couples) after 2009. This means the first $ 7 million of a family's estate would not be taxed under the estate tax. Pomeroy's alternative would also hold the tax rate at its current level of 47 percent and exempt 99.7 percent of Americans from paying the tax.

At just a fourth of the cost of H.R. 8 over the next decade, the Pomeroy substitute was the fiscally responsible choice to further exempt small businesses and family farms from the estate tax and simplify the estate planning process by adding consistency to the tax code. Based on data from the Brookings Institution/Urban Institute Tax Policy Center, only 30 family farms or small business in the entire country would be subject to estate taxes under the Pomeroy alternative -- and, since these estates would be valued at over $ 7 million, they would not be such small operations.

Pomeroy's proposal had two additional benefits. His substitute would have had a consistent long-term cost rather than hiding massive costs in the second decade and beyond, and it would have fixed a known problem with capital gains issues associated with H.R. 8. Under current law, when an individual inherits property, the tax basis of the property is "stepped up" to its value at death. H.R. 8 would repeal that provision beginning in 2010 and substitute carryover basis rules that preserve the tax on increases in value before death.

The carryover basis rule is well known to be incredibly complicated and next to impossible to administer. It would require people to maintain records of assets for very long periods of times -- perhaps through multiple generations -- to determine the original price paid for the asset when wealth is inherited. A similar carryover basis provision was enacted in tax law in the 1970s, but proved to be so unworkable that it was repealed before it ever took effect.

Ironically, the House debate over estate tax repeal coincides with debate in Congress over cuts in programs assisting low-income families with children, the elderly, and people with disabilities. The House-passed budget resolution calls for an estimated $ 30 billion to $ 35 billion in cuts over the next five years in the low-income health care program Medicaid, food stamps, and other programs for low-income families. It is possible these cuts could come from programs such as the Supplemental Security Income program for poor and disabled Americans, foster care and adoption assistance programs, the Temporary Assistance for Needy Families program, and child care assistance supports. The budget resolution may also call for cuts to the Earned Income Tax Credit (EITC) for low- and moderate-income working families.

Many members of Congress have already expressed reservations about trimming back the EITC program while at the same time making permanent reductions to capital gains and dividend taxes that mostly benefit upper-income Americans. Add to that the repeal of the estate tax and a pattern emerges in House proceedings of paying for tax giveaways to the rich with cuts in programs for everyone else that may make many Republicans more than a little uncomfortable.

The estate tax debate will once again be determined in the Senate, where a House passed repeal bill died in 2003. It is still unlikely repeal supporters would have the 60 votes necessary to break a Democratic filibuster, but recent reports have indicated Senate Democrats may be moving towards a compromise.

The Hill newspaper reported on April 6 that Minority Leader Harry Reid (D-NV) has appointed Sen. Charles Schumer (D-NY) to be the lead negotiator with Senate Republicans in seeking a compromise on the estate tax. There are also indications informal conversations have taken place between other Democratic senators, such as Sen. Ron Wyden (D-OR), and Sen. John Kyl (R-AZ), a leading proponent of repeal among Republicans.

It is uncertain which direction those conversations and any more formal negotiations will go, but it is certainly possible that a bad reform proposal could emerge and gain broad bipartisan support.

No Compromise Seen in Budget Negotiations

It has been over a month since the House and Senate passed their fiscal year 2006 budget resolutions, yet GOP negotiators have not made significant strides toward reaching compromise between the two chambers. While only the Senate has named conferees to the conference committee, informal talks between House and Senate leaders have begun to point to difficulties ahead.

Last Friday, April 15, was the statutory deadline by which time Congress is supposed to pass the budget resolution. This deadline is non-binding and the budget resolution is rarely passed before the date. Yet this year it marks a change in the rapid pace maintained by both chambers in their budget work. Both the House and the Senate quickly pushed through their resolutions before recessing for the Easter holiday in mid-March. There have been few developments since then on the budget negotiations as the pace has slowed to a crawl.

The Senate appointed seven senators to the conference committee on April 4, including Budget Committee Chairman Judd Gregg (R-NH) and Ranking Minority Member Kent Conrad (D-ND). The House has yet to name any conferees and there have been no formal meetings of the committee. Some Capitol Hill sources speculate the House will wait to name conferees until a budget deal is accepted in order to avoid a variety of opportunities and platforms for Democrats to criticize the budget.

The major issue separating the two chambers is the level of mandatory spending reductions. The House has included $ 69 billion in cuts to mandatory programs while the Senate has budgeted only $ 17 billion. Both reductions would occur over five years. In addition, the Senate specifically removed in an amendment on the floor $ 20 billion in cuts to the Medicaid program -- a main target of House conservatives for spending cuts.

In continuing talks between the two budget committee chairmen last week, Gregg announced he would consider cuts to mandatory spending programs totaling $ 43 billion over the next five years. These cuts would come from many different programs including but not limited to Food Stamps, Medicaid, the Earned Income Tax Credit, and student loan subsidies. It is believed cuts to the Medicaid program would fall somewhere between $ 8 billion and $ 12 billion.

Further complicating the negotiations over mandatory spending was a letter sent to Nussle from Rep. Heather Wilson (R-NM) asking for Medicaid funding to be protected in budget negotiations with the Senate. The letter was signed by 43 other House Republicans. The support of those 44 Republicans for Medicaid funding may make it impossible to find significant savings this year as a majority of both chambers are now on record as opposing any cuts to the low-income health care program.

As Gregg and Nussle work to settle on a total amount of mandatory savings, they will need to also have a picture of what committees will be asked to cut funding. Both Nussle and Gregg worry any move toward the middle between the two chambers' mandatory savings figures will alienate enough GOP members to prevent floor adoption of a final measure. Gregg needs to keep the total amount of cuts lower to satisfy GOP moderates in the Senate while Nussle cannot accept too low a number without the risk of losing a significant number of House conservatives, many of whom felt the $ 69 billion in cuts in the House version was too small to begin with.

In addition to the quagmire over the mandatory funding debate, there are also differences in the two versions in the total amount for additional tax cuts, the total discretionary spending level in the budget, and a few somewhat less significant issues. Gregg has said he hopes to have a final budget resolution agreement before the May congressional recess. However, because the two versions of the budget resolution passed by such narrow margins, any compromise will once again be difficult to maneuver through both chambers. This will most likely lead to delays and drag out the process.

Billions Lost Annually Due to Tax Evasion

As tax day approached last Friday, there were a number of events in Washington, DC, dedicated to the issue of tax evasion and compliance. There is great concern in Congress and also among tax experts around the country about the detrimental effect the lack of tax compliance has on individual Americans and the broader U.S. economy.

The most significant meeting held last week was a Senate Finance Committee hearing on the U.S. tax gap. The tax gap is the difference between the amount of money the government is supposed to receive in taxes and the amount it actually does. Currently, the U.S. has a tax gap of approximately $ 353 billion per year. The hearing explored reasons why the tax gap exists and what steps the government and the IRS can take to work to close the gap.

Members of the committee expressed serious anxiety over the growth of the gap over the past few years. Expert testimony cited underfiling, underpaying, the vast exploitation of tax loopholes, and outright fraud among the many causes of the gap. There was also consensus at the hearing among witnesses and senators that the continuing complexity of the tax code has exacerbated the tax gap because it has become increasingly difficult for the average individual to accurately calculate their taxes.

Witnesses at the hearing included David Walker, Comptroller General of the Government Accountability Office (GAO), Mark Everson, Commissioner of the IRS, Eileen O'Connor, Assistant Attorney General of the Department of Justice, Nina Olson, the National Taxpayer Advocate for the IRS, and other tax compliance experts.

The presence of a large tax gap is detrimental to the U.S. because it represents revenues the government should be receiving from taxpayers to help pay for national priorities. As ranking Minority Chairman Max Baucus (D-MT) stated at the hearing, the tax gap can also be thought of as roughly $ 1 billion per day the government should be accruing that it is not.

Baucus went on to state concerns that the gap is contributing to economic instability and a devalued dollar. He said, "The value of a dollar in your pocket is actually less, because our nation has been piling up debts and owes more money to foreign governments." Baucus concluded if the tax gap were brought down to zero, the revenues could pay for roughly three-fourths of the current federal deficit, a large portion of our Social Security liabilities each year, or even all of the annual Medicare outlays.

Members of the committee as well as witnesses seemed to struggle with whether the more viable solution for dealing with the tax gap would be to increase services to taxpayers to help them better understand the filing process or to increase enforcement to ensure more compliance with the tax laws. IRS Commissioner Everson stressed that over the past four years the IRS has increased total individual audits (and more than doubled its high-income audits), increased the number of criminal prosecutions it recommends to the Justice Department, and increased its enforcement revenues from $ 33.8 billion in fiscal year 2001 to $ 43.1 billion in FY 2004.

Everson's testimony should not be taken at face value as many independent investigations have shown the information provided to the public by the Internal Revenue Service about the agency's criminal enforcement activities to be substantially inaccurate. According to the Transactional Records Access Clearinghouse (TRAC) run by Syracuse University, "IRS criminal enforcement data cannot be relied upon and if anything they appear to have grown worse over time." *(More information from TRAC about accuracy of IRS data)*

The money the IRS does not collect due to "tax cheats," non-compliance, loophole exploitation, or underpayments has a negative effect on the federal budget as well as the government's abilities to fund programs and services. As Comptroller General Walker mentioned in his testimony, paying taxes is a moral obligation people have as members of a society to provide funding for government services. He pointed out to members of the committee that people who do not pay taxes today are setting up their children and grandchildren for higher taxes in the future, because everybody ends up paying a small share for those who do not comply.

Besides increased efforts on tax compliance at IRS, there was a general consensus among those testifying at the hearing that the tax code is in desperate need of simplification and responsible reforms would help with compliance. While there continues to be a sense of urgency among many to simplify the code, it is unclear at this time whether the President's Advisory Panel on Tax Reform will be able to recommend substantial changes to the tax code that will survive politically.

The tax panel released a statement last week on Wednesday summarizing some of their initial work and findings. The panel has also requested the submission of specific proposals for reforming the tax code for the panel's consideration as its work moves forward.

The panel held their most recent public meeting in Washington, DC, on April 18. The meeting focused on how state tax systems interact with the federal system and how the tax system affects businesses looking to invest in technological innovations. More information on the meeting can be found here.

Homeland Security Won't Remove Hazmat Signs

The Department of Homeland Security (DHS) announced April 7 that it will drop a proposal to remove warning placards from railcars carrying hazardous materials that pose a toxic inhalation risk. The decision came after firefighters and other first responders warned that removing the signs could endanger those transportation workers and emergency personnel who respond to accidents involving hazardous materials, and communities through which the shipments travel. DHS was considering the removal of placards due to terrorism concerns.

DHS Secretary Michael Chertoff announced the decision at the National Fire and Emergency Services Dinner in Washington, DC. Chertoff explained, "I understand that there is a legitimate serious concern about whether by identifying hazardous material, we are giving people a target or a bull's-eye. And that is a real risk we have to weigh. I also understand that we have to consider the need of people who respond, people who respond not only to terrorist threats, but to derailments or accidents that happen at any point in time anywhere in the country, and the need they have to understand the hazards that they are going to face."

Last year, the Transportation Security Administration within DHS ordered an independent review of alternatives to the placard system. Among other things, it found that first responders use the placards to react to an emergency quickly and appropriately. The study also concluded that no alternate technologies are currently available that could effectively replace the system.

DHS and the Department of Transportation (DOT) published a notice and request for comments Aug. 16, 2004 in the *Federal Register* asking for feedback on several security proposals to increase security of toxic inhalation hazard (TIH) materials on railways. About 10 million tons of TIH materials are shipped by rail in the United States every year. The agencies specifically solicited comments on whether the placards should be removed, if alternative systems could replace the placards, and what the perceived impacts would be on first-responders and transportation workers.

An International Association of Fire Chiefs survey, published in early March 2005, found that 98 percent of fire chiefs who responded believed the placards were essential and should not be removed. The association opposed the DHS proposal. Almost all of the nearly 100 comments submitted in response to the *Federal Register* notice raised concerns about removing the placards.

Public Interest Group Sues IRS Over Access

Transactional Records Access Clearinghouse (TRAC), a nonpartisan research center at Syracuse University that disseminates federal government statistical information, filed a lawsuit April 14 against the Internal Revenue Service (IRS) for withholding information about enforcement actions that has been publicly available for the past 30 years. The center filed the lawsuit under the Freedom of Information Act (FOIA) after the IRS rejected a request for the statistical data, claiming releasing it could compromise homeland security.

TRAC submitted three separate FOIA requests for the IRS statistical databases in November 2004. Despite a consent decree from prior litigation requiring the agency to make statistical data available to TRAC on an ongoing basis, the IRS rejected each request. The agency claimed that the requested records did not exist, explaining that basic statistics about audits, appeals and collection activities were no longer compiled. The IRS also cited "new federal security requirements" to justify its refusal to release an IRS manual for statistical information systems.

TRAC claims in the lawsuit that the IRS does not have a valid exemption under FOIA to justify withholding the documents. The requested information is unclassified, and IRS officials do not possess the authority to designate documents for "Internal Use" only. The lawsuit also seeks a ruling that would allow the pursuit of disciplinary action against responsible agency officials for arbitrarily and capriciously withholding these documents from the public.

Scholars, public interest groups, researchers and journalists use the requested information to evaluate the agency's implementation of tax laws. Previously, the data has been used to prove that rich taxpayers involved in enforcement actions are more successful in reducing the taxes and penalties owed than poorer taxpayers.

David Burnham, co-director of TRAC, evaluated the IRS position stating, "From my research, it appears the IRS is reverting to its habits in the 1950s and 1960s, when secrecy was the norm and the problems of corruption and political abuse were later uncovered by the Congress."

Public Citizen Litigation Group, a public interest group with extensive experience litigating FOIA cases, is representing TRAC in this matter.

Senate Whistleblower Bill Leaves Committee, FBI Whistleblower Hearing Set

The Senate Committee on Homeland Security and Governmental Affairs favorably reported out a bill April 13 that would strengthen whistleblower protections. The measure, the Federal Employee Protection of Disclosures Act (S. 494), would amend the Whistleblower Protection Act to provide additional protections for federal employees.

Sen. Daniel Akaka (D-HI) introduced the bill, which is identical to legislation introduced in the 108th Congress as S. 2628. That bill, S. 2628, was the first stand-alone whistleblower protection bill to be approved by the Senate Committee on Government Affairs in 10 years. The Federal Employee Protection of Disclosures Act would clarify the original congressional intent for the WPA, and strengthens the language by:

- Adding a provision that allows for the protection of **any** disclosure that provides evidence of waste, abuse or violation of any law, rule or regulation;
- Allowing the Office of Special Counsel to file amicus briefs with federal courts;
- Requiring employee training on whistleblower rights;
- Permitting the review of whistleblower cases by any court of appeals, not just the Federal Circuit, as is currently the case;
- Protecting whistleblowers from having security clearances revoked as retaliatory actions;
- Amending the Homeland Security Act of 2002 to permit the disclosure of independently obtained critical infrastructure information if it provides evidence of waste, fraud or abuse.

Congress unanimously strengthened the WPA in 1994, but the courts have defied its statutory language and congressional intent by ruling to severely limit the cases in which whistleblowers receive protection. The protections have been whittled down so that whistleblowers will not be protected if they blow the whistle about wrongdoing to co-workers, if the whistleblowing connects with their job duties, or if another whistleblower has already exposed the issue.

Recent whistleblowers have demonstrated the importance of these individuals in exposing serious and unaddressed problems in government. FBI translator Sibel Edmonds was fired after publicly revealing that the agency was purposely delaying document translations to get more funding, and employing a person connected with individuals under FBI investigation, among other accusations. She later sued the FBI for wrongful termination, but her suit was dismissed after the government argued that the case would divulge state secrets if it proceeded. Edmonds has filed an appeal, and oral arguments for her new case will begin April 21.

S. 494 is cosponsored by Sens. Susan Collins (R-ME), Charles Grassley (R-IA), Carl Levin (D-MI), Patrick Leahy (D-VT), George Voinovich (R-OH), Joseph Lieberman (D-CT), Norm Coleman (R-MN), Richard Durbin (D-IL), Mark Dayton (D-MN) , Mark. Pryor (D-AR), Tim Johnson (D-SD), Frank Lautenberg (D-NJ) and Thomas Carper (D-DE) and Lincoln Chafee (R-RI).

Judge Upholds D.C. Hazmat Ban

On April 18, U.S. District Judge Emmet G. Sullivan upheld a new Washington, DC, law prohibiting hazardous cargo rail shipments near the U.S. Capitol. Sullivan said that the District has a right to protect itself from an accident involving hazardous chemicals, because the federal government has failed to do so.

CSX, the rail company challenging the District's new law, stated that it will immediately appeal the ban, which is scheduled to take effect April 20. The fate of the ban now rests with the federal appeals court. CSX said that it will reroute railcars containing hazardous materials to comply with the ban, despite its ongoing appeal.

Sullivan's decision comes after CSX and the federal government refused to engage in settlement talks with the city that could have avoided a costly legal battle. The refusal was unfortunate but not unexpected. Given the company's position that the law is an unconstitutional infringement of interstate commerce, it makes legal sense that the company would avoid appearing to give credence to the policy by negotiating on the matter. Unfortunately, this prevented any real progress or even constructive discussion on a genuine safety concern and forces the courts to resolve the issue.

Faster Freedom of Information Bill Introduced in House

On April 13, Reps. Brad Sherman (D-CA) and Lamar Smith (R-TX) introduced the House version of the Faster FOIA bill, H. R. 1620, which would establish a commission to report on delays in responding to Freedom of Information Act (FOIA) requests, and recommend solutions. The Senate version, S. 589, also a bipartisan bill, passed favorably out of the Judiciary Committee on March 17.

Both H.R. 1620 and S. 589 would create a 16-member Commission on Freedom of Information Act Processing Delays, which would study how to lessen delays in the FOIA process. Currently, federal agencies have 20 days to respond to a FOIA request, but backlogs contain requests that are decades old.

Smith noted the importance of the bill, stating that "American citizens should have the opportunity to quickly and easily obtain information from the federal government." The bill was referred to the Committee on Government Reform.

Smith and Sherman also introduced the OPEN Government Act in February, which contains several measures to strengthen FOIA. Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) introduced the Senate versions of both the Open Government Act (S. 394) and Faster FOIA bill.

President Bush recently raised FOIA during a speech before the American Society of Newspaper Editors (ASNE) on April 14. Bush discussed the need to balance public disclosure of information with security issues. "I know there is a tension now between making the decision of that which is -- that which can be exposed without jeopardizing the war on terror .... Right after September the 11th, I was fully aware that the farther we got away from September the 11th, the more likely it would be that people would forget the stakes. I wish I could report that all is well. It's not. It's just not. It's going to take a while."

When asked specifically about the presumption of disclosure, and the time it takes agencies to respond to requests, Bush referenced the Cornyn legislation stating, "John Cornyn is a good friend, and we look forward to analyzing and working with legislation that will make -- it would hope -- put a free press's mind at ease that you're not being denied information you shouldn't [sic] see... I think that FOIA requests ought to be dealt with as expeditiously as possible."

EPA Late Again with Toxic Release Data

The Environmental Protection Agency (EPA) has significantly missed its publicly stated goal of March for the release of the 2003 Toxic Release Inventory (TRI). The agency made several changes to its data management in an effort to streamline the process, apparently to no avail. In recent years, the agency has been releasing the annual TRI database in May or June.

The TRI data remains one of EPA's mostly widely-used databases, however the agency seems incapable of speeding up the process to release the database. Public interest groups have regularly complained that the delay make the data less timely and therefore less useful.

The Office of Management and Budget (OMB) has also chastised EPA for the regular delays with a prompt letter in March 2002 from its Office of Information and Regulatory Affairs urging the agency to find ways to speed up the annual release of TRI data. However, the following year EPA had one of the longest delays, releasing the 2001 TRI on June 30, 2003 -- one day before companies were required to submit their TRI forms for 2002.

As part of the agency's recent efforts to speed up the process of confirming and finalizing the data, EPA discussed procedural changes and timelines with interested stakeholders months ahead of time. The agency also reduced its analysis report of the data and publicly posted a Nov. 2004 database of the individual TRI forms. Unfortunately, it appears these efforts have resulted in little actual change. Even with minimal analysis done by EPA, this year is no faster and may be among the latest.

EPA is also in the process of evaluating several significant changes to TRI reporting, in an attempt to reduce the reporting burden on companies. Given the agency's continued problems managing the current TRI system, it seems that major changes would be inadvisable and likely lead to additional delays.

Disclosure Helps Chemical Security

The Wisconsin county of Waukesha has addressed chemical safety and security concerns with reporting and disclosure requirements stronger then those established by the federal government. The county has long used public disclosure of risks and hazards as a means to reduce and manage risks from toxic chemicals. A recent congressional report supports the county's approach concluding that reporting and disclosing chemical inventories and associated hazards promotes risk reduction.

In 1986, Congress passed the Emergency Planning and Community Right-to-Know Act (EPCRA), which requires disclosure of toxic pollution and chemical storage and allows for citizens to participate in local chemical emergency planning. Wisconsin quickly adopted EPCRA as a state law and passed additional stronger right-to-know policies.

For example, the federal Clean Air Act requires facilities that use large quantities of hazardous chemicals to inform the public about possible health consequences from a "worst-case" chemical accident. Waukesha County has established a program to calculate and disclose similar information for facilities that fall below the federal reporting thresholds. These policies provide Waukesha emergency management officials and the public with a better understanding of the threats to public safety that hazardous chemical-using facilities pose.

The county has made good use of the information. Emergency management officials identify 'special needs' facilities, like schools, daycare centers, and nursing homes, which require specialized evacuation plans to protect against a chemical accident. The increased collection of chemical information and the greater attention to chemical safety has compelled many facilities in Waukesha to eliminate toxic chemicals.

According to James Malueg, director of the Waukesha emergency management department, "The benefits of public reporting are that many facilities are maintaining a lower inventory of very toxic chemicals. Some have reduced the amount on-site while others have turned to substituting toxic chemicals with safer ones. This has been a direct result of the [right-to-know] legislation."

Malueg and Waukesha county policymakers are backed-up by a Feb. 14 Congressional Research Service report titled "Chemical Plant Security." The report explores the issue of making facilities that use hazardous chemicals safer from possible terrorist attacks. Within a balanced presentation of differing viewpoints on the best methods to improve security, the report concludes that public disclosure of chemical risks can make communities safer. Specifically the report states, "reporting and disclosure requirements are meant to facilitate planning, but sometimes they also promote risk reduction. For example, facility managers concerned about community relations sometimes reduce use of particularly toxic or otherwise hazardous materials .... In other cases, the public disclosure requirement may encourage them to change chemical processes and handling in order to reduce the risk of reportable spills."

Unfortunately, Waukesha County took down their online database of facilities' chemical inventories and worst case scenarios shortly following the 9/11 terrorist attacks. Citizens can still find out about chemical hazards by contacting the Waukesha County Department of Emergency or the state environment department, but online access has fallen victim to secrecy in the name of security.

Free E-Filing for IRS Form 990 Available

The National Center for Charitable Statistics (NCCS) is offering free electronic filing for nonprofits that file the annual Form 990 to the Internal Revenue Service (IRS) online. The process offers features that make filling out the form easier and helps make it more accurate.

Charitable organizations with budgets over $ 25,000 a year are required to file an annual information return (Form 990) with the IRS. The IRS uses the information to ensure groups continue to be eligible for tax-exempt status. The completed forms are made available to the public, and used for donor decisions, research and other purposes.

The IRS will begin requiring electronic filing of Form 990 for organizations with assets over $ 100 million next year. The following year electronic filing will be mandatory for groups with assets over $ 10 million and all private foundations and charitable trusts. However, smaller organizations can take advantage of NCCS's free service now. *990 Online* includes:

- A calculator that automatically totals and checks for errors
- Links to instructions and tips, eliminating the need to wade through the 49-page IRS instruction booklet
- Ability to create an Adobe Acrobat PDF file for printing or distribution
- Ability to import files from Excel.

NCCS, a national clearinghouse of research data on nonprofits sponsored by the Urban Institute, is working with state charity officials to offer electronic state registration at the same time Form 990 is filed electronically with the IRS. Pennsylvania and Colorado will be the first states to offer this service. NCCS is encouraging nonprofits to contact their state charity officials and ask them to participate.

Administration Stifles Dialog on Social Security

The Bush administration has denied use of public facilities to a group critical of its version of Social Security reform, while using federal resources to pay for propaganda and promotion of its agenda. It refused to allow a women's group to hold a conference on Social Security at the National Archives because they did not have a speaker supporting private accounts. The same week three people were ejected from a federal government supported town hall meeting on Social Security in Colorado because their car had an anti-war bumper sticker.

On March 31, the National Archives and Records Administration told a coalition of women's organizations that it could not hold a forum on Social Security at the Franklin Delano Roosevelt Library in Hyde Park, NY, because the coalition opposes Bush's proposal for private accounts and did not have a speaker supporting the administration's view. The library's director claimed the forum would violate the Hatch Act because it would not present both sides of the debate and "may be perceived as being partisan."

However, the Hatch Act only prohibits use of federal funds for partisan electioneering and does not address issue advocacy or debate on legislative proposals. The government agency responsible for enforcement of the Hatch Act, the Office of Special Counsel, told the *Washington Post* that the Hatch Act does not apply to the meeting because it "does not seem to involve a partisan campaign or activity." The National Archives moved to correct the error after the issue became public by telling the press it would re-invite the groups, but the groups were unaware of any re-invitation and had already made alternative plans.

The forum sponsors were the Older Women's League, the American Association of University Women and the League of Women Voters. They had invited two Republican members of Congress from New York, Reps. Sue Kelly and John Sweeney, to attend the forum, but both declined. Rep. Maurice Hinchey (D-NY) accepted.

The National Council of Women's Organizations objected to the National Archives' action, issuing a statement that said, "In keeping with the Bush administration's determination to quash anyone who disagrees with them, federal agencies now consider it 'partisan' to hold any opinion that is not identical to the president's." The statement noted that Bush was touting his plan for Social Security at the Bureau of Public Debt, a federal facility in West Virginia, without providing for any speakers opposed to the personal account proposal.

Although the National Archives backed off its assertion that the planned forum would violate the Hatch Act, groups wishing to use federal facilities may face pressure to alter the content of their meetings in the future. Archives spokeswoman Susan Cooper said groups would be "urged" to include dissenting voices in meetings, although not required to do so.

Ejections from Town Hall Meetings

On March 28, three people ejected from a Social Security town hall meeting in Colorado met with Secret Service officials to find out why. In an e-mail circulated by the National Coalition Against Censorship, three Denver residents described their experience, saying they had obtained tickets to the event from Rep. Bob Beauprey's (R-CO) office. When they entered, "we were told that we had been 'ID'ed' and were warned that any disruption would get us arrested. After being seated in the audience we were forcibly removed before the President [Bush] arrived, even though we had not been disruptive." The Secret Service told the three it was a private event.

In a subsequent meeting the Secret Service told them and their attorney that they were identified by a Republican staffer who saw a bumper sticker on their car that said, "No Blood for Oil." The Secret Service also said that the Republican Party was in charge of ticket distribution and staffing for the event. However, the White House communications office set up the event. The group also reported that a person wearing a Democratic T-shirt was ejected from a similar event in Arizona on the same day.

Federal Resources Used for Social Security War Room

The *Associated Press* reports that a 'war room' to sell Bush's Social Security plan has been established at the Treasury Department's public affairs office. Called the Social Security Information Center, the project has hired three full-time former Bush-Cheney and Republican National Committee campaign workers to use television ads, grassroots organizing, and other means to push the president's plan. The project is also coordinating travel for town hall meetings for Bush, Vice President Cheney, Treasury Secretary Snowe, and other cabinet members. The project also has a program for rapid response to negative editorials and news coverage.

While it is not uncommon for a president to use the resources of the office to promote a policy agenda, the use of government funds for this project has been questioned. Joan Claybrook, president of Public Citizen, said, "They have the right to say their piece and to respond, but to create a whole team of PR experts to try and influence the media, I think, is an excessive use of taxpayer money."

IRS Checking Form 990 Against Watch Lists

The Internal Revenue Service (IRS) is screening applications for tax-exempt status for terrorist names, IRS Commissioner Mark W. Everson testified at an April 5 Senate Finance Committee hearing on nonprofit accountability and tax compliance. The IRS's counter-terrorism project, focusing on the abuse of charities, is developing an electronic capability to review filed Forms 990 and 990-PF for terrorist names.

The explosive growth of the U.S. economy's nonprofit sector over the last decade has fueled tax fraud, terrorist financing schemes and illegal political activities, Everson said at the congressional hearing.

The IRS has already instituted procedures and is currently developing the electronic capability to review filed Forms 990 and 990-PF for terrorist names. Name matches are "coordinated with the appropriate office for verification and further action." In his testimony, Everson did not elaborate on which terrorism watch lists the IRS checks names against or where the name matches are sent. He also did not extrapolate on the consequences for an organization that had a name match.

The Senate Finance Committee did not question Everson about the controversy surrounding watch lists. 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. For example, one of the lists is 143 pages of individuals -- about 20,000 names and aliases -- and organizations. Some of the names are partial, such as "Ahmed the Tall."

The IRS is also planning a redesign of the Form 990. In November 2004, the IRS revised Form 1023, the application form to qualify as a tax-exempt organization, to ask for specific information on foreign activities, and the revision of Form 990 will most likely be similar.

The IRS is seeking more information about the practices of organizations that make grants to foreign entities, and the level of oversight the organizations exercise over the use of funds abroad. IRS agents are currently examining more than 100 charities that make grants overseas to determine whether they are supporting terrorism. According to Everson, investigations so far have contributed to the sentencing of 44 individuals in terrorism related cases, 32 of them for money laundering.

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.

Senate Finance Committee Discusses Nonprofit Accountability

On April 5, the Senate Finance Committee continued its examination of accountability, governance and oversight of the nonprofit sector in a hearing titled "Charities and Charitable Giving: Proposals for Reform." The hearing focused mostly on the valuation of non-cash contributions, excessive compensation, transparency and the sharing of information.

Witnesses included Mark W. Everson, commissioner, Internal Revenue Service; George Yin, chief of staff, Joint Committee on Taxation (JCT); Leon Panetta, director, Panetta Institute for Public Policy; Mike Hatch, attorney general of Minnesota; Dr. Jane Gravelle, Congressional Research Service; Richard Johnson, attorney; David Kuo, White House Office of Faith-Based and Community Initiatives; Brian Gallagher, president, United Way; and Diana Aviv, Independent Sector.

In addition to Chairman Charles Grassley (R-IA), senators in attendance for portions of the hearing included Sens. John Rockefeller (D-WV), Orrin Hatch (R-UT), James Jeffords (I-VT), Olympia Snowe (R-ME), Rick Santorum (R-PA), Blanche Lincoln (D-AR), Jim Bunning (R-KY), Ron Wyden (D-OR) and Charles Schumer (D-NY).

The hearing centered mainly on the tax-exempt proposals included in the JCT report, "Options to Improve Tax Compliance and Reform Tax Expenditures"and the Senate Finance Committee staff discussion draft. The Independent Sector Panel on the Nonprofit Sector's interim reportwas also discussed in the last panel. Common themes included:

- The lack of effective enforcement vehicles available to the IRS to police tax-exempt organizations
- Perceived lax oversight exercised by governing boards of nonprofit organizations
- Concerns with respect to excessive compensation paid to executives of tax-exempt organizations
- Deficiencies in Form 990 reporting by tax-exempt organizations
- Perceived excess in travel, entertainment and other related expenses of tax-exempt organizations.

The nonprofit health care industry received specific criticism at the hearings.

In opening remarks, Grassley expressed his intention to "move legislative reforms" in this area promptly to strengthen charitable governance and improve the tax gap. Rockefeller noted that the vast majority of foundations and charities do good work and encouraged the committee to find a way to fix the misuses without discouraging the formation and good work of charities. Santorum noted his serious concerns that a number of proposals in the JCT report and the staff discussion draft would impose too onerous a burden on small nonprofits. He encouraged the committee to push for enforcement of current laws before enacting new legislation.

IRS Commissioner Mark Everson testified that tax compliance and enforcement by nonprofit organizations is one of his top four priorities at the IRS and encouraged the committee to continue its review of the sector. Everson called the abuses "increasingly present" and said that if Congress does not act to end the abuses soon, public support for charities will "wither." Everson attributed much of the growth of problems to "weak governance practices" and "a culture that has become more casual about compliance and less resistant to noncompliance."

Everson, who said the IRS lacks adequate resources to effectively enforce current regulations, noted that while the nonprofit sector has evolved and grown over the years, tax law and regulation have changed much less. "Since 1969 there has been only limited review of the rules relating to tax-exempt status," he said, referring to the 1969 tax law changes affecting philanthropy. Among the most serious problems Everson highlighted is the growth of donor-advised funds and supporting organizations that allow taxpayers to make a deductible donation but delay shifting the money or other assets to the final charitable beneficiary.

The testimony of George Yin focused on the JCT's proposal to limit the deduction for charitable gifts of property to basis value. Yin argued that the cost to the taxpayer of getting an appraisal or determining fair market value for a piece of property, coupled with the cost to the IRS of ensuring that the value is justified, outweighs the charitable benefit of gifts of property. He advocated that the proposed limitation would encourage charitable gifts of cash and publicly-traded securities, which have a tangible value. Under questioning, he stated that he does not believe that a change in valuation would result in a decrease in the overall level of charitable giving. Yin also briefly touched on the JCT proposals to require a five-year review of tax-exempt status and the creation of a termination tax, but was not questioned by the committee on those issues.

Many senators voiced concerns that any changes regarding gifts of property could discourage legitimate charitable giving.

"I do not accept the concerns about non-cash donations," Jeffords said. He said farmers, for example, should be permitted to donate land and take a full tax deduction for the value of the land. "The government has no problem taxing that land at its fair market value. It can't have it both ways."

Schumer echoed Santorum's earlier concerns, noting that the $ 300 billion in tax revenue that goes uncollected each year due to tax avoidance and evasion could be collected with better enforcement of existing laws, not new legislation. He also noted that it will be unduly burdensome for many tax-exempt organizations under new, one-size-fits all-legislation, which will harm many smaller organizations that support or directly provide important social services.

In response to these concerns, many charities are arguing for increased self-regulation. Leon Panetta, a member of the Panel on the Nonprofit Sectors' Citizen Advisory Committee, encouraged the committee to find the right balance between the need for new laws versus increased self-regulation and pushed for the creation of a National Council on Nonprofit Accreditation. Brian Gallagher of United Way echoed these concerns, discussing United Way's internal efforts to ensure good governance. He also suggested that tax-exempt organizations be asked to report annually concrete results that are tied directly to their missions.

Minnesota Attorney General Hatch testified that self-regulation alone will not curb the abuses and lent his support to both the JCT and Senate Finance Committee staff draft proposals. He also encouraged the committee to eliminate the rebuttable presumption and instead shift the burden to prove reasonable compensation from the IRS to the charity.

Independent Sector's Diana Aviv discussed the Panel's interim report and recommendations. The 72 page report provides suggested actions for the IRS, legislators and tax-exempt organizations. If enacted, the proposals would affect all charities, regardless of size. Among the suggested changes: charities with at least $ 2 million in total revenue and filing a Form 990 would be required to conduct a yearly financial audit; organizations with $ 500,000 to $ 2 million in total revenue would be required to have an independent public accountant review financial statements and suspension of tax-exempt status for charities with less than $ 25,000 if they fail to file an annual notice with the IRS for three consecutive years. Aviv implored the committee to allow the panel to complete its work before introducing legislation. She noted that panel was preparing a second phase to provide greater detail on recommendations and to seek input from nonprofits throughout the country.

The Panel's recommendations were not questioned extensively by the committee even though the proposals have been questioned by some nonprofit leaders. A commentary in the *Chronicle of Philanthropy* by Pablo Eisenberg argued the recommendations were too weak and did not address the core accountability issues facing the sector, such as financial self-dealing activities. There has also been criticism leveled by the National Committee for Responsive Philanthropy, the Philanthropy Roundtable, and some conservatives that the panel's recommendations and process miss the mark. Some complained that the panel's proposals come at a time when many nonprofits are facing reduced funding and more costs for compliance and regulation. Additionally, the internal process of the panel has been shrouded in mystery. Organizations not directly involved with the panel's deliberations scrambled to get comments to the panel on its preliminary recommendations only to learn that the panel was already meeting to discuss the next phase.

Charities not involved in the Panel's discussions have also pushed for increased self-regulation. The National Council on Responsive Philanthropy has put forth a number of proposals that have not been considered by the Finance Committee or the Nonprofit Panel:

- Sharply limiting or eliminating compensation for foundation trustees
- Eliminating any and all self-dealing and conflict of interest by foundations
- Raising private foundations' payout from 5 to 6 percent
- Increasing disclosure of corporate philanthropic grant making
- Disclosing grant making by public charities and donor-advised funds
- Reducing the private foundation excise tax -- but devoting the bulk of the remaining excise tax to public oversight and enforcement activities by IRS and state attorneys general.

The panel's seeming unwillingness to discuss any recommendations not specifically mentioned in the Finance Committee staff draft proposals has some nonprofits concerned. Rick Cohen of NCRP noted, "[F]oundations get off pretty much scot-free in the first phase, which seems completely inappropriate given the press coverage around foundation scandals of self-dealing, inappropriate expenses, foundation trustee fees, and insufficient levels of grant making." Additionally, Independent Sector has raised $ 3 million "taking on issues that have minimal bearing on the scandals that have undermined and continue to undermine the trust of Americans in the nonprofit sector." In a statement critiquing the Nonprofit Panel's performance and proposals, NCRP has issued an additional set of recommendations to the Senate Finance Committee to strengthen self-regulation.

Overall, the witnesses' statements and the tone set by the committee suggest that proposed legislation will go farther than the panel's proposals. It also appears that the Senate Finance Committee's proposal may extend far beyond the proposals set forth in its discussion draft issued last summer and resemble the comprehensive proposals suggested by the JCT in January.

In related news, the House Ways and Means Committee announced it will hold a hearing on the sector April 20. A full list of witnesses has yet to be released, but George Yin of the Joint Committee on Taxation, David Walker of the Government Accountability Office and Douglas Holtz-Eakin of the Congressional Budget Office will testify during the hearing. According to Ways and Means Committee Chairman Bill Thomas (R-CA), the hearing will, "examine the legal history of the tax-exempt sector; its size, scope and impact on the economy; the need for congressional oversight; IRS oversight of the sector; and what the IRS is doing to improve compliance with the law."

527 Reform Bill Sponsors Circulate Amended Version

A draft substitute amendment to S. 271, the 527 Reform Act of 2005, is being circulated by sponsors Sens. John McCain (R-AZ) and Russell Feingold (D-WI). It removes some problems with the original bill, but still would subject independent political organizations to the same regulations as parties and federal candidates.

The substitute bill removes the possibility of the Federal Election Commission (FEC) determining that a group is "described in Section 527" by removing that phrase and limiting regulation to groups registered with the Internal Revenue Service (IRS) as political organizations under Section 527. It also extends an exemption for state and local 527 groups if they do not refer to federal candidates in their activities and public communications, only operate in one state, and do not refer to political parties unless it is to identify a non-federal candidate.

While these and other changes limit the damage S. 271 would cause, the fundamental problems remain. It would drive partisan activity to 501(c) groups in order to avoid FEC regulation, losing the public disclosure required of all 527s. It would also limit the ability of state and local groups to refer to anyone who is a federal candidate, even if she or he is a state or local official and the reference is in relation to state or local issues.

The bill would also tilt the political playing field in favor of business corporations because they can spend for political purposes without tax consequences, while 501(c) organization expenditures on political activities are taxed at the highest corporate rate.

Corporate-Conservative Alliance Plots Attack on Safeguards

From many small and supposedly disconnected proposals, a larger pattern is emerging: corporate special interests and conservative lawmakers are conspiring to mount a comprehensive assault on regulatory protections, on a scale equivalent to the broad-based attacks of the Contract With America.

The corporate-conservative alliance behind the major attacks of the mid-1990s decided almost immediately thereafter that any comprehensive "regulatory reform" is doomed from the start and that the wiser course of action would be to pursue the same objectives through smaller piecemeal proposals. Many of the same players are active today, and they appear to have learned that lesson well.

The November elections reinforced GOP political hegemony, and an emboldened corporate-conservative coalition is seizing the opportunity to pick up where the Contract With America left off. The combination of proposals recently announced and initiatives already underway reveals a plan to dismantle public safeguards in a corporate takeover agenda every bit as ambitious as the discredited efforts of the Contract With America.

Detailing the Corporate Takeover Agenda

The new attack on public safeguards adapts some of the ideas from the Contract With America and also offers some newly-minted ideas just as devastating as any from the 1990s. The single intention of all these efforts is to realign power dynamics in order to increase corporate profits by reducing the level of protection government is supposed to provide for the people. The details of the new corporate takeover agenda fall into the following clusters.

Distorting the Process for Creating Protections

The corporate-conservative coalition has had plenty of success in weakening or eliminating specific protections one by one, but the possibility that the public will realize the stakes -- as happened with a few high-profile missteps, such as the threatened weakening of the Clinton administration's standards for arsenic in drinking water -- makes that approach risky. The corporate-conservative alliance has thus always worked with a second approach less fraught with these risks and more capable of wide-ranging consequences: weakening the underlying process for creating all regulatory protections. Here are some of the proposals to distort the regulatory process:

> **Net Benefits:** The vision of net benefits is that agencies will be required to prove, through rigged cost-benefit analytical formulae, that any proposed regulation results in quantified, monetized benefits that exceed quantified, monetized costs. Industry may be seeking a bill to codify E.O. 12,866, the cost-benefit

analysis executive order. Additionally, as a possible further step in the direction of a net benefits policy, the White House's Office of Information and Regulatory Affairs (OIRA) has used its 2005 annual draft regulatory accounting report to invite comments on the utility of net benefits measures.

Centralized White House Review: The White House obviously has not ceased serving as one-stop shopping for corporate special interests seeking to roll back existing and pending regulatory safeguards. OIRA has extraordinary powers under the Paperwork Reduction Act (reauthorization of which is a priority item in the 109th Congress) to modify information collections, even those necessary for proposed regulations. The latest major OIRA initiative is the hit list of regulations to be weakened or eliminated, presumably in order to benefit the manufacturing sector, which puts at risk protections ranging from safe drinking water to Listeria to family and medical leave rights.

Regulatory Budgets: The vision of regulatory budgeting is that agencies are given fictional "budgets" of total costs that can be imposed on industry through regulations. When an agency reaches its fictional budgetary cap, it must cease regulating. The first step in this direction is H.R. 725, which would authorize a pilot study of regulatory budgeting.

Regulatory Sunsets: Corporate special interests are clamoring for regulatory sunsets, or automatic expiration dates for regulatory protections, on the argument that older regulations are somehow necessarily outdated. This argument easily falls apart: consider important protections such as the ban on lead in gasoline, which was a good idea 30 years ago and is still a good idea today. The first step in the direction of regulatory sunsets is H.R. 682, which would use periodic reviews under the Regulatory Flexibility Act as an occasion for agencies to consider whether a regulation is still needed.

Regulation by Litigation: Using the pejorative label of "regulation by litigation," some industry-funded think tanks have been raising objections to the consent decrees that resolve deadline cases and other litigation against the agencies to compel them to do their jobs. Reportedly, Rep. Candice Miller (R-MI), who chairs the regulatory affairs subcommittee of the House Government Reform Committee, is interested in legislation to force OIRA review or the equivalent of notice-and-comment rulemaking as a condition precedent of any consent decrees.

If current cost-benefit analysis policies had been in place 30 years ago, we would not have banned lead in gasoline! Read more.

Hiding Information the Public Needs

Whether the goal is holding corporate special interests accountable for the harms they cause or holding the government itself accountable to the public from which it derives its authority, information is critically important. The corporate-conservative conspiracy therefore is planning to constrict the free flow of information in order to continue implementing its agenda in the shadows.

Industry Information Disclosures: Many regulatory protections depend on the public's ability to force corporate special interests to disclose vital pieces of information that become the basis of sensible safeguards. A proposed amendment to the Senate's bankruptcy bill would have reduced corporate disclosure by resurrecting a small business paperwork measure that would give a get-out-of-jail-free card to small businesses for first-time violations of information collection requirements. Fortunately, that amendment was defeated, but it could return. There may be other efforts to reduce industry's information disclosure requirements.

The Paperwork Reduction Act: Reauthorization of the PRA is likely to start in earnest this year. Not only could it be the vehicle for other anti-regulatory riders, but it is also a powerful tool that enables OIRA to change information collection requirements ranging from surveys to reporting and labeling requirements.

Open Government: The corporate takeover of government policy thrives in the secrecy that this administration is willing to create. The administration's penchant for secrecy and distinct unwillingness to err on the side of disclosure when faced with Freedom of Information Act requests will continue to present a formidable challenge to protections of the public interest.

Supplanting Science With Politics

This administration has an atrocious record of sullying science with political considerations. The corporate takeover agenda has as one of its aims the continuation of this trend, in order to cast doubt on the scientific conclusions that underscore the need for public protections. OIRA has indicated that implementation of peer review will be a major priority this year, and one of the suggestions bandied about in OIRA's pre-109th Congress meetings with industry has been legislation to add judicial reviewability to the Data Quality Act. The Integrity of Science coalition, a network of scientists and advocates, is continuing to monitor these developments and organize broad-based opposition to further attempts at politicizing science.

Neutering Federal-State Partnerships

Another common theme addresses the relationship between federal and state governments in regulatory policy. State and local governments are important partners in implementing federal standards, in issue areas ranging from special education to the environment. Additionally, state and local governments are actors just like corporations whose behaviors need to be modified -- they are employers, polluters, managers of waste dumps, and so on. Finally, they are also important as regulators themselves; especially in a time of GOP hegemony in federal government, we rely on state/local governments to create protections more stringent than the federal floor. Distorting this complex relationship can, therefore, wreak

havoc in regulatory policy.

Unfunded Mandates Reform Act: State and local government groups are clamoring for increasing the enforcement and coverage of UMRA, and they are being aided by GOPers anxious to reestablish the party's states' rights credentials--especially in a time of budget cuts and preemption policies that have been harmful to the states. This effort could pull back on any number of public protections insofar as state and local governments would incur costs above $ 62 million. Among the protections at risk would be the minimum wage, because any increase would affect states as employers, and environmental protections, many of which depend on state agencies for enforcement. Expanded coverage could also put at risk mandates that establish standards for special education, disability access, foster care and more.

Preemption: The issue of the federal government's power to preempt state policies leads to anti-regulatory initiatives that occupy one extreme position or the other. On the one hand, the federal government is aggressively preempting the states' efforts to develop regulatory protections of the public interest in the face of weak or nonexistent federal protections. On the other, Sen. Lamar Alexander (R-TN) has expressed interest in offering a bill to prevent any federal preemption of state regulations unless the law specifies the exact conflict between state and federal law. (This kind of bill has been offered before.)

Consent Decree Rollbacks: Alexander is also promoting a bizarre plan to replicate the Prison Litigation Reform Act for all consent decrees that resolve federal court cases against state or local governments. (The sole exception would be for school desegregation decrees.) His bill would establish automatic sunsets for consent decrees: every four years or with every change in administration.

Establishing an Imperial Presidency

What we have called the Imperial Presidency is a drive to consolidate as much power as possible, with as little accountability as possible, in the executive branch and ultimately the White House itself.

Threats to Whistleblowers & Agency Experts: The administration has already won management "flexibility" and the erasure of civil service protections for workers in the Department of Homeland Security, and it is seeking the same flexibility for the rest of the government workforce. One proposal would link worker salary increases to an agency's score in White House program performance reviews. The workers who would be imperiled without civil service protections include the agency scientists and experts who must conduct research and reach conclusions that threaten industry's bottom line. As menacing as the administration has already been to such familiar figures as David Graham, Jack Spadaro and Sibel Edmonds, the elimination of civil service protections could make things even worse.

Reorganization Authority: The White House is also seeking -- with strong support from Rep. Tom Davis (R-VA), chair of the House Government Reform Committee -- the power to reorganize the very structure of government. The danger is obvious: any resulting restructuring would decrease the role and power of many agencies charged with serving the public interest. Restructuring guided carefully by Congress can serve the public interest (for example, some groups are calling for a single food safety agency), but wholesale, unchecked authority is a recipe for disaster.

DHS Above the Law: The REAL ID Act has a provision that would give the Department of Homeland Security the power to waive all law in the course of securing the borders. The measure, which passed the House and is now moving as a rider to the Iraq supplemental, also has a clause stripping the courts of authority to hear cases arising from any waiver decisions.

Sunset & Results Commissions: A Sunset Commission bill would force government programs -- not individual regulations, but programs in their entirety -- to plead for their lives every 10 years or else expire. A Results Commission bill would allow a presidential commission to recommend restructuring of programs and departments, based in part on performance data, and to have its proposals fast-tracked through Congress. Both would expose the structure of government and the very existence of a government agency to the destructive whims of the corporate-conservative coalition.

Wrapping Attacks in a Rhetoric of Results

Performance is developing into a technical threat equivalent to cost-benefit analysis. Just as CBA is justified on the grounds that regulatory costs should not exceed benefits, the drive to performance assessment is justified with a good government rationale (in this case, that government programs should produce results or else be held accountable). Also like CBA, the devil is in the details: both CBA formulae and performance assessments are typically rigged to side against stringent protection of the public interest. The link between CBA and performance also crosses from the metaphorical to the actual: the White House is using its performance measurement system, the Program Assessment Rating Tool (PART), to penalize agencies for failing to use cost-effectiveness in regulatory choices or conduct cost-benefit analyses (even when forbidden by law).

PAR Act: The Program Assessment and Results Act would codify the PART, which is currently not authorized by any law. The PAR Act offers a pretense of congressional oversight over PART even as it gives the White House a green light for continuing with PART and any other assessments it sees fit to conduct.

Beyond PART: PART is expressly intended to link management and budget decisions with notionally neutral information about "performance" or "results." Performance rhetoric is already starting to creep beyond PART: proposals for civil service reform, reorganization and results commissions, and more would adopt the language of performance (or even PART scores themselves) in projects that could have

widespread consequences for the public interest.

Take Action

OMB Watch and Citizens for Sensible Safeguards, a coalition of leading public interest organizations created to defeat the Contract With America, will continue to monitor developments and oppose the corporate-conservative agenda. You can do your part as well, by signing up for action alerts and updates and adding your voice to the calls for protections of the public interest instead of a corporate takeover of our government.

Sign Up for Action Alerts

Email address:

Your name:

Preferred mail format: auto-detect text HTML

subscribe

Be sure to check our Take Action page periodically, at www.ombwatch.org/regs/action.

Local Governments Demand UMRA Changes to Avoid Accountability

State and local governments addressed a Senate subcommittee and called for an expansion of provisions in the Unfunded Mandates Reform Act (UMRA) that would further relieve them from their obligations to provide important public protections.

The Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia held a hearing April 14 on the Unfunded Mandates Reform Act. After accounts from the Government Accountability Office, the Office of Information and Regulatory Affairs and the Congressional Budget Office on the first 10 years of UMRA, a second panel featured testimony from representatives of state and local governments demanding relief from their obligations under government mandates. Representatives from the National Association of Counties (NACo), the National Conference of State Legislatures, and the National League of Cities all decried their obligation to comply with federal requirements in federally funded programs.

In testimony before the subcommittee, NACo Vice President Colleen Landkamer presented a NaCo study that looked at obligations of counties associated with 10 common mandates from which NaCo is presumably seeking relief. The study criticized the following public protections:

- Clean Air Act, which requires compliance with federal air pollution standards.
- Clean Water Act, which requires compliance with regulations regarding wastewater treatment and discharge.
- Resource Conservation and Recovery Act, which regulates solid and hazardous waste.
- Americans with Disabilities Act, which protects the rights of disabled citizens.
- Help America Vote Act, which establishes minimum standards for voting equipment used in federal elections.
- Endangered Species Act, which protects jeopardized species against harm, including destruction of their habitats.

Rather than calling for increased funding of these important public safeguards, state and local governments asked for relief from compliance. Landkamer outlined the approximate costs of some of the federal obligations. For instance, according to the study, the compliances costs borne by a family of four for the Americans with Disabilities Act is $ 8.38 while the cost for the Clean Water Act and the Safe Drinking Water Act is $ 26.11.

NACo's figures, however, failed to take into consideration the cost to the states in the absence of the mandates. CBO Deputy Director Elizabeth Robinson testified that any study of costs to states must take into consideration the counterfactual -- what the states would have done in the absence of the federal requirement. In most cases, such as public education requirements, the states would have more than likely chosen to spend money even in the absence of a federal mandate. Taking those expenditures into consideration, the cost of the federal mandate is actually much lower than the figures presented by NACo.

Landkamer also decried the one-size-fits-all approach of federal mandates. Federal mandates are applied equally across the board to all state and local governments in order to ensure that all citizens are guaranteed the same basic level of public health, safety and environmental protections. Landkamer's arguments ignore that to apply obligations on the state on a case-by-case basis is to deny citizens the same degree of protection.

State and local governments also called on the committee to consider changes that would strengthen UMRA by closing loopholes and exemptions. Currently, for instance, UMRA does not apply to costs associated with enforcing constitutional rights or providing for national security. UMRA also excludes grant conditions. State and local groups called for expanding UMRA to cover these exemptions. If UMRA is expanded in this way, state and local governments may no longer have to comply with such important public protections as the Help America Vote Act or the Americans with Disabilities Act, which safeguard many important rights.

Though representatives of state and local governments were united in calling for an expansion of UMRA's provisions, the

suggestions for reform varied considerably. Committee Chairman George Voinovich (R-OH) asked for the groups present to coordinate their efforts and bring to the committee a singular legislative package of recommendations. Voinovich told the panel that with a coordinated effort from state and local governments, they would be able to "move mountains."

The Senate hearing is part of a coordinated effort to expand the provisions of UMRA. Provisions already in the Senate budget resolution would increase the number of votes needed to overturn an UMRA point of order. The House of Representatives has also held a hearing that sought suggestions on how to expand UMRA's provisions, and that hearing featured many of the same organizations represented in the Senate hearing.

House Considers Anti-Regulatory Hit List

The White House's anti-regulatory hit list took center stage in a House committee hearing, during which GOP members and White House regulatory czar John Graham praised the hit list as a gift to the manufacturing sector while Democratic members criticized the entire project as yet another example of a corporate special interest takeover of government.

The hearing, held April 12 by the House Government Reform Committee's Subcommittee on Regulatory Affairs, featured Graham, Department of Commerce Assistant Secretary for Manufacturing and Services Albert Frink, and several representatives from the manufacturing sector all celebrating the hit list project. Only one witness -- Sidney Shapiro, law professor at Wake Forest University and board member of the Center for Progressive Regulation -- was allowed to offer an opposing view.

The hearing began with a statement from subcommittee chairperson Rep. Candice Miller (R-MI). According to the *Washington Post*, Miller has been meeting regularly with representatives from the manufacturing sector and other corporate special interests to develop anti-regulatory plans. Miller's opening remarks parroted the usual corporate special interest arguments that onerous regulation harms the competitiveness of U.S. manufacturing and directly contributes to job loss in that sector.

What is the Hit List?

The White House's Office of Information and Regulatory Affairs invited corporate special interests in March 2004 to send in their wish list of regulatory protections to be weakened or eliminated, and the administration followed up a year later with a list selecting 76 items from the industry wish list that the administration was endorsing as its "regulatory reform" priorities. OIRA did not, however, seek comments on protections to address unmet needs. (Read more about the hit list.)

OMB's Regulatory Hit List

The hearing focused on the latest development in the White House's anti-regulatory hit list: the release last month of a report in which the White House selected 76 of the public's 189 suggestions for regulatory protections to be weakened or eliminated and endorsed them as the administration's regulatory "reform" priorities. The hit list items with the White House's seal of approval include such important protections as rules governing how long truck drivers can work without breaks and an interim rule protecting the food supply from the deadly food-borne pathogen Listeria. Graham promised that the 76 priority rollbacks "will be done," but he acknowledged that it would be a long road.

The hit list focuses primarily on regulatory protections developed by the Environmental Protection Agency and the Department of Labor. Frink urged that the hit list should go even further, citing the Sarbanes-Oxley Act as the most onerous requirement for the manufacturing sector. The act seeks to avoid Enron and WorldCom-type scandals by establishing audit reporting standards and other rules to hold public companies accountable. Despite what Frink characterized as a "plea for assistance" from the manufacturing sector to reduce the burdens of rules associated with Sarbanes-Oxley, rules implementing that act do not appear on the final hit list.

The Myth of Reduced Competitiveness

The primary basis of the argument for regulatory rollbacks is a Small Business Administration study purportedly demonstrating that regulation is overly burdensome for the manufacturing sector, but Professor Shapiro debunked those arguments in his testimony. Scholarly research does not support the claim that regulation harms competitiveness. According to leading research, regulation does not affect plant location decisions or trade flow. In fact, in some cases regulation has actually increased competitiveness. The cost of compliance with regulation is less that half of one percent of the value of manufactured goods and can hardly be seen as the cause of manufacturing moving overseas, especially given labor and trade issues which have a much more marked impact on competitiveness.

Other "Reforms" for Manufacturers

The White House is targeting the manufacturing companies for even more favors beyond the anti-regulatory hit list. In January 2004, the Department of Commerce released a report entitled *Manufacturing in America*, which outlined recommendations to increase the competitiveness of the manufacturing sector. Already the Department of Commerce has implemented 18 recommendations from the plan and intends to work towards the rest. Reducing

Shapiro also discredited much of the underlying data on the cost of regulation to business. Much of the existing data comes from the manufacturing sector itself, which has clear incentives to overstate the costs of regulation. Further, their arguments fail to consider the benefits of these regulations. The cost may be high, but the benefits of these regulations are even greater. Even Graham concedes that the benefits of regulation far outweigh the cost.

Shapiro also rejected the argument that the manufacturing sector deserves to be enabled to dodge its responsibilities because it bears larger regulatory burdens than other sectors. As Shapiro pointed out, manufacturing is also one of the most dangerous industries, along with logging and construction. Given that the manufacturing sector is responsible for some of the greatest risks to the public, it is only natural that the sector would have one of the largest regulatory burdens.

the burden of regulation and legislation is seen as a major priority under the recommendations. Among the recommendations already implemented was the creation of the position of an assistant secretary for manufacturing and services, a position now filled by Albert Frink, who spoke at the hearing. Other recommendations already implemented included the creation of a manufacturing council and an office of industry analysis, which will work with OIRA "to develop analytical tools and expertise to assess manufacturing competitiveness."

Reduce Cost, Not Protections

Rep. Stephen Lynch (D-MA), the ranking minority member on the subcommittee, made the case for strong public health and safety protections. Lynch relied on his own experience as a steelworker to assert the need for strong public health and safety protections. Visiting the wakes and funerals of friends who died on the job helped Lynch to realize the importance of government intervention in workplace health and safety. Though in some cases the cost of regulation can and should be reduced, it should not be done so at the expense of needed protections, Lynch asserted. Many items on the hit list seek not only to reduce cost burden but also to limit a needed public protection. For instance, one reform priority seeks to reduce reporting requirements to the Toxic Release Inventory. This supposed reform will limit the public's access to information about the release of harmful toxins by chemical plants and will ultimately impede EPA's enforcement of the Clean Air Act.

Lynch also questioned several inconsistencies on the hit list, such as the appearance of the Listeria rule as an accomplishment in 2004 and then as an item for reform in the 2005 hit list. Graham claimed that the rule has turned out to be overly costly and that the reform is intended not to repeal the rule but rather to "refine and retune" it. Comments printed in the final hit list report suggest otherwise: the comments appended to the listing of the rule claim that not only were the costs of compliance too great, but that the benefits were also overstated.

True regulatory reform should not just seek to remedy excessive regulation but must also seek to identify unmet needs and gaps in public protections. Rather, the current ad hoc hit list method seeks to remove regulation without simultaneously looking at gaps in regulation. Shapiro suggested that regulatory reform should take place in the context of agencies' regulatory plans. Shapiro suggested that the development of the semiannual agendas could be an occasion to identify regulations in need of updating as well as unmet needs crying out for new regulatory protections.

Call for an Open and Transparent Process

Lynch also called for the process of regulatory reform to be an open and transparent process in which all sides are given a voice. Lori Luchak, speaking on behalf of the American Composites Manufacturers Association, echoed this sentiment. She argued that stakeholders, who may have a better idea of the most effective way to implement a regulation, should have a seat at the table during the creation of a regulation.

Not all stakeholders have had the kind of opportunity that Luchak enjoyed. The public interest community had little to no say in the rollback nominations; 97 percent of rollback on OMB's hit list were suggested by industry representatives. Public industry groups were left out of much of the OMB regulatory reform process due, in part, to the comments OMB solicited. Whereas in previous years OMB asked for comments on any proposals for regulatory reform, in 2004 OMB solicited nomination for regulatory reform measures that would reduce the burden on the manufacturing sector. This phrasing implied an interest only in rollbacks of existing protections, to the exclusion of calls for new safeguards to address unmet needs.

Lynch insisted that complete and accurate information is essential for Congress to make well-informed regulatory decisions. Regulatory reform measures should reflect the interests of all stakeholders and not just those of big business. A balanced regulatory reform plan should address not only excessive costs but also the need for increased public protections.

Lynch and Rep. Henry Waxman (D-CA) sent a letter to John Graham in March requesting information on the hit list process, in particular Graham's external communications on regulatory reform, including discussion participants and topics of discussion. Graham had yet to respond to their inquiry.

Increased Congressional Oversight

Both the committee members and the manufacturing sector seemed to view Congress's main role in the hit list and other regulatory "reforms" as one of oversight. When Miller pointedly asked Graham what the committee could do to help, Graham suggested that committee staff should be monitoring the progress of the agencies on completing the regulatory reform priorities and holding agencies responsible for missed deadlines.

Corporate special interests, meanwhile, may be clamoring for an even more aggressively anti-regulatory role. According to the *Washington Post*, "the U.S. Chamber of Commerce wants the panel to require federal agencies to do a formal review of their past rules with an eye to eliminating some of them." Miller may take up this reform option or others when the committee considers the reauthorization of the Paperwork Reduction Act or other bills this session.

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In This Issue

Congress Passes Irresponsible Budget Resolution

Last week, after lengthy negotiations, House and Senate Republican leaders finally agreed to a set of compromises in the fiscal year 2006 (FY06) budget resolution that allowed both chambers to narrowly pass the legislation. Negotiated behind closed doors, the final budget resolution is a dishonest and irresponsible agreement that will weaken both the federal government and the U.S. economy -- and negatively impact most Americans. Most striking is that it provides another tax break for the wealthy and cuts programs to needy and middle-income Americans while still increasing the deficit.

The resolution, setting spending levels and tax-cut thresholds for the next five years, passed late in the day on April 28 by narrow margins: 214-211 in the House and 52-47 in the Senate. The resolution would cut both annually appropriated programs and entitlement spending over the next five years, allow for two-thirds of a total $ 106 billion in additional tax cuts (primarily for the wealthiest Americans) to be "fast-tracked" in the reconciliation process, and would actually increase deficits contrary to Republicans' claims.

The main roadblock to reaching an agreement on the budget resolution was resistance from a small group of moderate Senate Republicans, led by Sen. Gordon Smith (R-OR), over cuts to the Medicaid program. A member of the Senate Finance Committee, Smith led the effort to add an amendment to the Senate's FY06 budget resolution in March to prevent $ 14 billion in Medicaid cuts. Smith's amendment also called for the establishment of a commission to study Medicaid to better target savings proposals. To achieve agreement in the final budget, a deal was reached with Smith, who was considered the linchpin in the fight against reducing Medicaid spending, on the maximum level ($ 10 billion) and provisions (no cuts in the first year) for enacting Medicaid cuts.

Under the Medicaid budget agreement, a commission will be created to determine the policy changes needed to produce required program savings. Senate Budget Committee Chairman Judd Gregg (R-NH) said the advisory committee would report its suggestions to Congress by Sept. 1.

Key Aspects of the Budget Resolution

Large Cuts in Domestic Discretionary Spending

The budget resolution sets the total level of funding for discretionary programs in 2006 at $ 893 billion, which equals the $ 843 billion proposed in the president's budget plus $ 50 billion for supplemental funding for the wars in Iraq and Afghanistan. (The president's budget included no funds for Iraq and Afghanistan in 2006 or subsequent years, but it is widely acknowledged the president will continue to request supplemental funding.) It will be difficult to adequately fund programs at current levels under the $ 893 billion cap.

Funding for domestic discretionary programs (those outside of defense and international aid) will total $ 373 billion in 2006,

representing a cut of $ 23 billion (5.9 percent) below 2005 funding levels after adjusting for inflation. Over five years, the cuts in domestic discretionary funding total $ 212 billion. These cuts will have substantial effects on programs across the federal budget, from education, job training, and child care, to after-school, veterans, environmental and natural resource programs.

Reconciliation Instructions to Cut Mandatory Programs

For the first time since 1997, the budget resolution contains reconciliation instructions requiring legislation that will achieve reductions in mandatory spending and further tax cuts, as well as an increase in the debt ceiling. Congress is supposed to use the reconciliation process to reduce deficits. The process expedites consideration of legislation requiring sensitive political decisions on raising taxes or cutting mandatory programs. However, this budget resolution hijacks the process, and in a bastardization of its original intent, partially funds continued unpaid-for tax cuts mostly for the rich by cutting social programs that primarily benefit lower-income Americans. The result, ironically, is increased deficits.

Although it is not a procedural requirement, the resolution calls for three separate reconciliation bills -- one for tax cuts, one for spending cuts, and one to increase the debt ceiling -- all of which are to be finished by September. This is done in a not-so-subtle attempt to hide the juxtaposition of reducing spending primarily on low-income entitlement programs to help pay for tax cuts primarily benefiting the wealthy.

The tax reconciliation bill allows for $ 70 billion in tax cuts over the next five years. While it is up to the tax-writing committees to determine which tax cuts will be included in the $ 70 billion, the bill is likely to include extension of expiring provisions from the 2001 and 2003 tax cuts, most notably the reduced rate on capital gains and dividends. (The Urban Institute-Brookings Institution Tax Policy Center estimates that more than half of the benefits of this tax cut go to households with incomes over $ 1 million per year and nearly 80 percent of the benefits go to the 3 percent of households with annual income over $ 200,000 per year.)

The spending reconciliation bill requires $ 34.7 billion to be cut across eight authorizing committees. The largest program reductions will most likely come from Medicaid ($ 10 billion), the Pension Benefit Guaranty Corporation ($ 6.6 billion), student loan programs ($ 4.7 billion) and programs under the agriculture committees ($ 3 billion). (The budget resolution can provide guidelines to committees, but cannot require cuts in specific programs. Hence, the identified cuts are likely to occur, but the committees could choose other areas for cuts, such as Medicare.) Below is a breakdown of the cuts to be achieved through reconciliation bills in the House and Senate.

Cuts to Mandatory Spending Protected Through Reconciliation (FY06 - FY10)

(billions of dollars)

House Committees		**Senate Committees**	
Agriculture	3.000	Agriculture	3.000
Education and Workforce	12.651	Banking	0.470
Energy and Commerce	14.734	Commerce	4.810
Financial Services	0.470	Energy	2.400
Judiciary	0.300	Environment & Public Works	0.027
Resources	2.400	Finance	10.000
Transportation and Infrastructure	0.103	Judiciary	0.300
Ways and Means	1.000	Health, Education, Labor & Pensions	13.651
Total Mandatory Program Cuts	**34.658**	**Total Mandatory Program Cuts**	**34.658**

Still More Deficit-Financed Tax Cuts

The budget resolution calls for $ 106 billion in tax cuts over the next five years, which more than negates any deficit reduction achieved by reducing mandatory spending. This amount is sufficient to extend all of the expiring provisions of the 2001/2003 tax cuts through 2010 including reduction of rates on capital gains and dividends, marriage penalty relief, expansion of the 10 percent income tax bracket, expansion of the child tax credit, research and development tax credits, and other associated provisions.

As discussed above, $ 70 billion of the total tax cut amount would be included in a reconciliation bill that will be considered under expedited procedures, is difficult to amend, and cannot be filibustered. The inclusion of deficit-exploding tax cuts in reconciliation is the most disturbing, irresponsible, and arrogant aspect of the budget resolution and is opposite of the original intent of the process, which was to allow political cover for members of Congress to vote to increase taxes in the name of deficit reduction. In its current use, it is being used to ram through another round of unending tax cuts mostly benefiting the most well-off even while federal revenues are at their lowest levels since the 1950s. These additional deficit-financed tax cuts will continue to push revenues to historically low levels and institutionalize structural deficits for decades to come.

But Wait, There's More...

In addition to drastically poor budgeting practices and misguided priorities, the budget resolution also contains three provisions that could diminish the ability of Congress to maintain authority over the federal budget and protect the public interest. The provisions endorse the establishment of results commissions, mark the first step in turning the Unfunded Mandates Reform Act into an insurmountable obstacle for new protections of the public interest, and restrict the ability of future congresses to respond to changing national spending priorities.

The first provision is a "sense of the Congress" measure in support of proposals in the president's budget to establish

commissions to review the effectiveness of government programs. Referred to as "results commissions," in the budget, they would have "the express purpose of providing Congress with recommendations to realign or eliminate government agencies and programs that are wasteful, duplicative, inefficient, outdated, irrelevant, or have failed to accomplish their intended purpose." (Budget Resolution conference report, pages 66-67). The second provision was reportedly inserted into the budget resolution by Sen. Lamar Alexander (R-TN) and would turn a relatively harmless procedural mechanism in the Unfunded Mandates Reform Act into a roadblock to protecting the public interest. (Read more about these provisions and their harmful effects.)

The third provision in the budget resolution is a requirement that any legislation increasing direct spending by $ 5 billion over any of the ten-year periods between 2016 and 2055 be approved by three-fifths of senators. This budget enforcement rule will make it extremely difficult for future Congresses to respond to evolving needs.

Congress Can Do Better

The budget resolution approved last week will damage not only specific programs and investments millions of Americans rely on to build and support their communities, but also the overall fiscal and economic health of the nation. As the baby-boom generation approaches retirement, Congress and the American people will need to invest substantially more in our society -- not less, as this budget does. By continuing to prioritize tax cuts that undermine the revenue base of the government, Congress is creating a structural deficit that will cripple the country's ability to invest in infrastructure, health care, transportation, and other quality of life services and systems that all of us depend on. It would have been far better if Congress had done nothing at all.

Despite Public Disdain, Private Accounts Will Not Die

The issue of Social Security reform is gathering steam once again as President Bush wraps up his "60-cities-in-60-days" tour to sell his privatization plan to the public. Although the latest polls show more Americans oppose the president's proposal than ever, recent congressional hearings continue to keep the plan on life support.

On April 26 the Senate Finance Committee held a hearing on Social Security solvency, in what could possibly be the final Senate hearing before Committee Chairman Charles Grassley (R-IA) delves into crafting legislation. The hearing focused on the issue of achieving solvency within the benefits program but also covered the widely-discussed idea of private accounts. While witness Peter Orszag of the Brookings Institution focused his testimony on the importance of solvency, other witnesses, such as Peter Ferrar and the Cato Institute's Michael Tanner, chose instead to discuss what they believe would be the benefits of personal retirement accounts. Grassley praised witness Robert Pozen's Progressive Price Indexing plan because, according to Grassley, it "seems like a compromise." Critics of Pozen's plan, however, believe it will result in benefits cuts for too many people.

The hearing was well attended by senators serving on the committee, many of whom asked witnesses pointed questions regarding how reform would impact the national level of debt, how much risk private accounts would create for beneficiaries, and how to avoid across-the-board benefit cuts. For some senators, this issue is very personal. Sen. Trent Lott (R-MS) discussed his elderly mother and Grassley exhibited intense anxiety about what kind of a benefits program would exist for his grandchildren.

Other members of the committee had a different focus to their comments, framing the Social Security debate in a larger context. Sen. John Kerry (D-MA) commented with frustration that both Congress and the administration had wasted precious months focusing on small details such as private accounts while avoiding the bigger issue of solvency. He discounted the "crisis" mentality, saying "we do have enough money to pay benefits," and that the entire seventy-five year Social Security shortfall is equivalent to one-fifth of the cost of making the president's tax cuts permanent. (See statistical analysis.) Sen. Kent Conrad (D-ND) focused on misplaced priorities, stressing the Medicaid and Medicare programs face a much greater fiscal crisis than Social Security, calling Medicare "the real eight-hundred pound gorilla."

For months, Democrats in the both the Senate and House have remained unusually united against any Social Security reforms that would cut benefits for recipients in the future. At an April 26 "anti-privatization" Social Security rally on Capitol Hill, sponsored by Americans United to Save Social Security, scores of congressional Democrats stood on stage before the rally participants showing their unity in opposition to private benefits accounts. House Minority Whip Steny Hoyer (D-MD) was one of many to address the crowd, saying, "Democrats, as you have seen, are seeing, and will see, are absolutely united in opposition to the Republican plan to privatize one of the most important programs this country has ever adopted."

Despite unified Democratic opposition and an unsuccessful nationwide campaign, President Bush held a prime-time televised news conference on April 28 in a last ditch effort to rally support for his dying proposal. Bush reiterated his belief that private accounts would be the best way to solve issues of Social Security solvency. In a change of strategy, he stated he did not want reforms to cut benefits for low-income workers, who represent a traditionally Democratic demographic. In doing so, the president made it clear there would be cuts in benefits to middle and upper-income beneficiaries and Democrats immediately lashed out at the president for proposing a means-test that would translate into cuts for average American retirees. Bush repeated during the news conference what has become increasingly clear over the past several weeks -- that is it is up to Congress now to achieve an actual solution. Chairman Grassley will undertake the task of drafting legislation to reform Social Security in the Senate. He will begin by working solely with members of his own conference on the legislation, although aides have noted Democrats on the Finance Committee, all of them opposed to private accounts, may end up helping. Grassley is expected to look seriously at key aspects of Pozen's plan.

In addition to the Senate's efforts, the House Ways and Means Committee will also be exploring Social Security reform and plans a full hearing on May 12. The hearing will be followed by an ambitious schedule of subcommittee hearings -- about one a week, according to Chairman Bill Thomas (R-CA). The committee will study specific details such as adjustments to the payroll tax, changing the retirement age, retirement benefits for dual earners, and how the current benefit structure is unfair to women. Thomas expects the committee will begin writing legislation in June.

Bush Criticized for Continuing 'Dishonest' War Budgeting

For months, President Bush's budget proposal has been criticized for not being an honest reflection of his intended policies or the current fiscal reality. The president purposely left out a number of major policies, including Social Security reform, extension of Alternative Minimum Tax relief, and perhaps most egregiously of all, any funding for the future cost of the wars in Iraq and Afghanistan. That last omission garnered increased criticism from Capitol Hill last week.

During the debate on the latest emergency supplemental funding bill, Appropriations Committee Ranking Member Robert Byrd (D-WV) offered an amendment that dealt a symbolic blow to the administration's practice of funding the current wars through an ad-hoc system of irregular spending requests. The amendment, which passed 61-31, expressed the sense of the Senate that war funding should be included in regular budget requests, not through supplemental spending bills. The president's FY06 budget proposal included no funding for the wars.

Byrd expressed outrage over the lack of transparency resulting from the piecemeal information the president provides Congress concerning the long-term costs and planning for ongoing military operations. Byrd felt the White House, by separating the regular budget of the Defense Department and other parts of the federal government from the wartime costs of military operations, had effectively denied Congress the ability to balance the whole picture of military needs of our troops and the other national priorities, such as education, highways, and veterans medical care.

The practice of using supplemental funding requests also has more serious implications for the goal of balancing the budget. During his introductory statement, Byrd highlighted the misleading and dishonest nature of a budget proposal containing such omissions. "By refusing to budget for the cost of the war, the President is submitting annual budgets to Congress that are downright inaccurate. These budget requests are inaccurate. They understate the actual amount of our annual deficits by scores of billions of dollars."

Byrd's amendment passed with the support of 21 Republicans, showcasing the growing bipartisan uneasiness in Congress with the administration's practices and the implications for the nation's fiscal health. To date, over $ 200 billion has been appropriated through supplemental spending requests for the wars and the Congressional Budget Office estimates it will cost an additional $ 458 billion over the next 10 years.

In the end, Byrd believes the key issue is honesty. "The President will not tell the American people what the war in Iraq will cost. By understating the deficits, the American people are being led down a primrose path. That is dishonesty."

To help solve this problem, Byrd's amendment calls on the president to include funding for the wars in regular budget proposals and submit to Congress by Sept. 1 a separate, detailed plan for the cost of each of the wars for the entire 2006 fiscal year.

Unfortunately, the amendment is non-binding and given the administration's penchant for secrecy and inability to admit to mistakes, it is unlikely to change the current practices for funding the wars. Byrd remained optimistic however, stating, "Hopefully, this will be the first step in restoring some sanity to the President's budget request that has so far ignored the enormous costs of military operations in Iraq and Afghanistan."

Senate Passes Emergency Supplemental; Bill Held up in Conference

The latest emergency supplemental spending bill (H.R. 1268) was held up as House and Senate conferees struggled to reach an agreement regarding specifics for the bill before leaving town April 29 for the week-long May recess. The bill, which will mainly fund war operations in Iraq and Afghanistan, was held up due to disagreements over provisions regarding immigration, border security funding, and earmarks for special projects and programs.

In February, President Bush originally asked Congress to pass an $ 81.9 billion emergency bill to fund ongoing war operations. The president has recently received additional criticism, particularly from Sen. Robert Byrd (D-WV), over the practice of funding the wars through emergency supplemental bills, instead of through the traditional congressional budget process.

The House passed its version of the emergency supplemental March 2. It closely resembled the president's request, including all but $ 800 million of what he had requested. The Senate, on the other hand, passed a bill appropriating extra funding to address growing security concerns along the Mexican border. Additional items in the Senate bill include:

- $ 276 million for Immigration and Customs Enforcement to ensure adequate funding for critical investigative and detention programs
- $ 536 million of funding for the Department of Homeland Security to provide 1,050 border patrol agents, 250 immigration and customs investigators, 168 enforcement agents and detention officers, and 2,000 detention beds
- $ 65 million to help the federal judiciary deal with an increased caseload
- $ 100 million in loan guarantees for a coal program along with $ 24 million in other earmarks
- A provision offered by Sen. Richard Durbin (D-IL) that would ensure federal employees in the National Guard and Reserves do not see a loss of pay.

House Appropriations Chairman Jerry Lewis (R-CA) has been pressuring his Senate counterpart, Appropriations Chairman Thad Cochran (R-MS), to drop many of the items not related to the war added to the Senate bill since a majority of House Republicans want the bill to resemble the president's request as closely as possible. Lewis' request is despite the inclusion in the House version of a controversial immigration bill that includes dangerous language allowing the Department of Homeland Security to waive all law when securing the nation's borders.

As Congress takes a week-long recess, the two chambers remain approximately $ 800 million apart on border protection funds and without agreement on the House immigration rider -- the REAL ID Act. Final negotiations on the emergency supplemental bill will most likely be hammered out in private meetings between congressional GOP appropriations leaders and White House staff.

Economy and Jobs Watch: Economic Recovery Still Shortchanging Workers

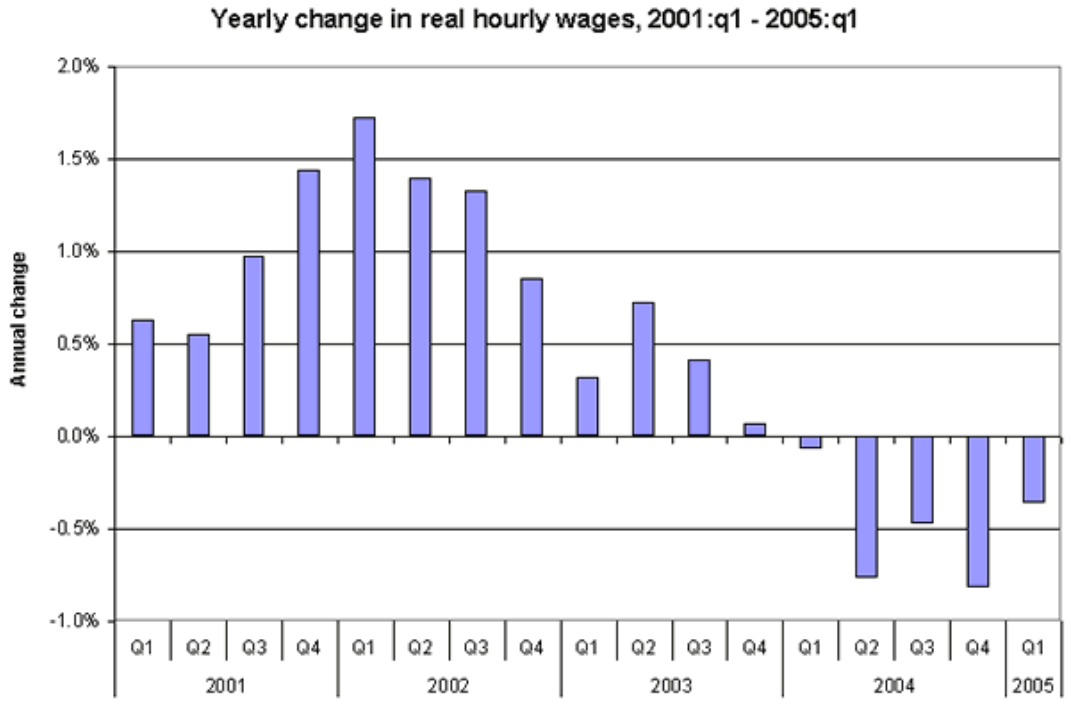
The gross domestic product (GDP) of the United States grew at a slower pace than expected during the first quarter of 2005 according to data released by the Commerce Department. At just 3.1 percent, it was the slowest rate of growth in over two years since the first quarter of 2003.

Economists and financial market investors were caught off guard by the slow rate of growth. Nigel Gault, chief U.S. economist at Global Insight, stated, "I think we do have to get used to the idea that growth is going to remain substantially slower [now] than in the earlier part of the recovery." Caused mostly by higher energy costs, lower business investment, and an ever-widening trade gap, the slow economic growth is seen as hurting workers the most.

Much of the drop in GDP growth is due to a falloff in the growth rates of both consumer spending and business investment, as well as the widening trade gap. With inflation and prices for goods -- especially foreign oil (although this has been dropping in the past number of days) -- on the rise, public consumption by both businesses and consumers is down. Final sales to domestic purchasers grew by only 3.2 percent this quarter. In 2004, the growth of sales to domestic purchasers was significantly higher, averaging 4.2 percent over all four quarters.

Helping to slow economic growth was a decline in real, disposable personal income by 0.3 percent in the first quarter of 2005. The Economic Policy Institute (EPI) reported April 20 that "real wages continue to deteriorate for many U.S. workers" with private-sector jobs experiencing slower than usual wage and salary growth.

In fact, March marked the 11th consecutive month in which annual wage growth failed to outpace inflation. Real hourly wages fell for the fifth consecutive quarter due to the continually and persistently weak job market, building upon a trend of either flat or declining wages relative to inflation throughout 2004. The chart below illustrates a worsening trend in real hourly wages from 2001 - 2005. This erosion of real wages, despite rapid productivity growth and continued job growth, is disappointing and a real detriment to working families' living standard.



Source: The Economic Policy Institute's Jobwatch.org site

This Feb. 16 report from the Economic Policy Institute and the Center on Budget and Policy Priorities also finds the only group to see wage gains from 2003 to 2004 were workers who had attended graduate school. While most workers have been left out of the economic recovery, it has negatively impacted low-income workers most severely.

Chemical Security Remains an Unaddressed Problem

An April 27 panel of government officials and security experts told the Senate Subcommittee on Homeland Security and Governmental Affairs that chemical security remains a looming problem that the federal government refuses to address. The same day the House Committee on Homeland Security proved that point by rejecting an amendment to improve security related to shipments of dangerous chemicals. Also the same day, President Bush called for development of new oil refineries on old military bases but did not address the existing gaps in chemical security.

The Senate hearing addressed the fact that there are no federal regulations that require security measures at chemical facilities although numerous officials have noted the significant risk these facilities pose to national security. One panelist referred to these facilities as thousands of "weapons of mass destruction" around the country.

While the panelists offered different recommendations on how best to structure a federal solution to the problem they all agreed that new federal laws are needed to address chemical security issues. Richard Falkenrath, a visiting fellow studying foreign policy for the Brookings Institution and a previous homeland security advisor to President Bush, told the committee that some the chemical industry's voluntary efforts "are good," but "I recommend federal regulations; no question."

Sen. Jon Corzine (D-NJ), sponsor of chemical security legislation in the last Congress, also testified at the hearing and stressed the importance of congressional action on the issues. Corzine informed the committee that any chemical security legislation should include both improving plant perimeter security and reducing hazards in the facilities to minimize the impact of a successful attack.

Corzine strongly recommended requiring facilities to consider safer chemicals and technologies. "Examination of alternative approaches should be required in legislation," Corzine testified, "not mandated, but legislation should make certain they've been examined."

Sen. Susan Collins (R-ME), chairman of the committee, appeared convinced by the testimony that chemical security was an important issue that had gotten too little attention in the over three years since the 9/11 terrorist attacks. Collins stated, "I am inclined to believe we need strong federal legislation in this area, but legislation that does not put a significant burden on the chemical industry." Sen. Joseph Lieberman (D-CT), the ranking Democrat on the committee, agreed and predicted, "we're going to get something done to protect chemical facilities in this Congress." However, no chemical security legislation has been introduced in the Senate in the 109th Congress.

At the same time, the House Committee on Homeland Security rejected an amendment to require rerouting of extremely hazardous materials around sensitive areas. Rep. Edward Markey (D-MA) submitted the amendment to the Homeland Security Authorization Act for Fiscal year 2006 (H.R. 1817). Markey noted that the administration has done nothing to address shipments of hazardous materials and proposed in the amendment a national plan to protect such shipments. Under the plan, rerouting would only have been required if the Department of Homeland Security had determined that a safer route was available.

Markey originally introduced the plan as a stand-alone bill, the Extremely Hazardous Materials Transportation Security Act of 2005 (H.R. 4824), but then decided to attach the measure to the Homeland Security authorization bill. The amendment failed after receiving a 16-12 vote along party lines on April 27. The authorization bill now moves the House floor for debate.

The provision was introduced, in part, to address the District of Columbia's recent struggle to improve safety by requiring hazardous shipments to be rerouted around the city. The provision has been challenged by both CSX, a rail transportation company, and the federal government. District Councilwoman Kathy Patterson (D), categorized the rejection of the Markey amendment as "a slap in the face to citizens who look to their federal government for protection from terrorist threats."

Also on April 27, the president proposed building new oil refineries at closed military bases and jumpstarting construction of new nuclear power plants to address rising energy costs. He also proposed giving federal regulators the lead authority to decide where to locate terminals for processing imported natural gas. Liquefied natural gas terminals take compressed, supercold natural gas shipped from overseas and warm it into usable energy. Only four such terminals exist in the United States and authority for terminals currently resides with states. Despite these proposals that increase chemical risks, the president has yet to address the need to strengthen chemical security at plants and terminals.

National Security Whistleblowers Urge Better Protections

The National Security Whistleblowers Coalition met with key congressional committee staff April 28, stressing the important role of whistleblowers that disclose security problems, and detailing the retaliation these individuals then encounter. On the same day, Rep. Edward J. Markey (D-MA) announced his intention to introduce legislation in the House to strengthen whistleblower protections.

After meeting with staff from the House Government Reform Committee and the Senate Judiciary and Armed Services Committee, the new coalition held a press conference. Sibel Edmonds, the FBI translator fired after exposing security problems within the agency, is lead organizer for the coalition. She testified about the current climate for whistleblowers, stating, "Currently we have no system in place that applies direct, individual accountability when it comes to retaliation against whistleblowers. Thus, there exists NO deterrence for those who engage in government waste, fraud, and abuse, and criminal activities that jeopardize our nation's security, interests, and wellbeing."

Edmonds had sued the FBI for wrongful termination, and oral arguments for her appeal began April 21. However, at the last minute, the U.S. Court of Appeals closed the hearing to the public and journalists, allowing only Edmonds and her attorneys into the courtroom. The government had already barred access to most of the information regarding Edmonds and her allegations -- it retroactively classified information presented during a congressional briefing, and classified a CBS *60 minutes* interview featuring Edmonds. The court dismissed her initial lawsuit after the government argued it would divulge state secrets.

During the coalition's press conference, Markey promised to introduce legislation that would provide government whistleblowers similar protections to those in the Sarbanes-Oxley Act, a corporate accountability law that protects corporate whistleblowers. "It is preposterous that Congress, in the Sarbanes-Oxley Act, gave better whistleblower protections to employees of Enron or WorldCom who report accounting fraud than it gives to FBI employees, TSA baggage screeners, or nuclear reactor security guards who report serious risks to homeland and national security!" Markey said. An amendment version of his whistleblower improvements was rejected during the April 27 markup of the Homeland Security Authorization Act.

According to a press release from Markey's office, the upcoming bill would protect whistleblowers that disclose information about national security, a public health threat, or fraud, waste and mismanagement. Any retaliation against a whistleblower would be punishable by up to 10 years in jail. The bill would also permit a whistleblower to bring his or her case to civil court if the Department of Labor does not act on the case within six months. Additionally, the bill will stipulate that if the government exerts the state secret privilege and a case is not heard by the court, the whistleblower would automatically win.

As reported in the last *OMB Watcher* Sen. Daniel Akaka (D-HI) is the sponsor of whistleblower legislation currently moving through the Senate. The Senate Committee on Homeland Security and Governmental Affairs favorably reported out the bill, S. 494, on April 13.

Whistleblower protections are also being addressed outside of Congress. The Department of Defense issued a memorandum Jan. 7, modifying the agency's whistleblower policies. The memo explains that civilian employees working on intelligence issues are now covered by whistleblower laws. In addition, anyone that blows the whistle is protected from having security clearances revoked or modified in retaliation. While these changes are steps in the right direction, the protections for civilians and service members are still not equal. Civilians cannot report waste, fraud or abuse to a direct supervisor; service members can.

The Project on Government Oversight (POGO), supporting the need for changes in whistleblower protections, especially in the area of homeland and national security, released a report the day of the hearing. The report details the increase in national security whistleblowers since 9/11, and points out gaps in current law along with possible legislative solutions. The report, "Homeland and National Security Whistleblower Protections: The Unfinished Agenda," is available at POGO's website.

Defense Department Seeks New FOIA Exemption

The Department of Defense (DoD) is seeking a broad Freedom of Information (FOIA) exemption, which would remove critical information from public purview -- everything from information on human rights abuses, to historical military records. The agency sought such an exemption in 2000, but Congress rejected the measure.

The proposed FOIA exemption would be specifically for the Defense Intelligence Agency (DIA), an agency that creates and supplies intelligence information for the DoD. The exemption would allow both the DIA director and the new Director of National Intelligence to exempt operational files from public disclosure. DoD included the exemption in Section 901 of the National Defense Authorization Bill for fiscal year 2006, sent to Congress April 7.

The provisions mirror a FOIA exemption the CIA has for operational files, granted through the CIA Information Act of 1984. However, the DIA's mission and duties vary significantly from the CIA, making it impossible to apply the same disclosure standards. Currently the DIA does release certain operational files that are important to the public. Past examples include a 1990 declassified intelligence report on events in Rwanda, and a 1990 partially declassified intelligence report on arms sales between Britain and Saudi Arabia.

In 2000, the Senate passed the same provision in the FY01 Defense Authorization Act, but after significant objection from public interest groups the full Congress rejected the measure.

The text of the FY06 authorization bill can be found through the Department of Defense website. Analyses of the FY01 provision is available from the National Security Archive and the Federation of American Scientists.

Ohio Bill To Privatize Government Information, Services

An Ohio state legislator last month reintroduced legislation to force taxpayers to pay companies for services and information that taxpayers already receive more efficiently and cheaply directly through the government. An anti-government conservative group, the American Legislative Exchange Council, originally drafted the legislation and saw it introduced in at least five states in 2003. It previously failed in Ohio.

The Electronic Government Services Act, introduced as H.B. 188 in the current session of the Ohio General Assembly, could require state agencies to stop providing hunting, sport fishing and business licenses and re-using inexpensive furniture in government offices if private companies are trying to sell similar services. The proposal would limit access to important information held by government if two or more private companies were providing similar services or information. It would limit government information only to those who could afford to pay.

In the legislature's last session the bill passed through the Ohio House of Representatives. It was attached to the state Senate's budget bill before being pulled at the last minute after drawing public criticism from many groups and the community, including the Ohio Public Interest Research Group and a scathing editorial in the Cleveland *Plain-Dealer*.

When the legislation was originally introduced two years ago, a number of good-government groups denounced the legislation in a letter to Bill Harris (R), chairman of the Ohio Senate's Finance and Financial Institutions committee, because it would "undermine one of the most fundamental tenets of American democracy -- that public access to legal and government information is the bedrock of our society and crucial to the ability of citizens to participate in their government."

Kentucky Attorney General Caps Copying Fees

Kentucky Attorney General Greg Stumbo (D) recently limited the amount the state agencies could charge citizens for copies of government documents. The prices the government charges for searches and copies are often cited by groups as a major obstacle to obtaining more information through the Freedom of Information laws.

In an April 25 opinion, Stumbo capped fees on copies of public records at 10 cents per page. The opinion came after Beaver Dam resident Mike Nance contacted the attorney general's office complaining about the 50 cents per page the Hartford, KY, county government charged him.

Under the federal Freedom of Information Act (FOIA) and state open-records laws, agencies are permitted to charge requestors fees for search time and document duplication. However, high fees have become a serious impediment to obtaining government information. Some contend that agencies intentionally discourage requests and limit access with higher fees to avoid public scrutiny and accountability.

While the opinion improves the situation for Kentucky citizens that want government information, steep fees remain an obstacle elsewhere. For example, the Justice Department tried to charge the People for the American Way nearly $ 400,000 just to conduct the search for documents associated with the organization's request under the Freedom of Information Act. The request, filed Nov. 25, 2003, seeks all records related to the Justice Department's decision to hide the identity of immigrants detained in the wake of the 9/11 terrorist attacks.

Journalists Teach Communities to Access Government Information

On the heels of Sunshine Week, during which journalists highlighted the importance of open government, several newspapers have taken an extra step and begun training local communities to use freedom of information laws. Though freedom of information laws grant the general public rights to access government information, many citizens do not know how to use them and often journalists act as intermediaries between the public and the government. However, journalists can never fully represent a community's range of concerns, so it is important to inform and empower the public.

New Jersey's *Courier-Post Journal* is holding seminars to teach community members how to use the state's Open Public Records Act. The newspaper promoted the free sessions with articles in its own paper. Two seminars have been conducted and a third is scheduled for May 3. According to the *Courier-Post*'s Executive Editor Derek Osenenko, "Participation has been great and has motivated us here at the *Journal* to continue the fight for access to information." The first two sessions were filled to capacity with about 50 people at each. The newspaper has increased the capacity for its third session to 75 and has already filled it.

In a different approach, an El Paso, TX, paper, the *Newspaper Tree*, has showcased its use of the state's open records law to obtain information. The paper has provided the community with a blueprint for using the access laws by providing a detailed example of the process. On Jan. 14, the paper requested documents from the City of El Paso about the amount the city paid lawyers for an air permit renewal for the company ASARCO. The city originally claimed the information was exempt from disclosure. However, an opinion from the Texas attorney general concluded that some of the records could be released. The newspaper received the records nearly four months after the initial request.

Newspapers represent an ideal source on right-to-know laws for communities. The organizations are familiar with regional issues and have intimate familiarity with the process. While most newspapers willingly answer any questions from the public about requesting government information, a more proactive effort to educate the public would likely reach more people.

Senate Committee Passes Amended 527 Bill

An attempt by Sens. John McCain (R-AZ) and Russell Feingold (D-WI) to extend federal campaign finance regulation to independent political groups has backfired in the Senate Rules Committee, which amended the 527 Reform Act of 2005 (S. 271), to repeal portions of the Bipartisan Campaign Reform Act of 2002 (BCRA). The vastly altered version of S. 271 passed by the committee on April 27 is a crazy quilt of amendments that restricts independent groups while lifting limits on business groups and PACs run by members of Congress. An additional amendment exempts groups that limit their activities to voter mobilization if they do not use broadcast media. Another exempts the Internet from the definition of regulated public communications. The bill reflects opposing approaches to changing campaign finance laws that were also debated in an April 21 hearing by the House Administration Committee.

S. 271 would subject many non-party groups that do not coordinate with candidates or campaigns to Federal Election Commission (FEC) rules that require registration and reporting and limit the amount and sources of funds that can be raised. A sponsors' amendment was submitted before the committee markup began April 27 to clarify that the bill applies to 527s that register with the Internal Revenue Service (IRS), eliminating the original threshold that would have regulated groups "described in" Section 527. This change made it clear that the bill would not cover other nonprofit groups such as 501(c)(3) and 501(c)(4) entities. The sponsors also narrowed its application to state and local political committees.

Summary of Amendments

The committee approved an amendment proposed by Sen. Charles Schumer (D-NY) that would protect voter mobilization activity by exempting independent political committees that work exclusively to get out the vote and do not use broadcast communications. The result is that wealthy individuals can continue to give unrestricted donations to groups that qualify for this exemption. Internet postings were exempted from the definition of regulated public communications in an amendment proposed by Sen. Robert Bennett (R-UT).

A series of additional amendments offered by Bennett would repeal parts of BCRA, making it easier for federal officeholders to raise and contribute political funds, and tilt the political playing field in favor of business corporations. The amendments would:

- Increase the limits on individual contributions to regulated political action committees (PAC), PAC contributions to candidates, and contributions from one PAC to another from $ 5,000 to $ 7,500
- Increase the limits on PAC contributions to national political parties from $ 15,000 to $ 25,000
- Allow unlimited transfers of funds from leadership PACS (operated by members of Congress) to national party committees
- Increase the threshold for registration with the Federal Election Commission (FEC) from $ 1,000 to $ 10,000
- Index all limits for inflation
- Eliminate the requirement that trade associations get prior written approval from their member corporations before soliciting contributions from executives and administrative personnel, and allow members to permit fundraising by more than one association
- Eliminate the twice yearly limit on employee political fundraising by corporations.

The committee also approved an amendment offered by Sen. Richard Durbin (D-IL) that would require broadcasters to charge candidates the lowest advertising rate available during the election season.

Rancorous Committee Debate Defines Issues for the Senate Floor

Schumer withdrew his sponsorship of the bill, saying the bill was "serving as an anti-campaign-finance Trojan horse." Senate Minority Leader Harry Reid (D-NV) released a statement after the hearing noting the Republicans "moved to report the bill from Committee without a recorded vote over strong and repeated Democratic objections," resulting in amendments that "unravel McCain-Feingold campaign reform legislation." The majority of Republicans voting for the bill opposed McCain and Feingold's BCRA legislation in 2002.

More amendments are likely when the bill goes to the Senate floor. McCain and Feingold said they would seek to remove the amendments, while Sen. Ted Stevens (R-AK) promised an amendment extending FEC regulation to 501(c) groups that broadcast ads asking people to "call so and so." This would treat grassroots lobbying communications as election ads. Sen. Diane Feinstein (D-CA) said she would continue working on an amendment that would extend expenditure disclosure requirements to non-broadcast communications of regulated 527s. The amendment was withdrawn during the committee's consideration of the bill because of confusion over its impact.

The Internet exemption is the subject of separate legislation Reid introduced in March. S. 678 would exempt Internet communications from FEC regulation. A companion bill (H.R. 1606 is pending in the House. The FEC is currently seeking comments on a proposed rule regulating some Internet communications. The rulemaking is in response to a court order that invalidated a rule exempting all Internet communications from the definition of a regulated public communication. The court found the FEC did not adequately explain the basis for the exemption. The Rules Committee action and pending legislation make it clear that Congress does not intend to extend campaign finance regulation in this direction.

IRS Describes Increased Enforcement of Nonprofit Sector

Mark Everson, commissioner of the Internal Revenue Service (IRS), told attorneys at the Georgetown Law Center's Tax-Exempt Seminar that the sector must act to head off a "gathering storm" resulting from use of the sector as a vehicle for tax avoidance. Other IRS officials at the April 28 training described new and increased enforcement activities.

Everson expressed concern that a 1990s trend in banking and accounting that designed and marketed abusive tax shelters has negatively impacted the nonprofit sector. He also said, "Shoddy shelters are now moving into organizations that you are working with." However, he said he is optimistic that the sector can respond positively, noting, "I think that unlike the business community and the profit-making community, the exempt community is taking steps to address this." The IRS's main priorities for enforcement in this area are donor-advised funds, supporting organizations, inflation of deductions, executive compensation, and credit-counseling groups.

Currently the IRS has more than 2,000 inquiries into executive compensation pending. In addition, it has established a data analysis unit to help target resources more effectively. A pilot program with California will help establish ways to work more closely with state charity regulators. Overall, IRS staff said they want to "touch more organizations sooner," in order to enhance education and compliance. One possible approach would be a "follow up" with organizations three to five years after they are granted tax exemption.

GAO Finds Bush's Social Security Campaign Not Illegal Lobbying

On April 27, the Government Accountability Office (GAO) sent a letter to eight Democratic senators finding that the Bush administration's program to promote its Social Security plan to the public does not constitute illegal use of government funds for grassroots lobbying. The senators had asked for an assessment of whether the overall context and message of the administration's Social Security campaign amounted to a clear appeal to the public to contact members of Congress. The GAO disagreed, saying that no violation occurs unless there is an express request to the public to contact Congress.

House Ways and Means Committee Holds Hearing on the Tax-Exempt Sector

More law school seminar than hearing, on April 20, the House Ways and Means Committee examined the "legal history of the tax-exempt sector; its size, scope and impact on the economy; the need for congressional oversight; Internal Revenue Service (IRS) oversight of the sector; and what the IRS is doing to improve compliance with the law." According to Chairman Bill Thomas (R-CA), the hearing, was not meant to parallel a recent hearing by the Senate Finance Committee reviewing specific reforms. Instead the committee wanted to "establish a foundation from which members can systematically begin to examine the tax-exempt sector, and determine what remedies, if any, are needed to provide greater clarity, transparency, and enforcement."

Throughout the hearing, the committee grappled with understanding how tax-exempt organizations function while attempting to identify the greatest problems in the sector. The hearing seems to be a reaction by the committee to the massive overhaul of the sector proposed by the Senate Finance Committee's staff draft. It forecasts an attempt by the House to make smaller, more piecemeal changes to the tax-exempt categories of the IRS code that would serve as a template for further reforms.

In his opening remarks, Ranking Member Charles Rangel (D-NY) asked why representatives from the IRS had not been invited to testify and asked the Chairman if the panels would address the question of religious organizations. Thomas replied that the hearing was intended to provide an overview of the tax-exempt sector and subsequent hearings would focus on enforcement. He then noted that the status of religious organizations would not be discussed separately.

U.S. Comptroller General of the Government Accountability Office (GAO) David Walker advocated the need to engage in a fundamental review of the sector. The review should ensure the effective and efficient running of nonprofits by focusing on strengthening sound governance practices, improving transparency, enhancing oversight by the IRS and examining the rationale of tax exemption, he said.

Joint Committee on Taxation (JCT) Chief of Staff George Yin described the tax-exempt categories as a largely piecemeal attempt at regulation. According to Yin, there was no overarching reason for the creation of the tax-exempt categories. Yin did not discuss the JCT's proposals to reform the sector.

Douglas Holtz-Eakin, head of the Congressional Budget Office (CBO) focused on the complex issues that arise when tax-exempt organizations sell goods and services that put them in direct competition with for-profit entities. He urged the committee to examine the impact nonprofit hospitals, credit unions and municipal utilities have on for-profit businesses and the effect of revocation of tax-exempt status.

John Colombo, a law professor at the University of Illinois, made the distinction between organizations under 501(c)(3) of the tax code and all other tax-exempt organizations. He noted that public charities get their money from a broad cross section of the general public and are therefore more accountable to the general public than private foundations, which are funded by a single donor or family. He urged the committee to examine transparency levels in 501(c)(3)s and to determine whether the public is getting the information it needs to hold charities accountable.

Colombo advocated a system which uses donative status to distinguish whether an organization should be tax-exempt. Under this system, charitable organizations under 501(c)(3) would be limited to entities that were substantially dependent on donations for their operating revenues each year.

Francis Hill, a law professor at the University of Miami in Florida, said that the tax-exempt sector should be accountable but not improperly constrained. She stated that government oversight is vitally important and urged Congress to work with the IRS and Treasury to help define who is benefited by tax-exemption of charities and what the charitable class is. She also stated that greater numbers of specially trained IRS staff and increased IRS funding are critical in any revamping of the laws governing the nonprofit sector.

Sheldon Cohen, a former IRS commissioner, talked about the history and complexity of the tax code as it relates to tax-exempt organizations. He noted the government's lack of information regarding small organizations and urged the committee to establish rules promoting greater transparency for small organizations.

Bruce Hopkins, an attorney with Polsinelli Shalton Welte Suelhaus, P.C. in Kansas City, MO, reiterated that the tax code provisions on nonprofits have evolved over decades in a disorderly and unplanned fashion and that Congress has frequently modified and expanded the laws governing the sector. He called the current tax laws unbalanced and uneven, recognizing that many aspects of today's laws governing the sector are unclear. He specified six of 12 areas that could benefit from congressional overhaul:

- Create laws spelling out criteria for tax-exempt status
- Spell out the elements of private inurement and private benefit doctrine
- Amplify the political activities rules
- Codify a version of the commerciality doctrine
- Develop statutory law concerning tax-exempt organizations' use of the Internet
- Consider the need for more reporting and disclosure.

In response to questions from committee members, Hopkins suggested revising the definition of the "charitable, scientific, educational" standard for determining exempt status under Section 501(c)(3) and establishing intermediate sanctions.

Thomas suggested the committee focus on charities, the largest segment of the tax-exempt sector, given the time and resource constraints of the committee. Walker agreed, saying that efforts focused on the charitable sector could be used as a template for other tax-exempt organizations. Thomas was particularly interested how nonprofit hospitals fit into the proposed "donative structure," and indicated nonprofit hospitals could be the first target of new legislation. Yin volunteered that the health arena, by assets and revenue, was the largest in the charitable sector, and the largest of that is hospitals.

Rangel stated the panel had painted a picture of a sector that "screams out for correction" and indicated he would like more information on the reported violations and the panel's specific recommendations. Thomas suggested that the majority and

minority committee staff work together to submit additional questions to the panel witnesses ostensibly in preparation for future legislation.

Rep. Sander Levin (D-MI) asked each panelist to describe the major problem with the tax-exempt categories section of the code. Colombo, Walker, Holtz-Eakin, Yin and Hopkins cited the lack of an overarching rationale or criteria for tax-exemption in the current law. Yin also mentioned a lack of oversight and transparency in the sector. Hill pointed to the need to reduce abuse without stripping the sector of the capacity to do good works. Cohen mentioned the failure of congressional and IRS oversight.

Rep. Dave Camp (R-MI) asked if most of the abuses would be eliminated by greater enforcement of current laws by IRS. Although that would certainly reduce the number of abuses, Walker replied, the sector needs more transparency and additional data sharing so that the IRS can have better targeting and more effective enforcement. Walker also advocated supplemental, intermediate sanctions available to the IRS.

Rep. Ben Cardin (D-MD) questioned the need for Congress to create more sanctions while the IRS examination rate is so low and the chances of sanctions being used so minimal. He also noted the possible lack of national political will to be more stringent on tax-exempt organizations.

Rep. Earl Pomeroy (D-ND) stated that the hearing highlighted two issues: one, the confused state of the tax code regarding nonprofits, and two, the lack of IRS enforcement of current laws. He urged the committee to consider enforcement and compliance problems immediately and hoped they would also support increased funding and resources for the exempt organization division.

The committee continues to accept written statements, which must be submitted by May 4.

Unfunded Mandates, Results Proposals Advance in Budget Resolution

The budget resolution Congress finally agreed upon last week incorporated language that endorses the establishment of a results commission and marks the first steps in the direction of turning the Unfunded Mandates Reform Act (UMRA) into an insurmountable obstacle for new protections of the public interest.

The House and Senate passed the resolution on April 28 after heated negotiations. As Medicaid funding in particular dominated the debate, a final resolution appeared unlikely at times. Two pieces of the budget resolution -- one section affecting UMRA points of order, and another endorsing a proposal to establish a results commission -- were simply crowded out by these controversies and went under the radar.

UMRA Point of Order

The final budget resolution retains a section, reportedly inserted at the behest of Sen. Lamar Alexander (R-TN), that turns a relatively harmless procedural mechanism into an insurmountable roadblock. UMRA currently requires the Congressional Budget Office to estimate the costs to the states of complying with new legal mandates. For any bill that establishes new requirements for state and local governments that would cost $ 50 million in a single year (indexed for inflation to $ 62 million), a member of Congress can raise a point of order, which can be waived by a simple majority vote under current law. The Alexander provision increases the required vote count in the Senate to a 60-vote supermajority, which would make it much more difficult to pass mandates in the Senate.

This measure, section 403(b) of the budget resolution, was never debated, and many senators on both sides of the aisle were so distracted by the draconian budget cuts for important programs that they did not focus attention on the UMRA provision.

Immediately at stake would be new environmental protections, which typically either rely on state and local governments as partners in enforcement activities or call on the local governments to modify their own behaviors (as polluters, as managers of water systems, sewers, and waste facilities, etc.). Also at stake would be any improvements for workers, such as a real increase in the minimum wage, if the costs to states for applying new safeguards for their own employees reach $ 62 million or more. One of the few statutes ultimately enacted that met the UMRA threshold was, in fact, the minimum wage increase from the mid-1990s.

Moreover, this change in the point of order is only the first step in a larger plan to make UMRA a more significant obstacle to new protections of the public interest. State and local government groups are lobbying for the elimination of exemptions from UMRA's coverage, which currently include civil rights protections and conditions of grant funding.

Because the budget resolution is only a concurrent resolution, UMRA itself has not been amended. Presumably, this section is tantamount to a change in the Senate rules. The revised point of order mechanism will be governed by a section of the Congressional Budget Act that requires this supermajority requirement to be renewed in 2010.

Results Commission

Another section of the budget resolution advanced the concept of a results commission with a "sense of the Senate" resolution. As has been proposed in past sessions of Congress and more recently in the White House budget submission, a "results commission" would be charged with reviewing government programs and considering proposals to restructure or eliminate programs in order to "improve performance and increase efficiency." These proposals would then be fast-tracked through Congress.

Although the proposals to "consolidate" and "streamline" programs would seem initially more structural than substantive, structural changes can be the technical cover under which major substantive changes are hidden. For example, this year's budget submission called for consolidating various block grants into the new "Strengthening America's Communities Grant Program," while subtle clues in the text -- referring to "focuse[d] resources" and a "targeted, results-oriented approach"--

indicated the White House's intention to change the direction, purpose and function of the original grant programs.

A recurring theme in discussions of results commission proposals is that any such commission would rely on White House performance reviews using the Program Assessment Rating Tool. The clear intention of this proposal, as evinced by both the language of past results commission bills and related Senate testimony, is to use tools like the PART assessments to justify eliminating or cutting back government programs and agencies. Though PART is touted as a neutral tool to assess government productivity, we have shown elsewhere that PART is highly political and fails to capture the real successes and failures of government programs. PART is so flawed that some programs actually receive point reductions for following the law. Using this tool to remake government could have dangerous consequences for the health, safety and security of Americans.

This section of the budget resolution is merely hortatory and has no legal ramifications. It does signal, however, the likelihood that there could be some momentum for a results commission proposal during the 109th Congress.

Section 502 of Budget Resolution

Sec. 502. Sense of the Senate Regarding a Commission to Review the Performance of Programs.

It is the sense of the Senate that a commission should be established to review Federal agencies, and programs within such agencies, including an assessment of programs on an accrual basis, and legislation to implement those recommendations, with the express purpose of providing Congress with recommendations, to realign or eliminate Government agencies and programs that are wasteful, duplicative, inefficient, outdated, irrelevant, or have failed to accomplish their intended purpose.

Anti-Regulatory Hit List Debated in House Hearing

The Bush administration again defended its anti-regulatory hit list to Congress, this time presenting the initiative as a boon to small manufacturers in a hearing before the House Small Business Committee that also featured renewed calls for regulatory sunsets.

The committee's Subcommittee on Regulatory Reform and Oversight held a hearing on April 28 to discuss the White House's hit list of regulatory protections to be weakened or eliminated supposedly for the benefit of the manufacturing sector.

Proponents of the hit list, including White House regulatory czar John Graham and a representative of the National Association of Manufacturers, relied heavily on a discredited study commissioned by the Small Business Administration to argue that the manufacturing sector needs the hit list to counter its supposedly disproportionate burden of costs from complying with public health, safety, and environmental regulations. That study is deeply flawed for several reasons:

- It calculates what it calls "regulatory costs," or the costs to industry from complying with protections of the public health and safety, based on old studies that are based, in turn, on *ex ante* guesses of potential costs that the agencies developed when promulgating the regulations. These guesses have been shown to overestimate actual compliance costs, often to a significant degree.
- The figures aggregate cost and benefit estimates from agencies which use methodologies so divergent that the resulting numbers are not comparable in any meaningful way.
- The study actually treats the costs to industry of *lobbying Congress and waging public relations campaigns against regulatory protections* as part of the compliance cost totals.
- Even John Graham himself has admitted before that the study is too shoddy to be a reliable basis for public policy. In a July 2003 hearing before the House Committee on Government Reform, Graham had this to say about the study:

> The fact that attempts to estimate the aggregate costs of regulations have been made in the past, such as the Crain and Hopkins estimate of $843 billion ..., is not an indication that such estimates are appropriate or accurate enough for regulatory accounting. Although the Crain and Hopkins estimate is the best available for its purpose, it is a rough indicator of regulatory activity, best viewed as an overall measure of the magnitude of the overall impact of regulatory activity on the macro economy. The estimate, which was produced in 2001 under contract for the Office of Advocacy of the Small Business Administration, is based on a previous estimate by Hopkins done in 1995, which itself was based on summary estimates done in 1991 and earlier, as far back as the 1970s. The underlying studies were mainly done by academics using a variety of techniques, some peer reviewed and some not. Most importantly, they were based on data collected ten, twenty, and even thirty years ago. Much has changed in those years and those estimates may no longer be sufficiently accurate or appropriate for an official accounting statement. Moreover, the cost estimates used in these aggregate estimates combine diverse types of regulations, including financial, communications, and environmental, some of which impose real costs and others that cause mainly transfers of income from one group to another. Information by agency and by program is spotty and benefit information is nonexistent. These estimates might not pass OMB's information quality guidelines.

Moreover, although the study may well be correct in its conclusion that manufacturers bear more compliance costs than other corporations, that conclusion does not necessarily mean that the sector is unfairly burdened. In fact, the very opposite may be true: manufacturers cause most of the pollution and workplace harms that we suffer, and their larger share of compliance costs may therefore be evidence that regulatory policy is wisely targeting those corporations that are most responsible for the harms from which the public must be protected.

Even if the manufacturing sector needs help to be more competitive in the global marketplace (particularly in an era of free trade agreements that have proven devastating to American jobs), there is no scholarly evidence to back up the administration's argument that regulatory rollbacks will fit the bill. Economist Frank Ackerman and law professor Lisa Heinzerling have recently surveyed the scholarship on regulation and competitiveness, which they conclude actually proves the

opposite of the administration's contention:

- There is new evidence that investment in Mexican industry has grown at a time when Mexican regulations were becoming much stricter, consistent with the "Porter hypothesis" that regulation may actually stimulate growth and competitiveness.
- A recent study found that growth is positively correlated with pollution reduction within the Los Angeles area.
- Restrictions on timber harvesting caused by protection of the spotted owl under the Endangered Species Act may have had net benefits for timber companies, by raising the value of their non-protected timber.
- Finally, some occupational safety and health regulations have actually increased productivity in manufacturing in Quebec.

Administration officials and industry witnesses also repeated several times the argument that regulatory "sunsets" will aid the manufacturing sector. As envisioned by the corporate-conservative alliance mobilizing a larger assault on regulatory policy, regulatory "sunsets," or expiration dates, would be automatically written into every regulatory protection on the books.

Regulatory sunsets differ from proposals for a sunset commission. Whereas a sunset commission would set an expiration date on government programs, such as the Environmental Protection Agency in its entirety, regulatory sunsets would force expiration dates for individual regulatory protections, such as the ban on lead in gasoline.

The argument is primarily that older regulations must presumably be out of date. In fact, in most cases "old" regulations are still as necessary today as they were when originally enacted. The ban on lead in gasoline, for example, is every bit as good an idea today as it was 30 years ago. Present-day cost-benefit analysis would have actually counseled against that ban; given that the Reagan administration, which pioneered the requirements of cost-benefit analysis in regulatory policy, sought to reverse the phase-out, a regulatory sunset could very well have restored lead in gasoline long before science conclusively proved the benefits of the ban.

Although six witnesses from the administration and the manufacturing sector were invited to testify in favor of the hit list, the Democratic members of the committee were allowed only one witness to criticize the hit list. The written statement of OMB Watch's Robert Shull is available for download at www.ombwatch.org/regs/2005/HitList/ShullTestimony.pdf.

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In This Issue

Congress Passes Supplemental War Funding Bill

President Bush signed an $ 82-billion emergency war funding supplemental into law on May 11, one day after the bill received Senate approval. The Senate voted unanimously for passage despite some questionable provisions. And with the ink barely dry on the emergency fiscal year 2005 (FY05) supplemental, House appropriators are already discussing the next round of war funding, which the Pentagon may request as early as August.

The FY05 supplemental contains $ 75.9 billion for military operations, yet many House members believe an additional "bridge fund" will be needed to pay for war operations between the start of the fiscal year on Oct. 1, and the time when Congress will be able to pass an FY06 supplemental. This next supplemental is estimated to fall between $ 35 billion and $ 40 billion.

Besides funding war operations, lawmakers also managed to tack some pork-barrel spending onto the bill. A small portion of the emergency war supplemental funds will go toward studying preservation of Rio Grande River silvery minnows, providing debt service on a firefighting training academy in Elko, NV, and allowing oil and gas exploration along Mississippi's Gulf Islands National Seashore.

Senate Majority Leader Bill Frist (R-TN) was also able to quietly attach another non-war related provision to the bill. His measure will create a temporary worker program for up to 10,500 Australians. Many lawmakers are criticizing the provision because they believe immigration policy should be left to the Judiciary committees. Frist's case for the immigration provision was bolstered when the House attached the "REAL ID" measure to the legislation, which mandates tougher application requirements for driver's licenses and asylum standards.

Besides making asylum claims more difficult to pursue, the controversial REAL ID provision gives Secretary of Homeland Security Michael Chertoff the right to waive all law in his efforts to secure the border. This dramatic and dangerous provision could threaten existing public protections and safeguards. As OMB Watch analyst Robert Shull commented in a statement released last week, "This new power comes completely without limit; every law, from child labor to ethical contracting, can now be waived." (For more on this provision, see this background article.)

No government official should be given the power to unilaterally waive any law. Even worse, the House attached this provision to the supplemental, which was a must-pass bill for the Senate. Emergency war supplemental bills should be exempt from unrelated riders such as the REAL ID Act.

President's Tax Panel Hosts Two-Day Meeting on Reform Proposals

The President's Advisory Panel on Tax Reform met May 11 and 12 to discuss specific proposals, which had been publicly submitted to the panel during a brief comment period, for reforming the federal tax code. The two-day hearing covered some of the plans submitted and heard testimony from a number of tax experts and advocates. Notably, the panel expressed overwhelming skepticism regarding proposals that would fully repeal the federal income tax in favor of a national sales tax or other system.

Panel Chairman Connie Mack and Vice Chairman John Breaux both questioned witnesses on the practicality and progressivity of a national sales tax. Breaux observed a sales tax would have to include complex rebates and incentives in order to make the system more progressive, while Mack challenged witnesses on compliance levels. Members of the panel were quick to point out that no country has adopted a national system of taxation centered around a sales tax, most likely for a good reason.

Thomas Wright of the conservative advocacy group Americans for Fair Taxation was one of the most outspoken witnesses pushing a national sales tax. While Wright suggested a 23 percent sales-tax rate would bring in sufficient levels of national revenue, Breaux disagreed, saying the Tax Policy Center had proven a sufficient rate of taxation would be much closer to 30 percent. Mack was overtly skeptical about compliance rates, telling reporters during a break that compliance has always been an issue with a national sales tax. Wright acknowledged "people will cheat, as they do today," but argued tax evasion would be significantly less than it is under the current system.

Besides discussing proposals for a national sales tax, the panel also heard testimony about the value-added tax, the consumed-income tax, the flat tax, and additional proposals for reform. John Podesta, president of the Center for American Progress (CAP), presented the panel with the center's Progressive Tax Plan. CAP's proposal promotes fairness, simplicity, and overall economic growth -- the three main tax-reform goals President Bush stated he wants to achieve.

The second half of the two-day meeting focused less on specific plans and more on how businesses and international transactions should be taxed.

The panel will hold a ninth meeting May 17 at the Georgetown University Law Center. Witnesses will evaluate tax reform proposals and discuss issues associated with "return-free" filing. Information and supporting documents from all previous panel meetings can be found on OMB Watch's tax panel webpage.

Update: More States Consider 'Taxpayer's Bill of Rights'

In 1992, Colorado passed a constitutional amendment instituting a "taxpayer's bill of rights" (TABOR) in order to make it more difficult for the state to increase taxes during the good times and spend during the bad times. Although Colorado's TABOR law has resulted in a structural cycle of drastic disinvestment in public services, many other states have either considered enacting tax and expenditure limiting legislation (TELS) in 2005 or will likely consider it in 2006.

Although proven to be harmful to state budgets and citizens in Colorado, TABOR laws are easily marketable to the public because they force legislators to stay within a predefined budget and also appear to fight the public perception of out-of-control "government waste." In reality, TABOR laws limit a state's flexibility to alter spending levels from one year to the next. This effectively prevents states from being able to allocate money to different programs to reflect new or differing priorities.

Colorado's TABOR amendment forced that state to significantly cut education and other programs and to refund $ 3.25 billion in tax collections during the decade 1992-2002. As a result, today Colorado is ranked 48th in per-student funding, 47th in K-12 education relative to state income, and 50th in funding for the arts.

In 2005, a number of states introduced TELS amendments, which would restrict state revenue, appropriations, or both. Fortunately, a combination of grassroots pressure and other more important legislative priorities has so far prevented any state from actually altering their constitution.

However, TABOR laws may prove to be a greater threat in the 2006 election year. Politicians may be more likely to introduce TABOR to voters along with other state initiatives of public interest and importance. Arizona, Idaho, Kansas, Michigan, Missouri, Nevada, New Mexico, Oklahoma, Oregon, and Wisconsin have been identified as states closest to passing TELS. Ohio, where the General Assembly is considering a TABOR-type amendment that would specifically restrict spending, is the closest state to altering the constitution. This could happen as early as November 2005.

The Center on Budget and Policy Priorities released a report documenting how Ohio's state spending would have been impacted had this law been adopted in 1994, in order to show how the law would have affected the state over a number of years. Had this expenditure-limiting law been in place for the past eleven years, a total of $ 19 billion would have been cut from state programs and services such as education, Medicaid, public safety, transportation and the environment. Fiscal year 2005 expenditures alone would have been approximately $ 3 billion (17 percent) less than they actually were this year.

Not only would Ohioans, and mostly poor Ohioans, receive less in services because of decreases in state spending, but those reductions would be compounded by loss of federal matching funds. For example, Ohio receives $ 1.43 from the federal government for every $ 1 it spends on Medicaid. A TABOR amendment would drastically reduce state spending on Medicaid by hundreds of millions of dollars every year.

States should not be fooled into believing laws setting tax and spending limits will help limit government waste. Instead those laws will methodically cut spending and decrease revenues on important social programs regardless of need. Grassroots pressure against such laws is growing and must be maintained through the 2006 elections.

Appeals Court Overturns D.C. Hazmat Ban

The U.S. Court of Appeals for the District of Columbia ruled against Washington, DC (D.C.), on its law requiring that shipment of hazardous chemicals be rerouted around the nation's capital. The three-judge panel released its unanimous opinion May 3, overturning a lower court's decision to uphold the ban. The city may either appeal the panel's opinion to the full appeals court or return to the lower court for a hearing on the law.

The appeals court ruled that the federal government has authority over rail security as a part of interstate commerce. The court opinion also explained that a state or city may only intercede in these matters if the federal government abandons its responsibilities. D.C. officials argued that the federal government's actions on rail security were so inadequate they constituted a failure to act. However, the court rejected this viewpoint.

The ruling was a victory for CSX, a rail company that challenged the city's ban and then appealed the district court's decision. The Bush administration supported CSX's position, claiming that D.C.'s new law was unconstitutional. White House officials testified that a secret rail security plan was in place, but its details could neither be disclosed to the public, shared with city officials, nor submitted into evidence before the court.

Ironically, the appeals court decision came on the same day that the Department of Homeland Security announced a $ 1 million grant to D.C. to study rail security risks and the possibility of rerouting.

Should the case go back to the district court, a trial will be expensive. But it will go before the judge who believed the federal government had abandoned its responsibilities to develop a plan for rail security -- a position that is more friendly to D.C. than to CSX. Several other cities are monitoring the case as they consider passing similar laws.

Cheney Task Force Documents to Remain Secret, Judge Dismisses Lawsuit

A federal appeals court judge dismissed a lawsuit May 10, which sought to uncover secret documents from Vice President Cheney's energy task force. The judge ruled the task force was not subject to the disclosure requirements of the Federal Advisory Committee Act (FACA).

The plaintiffs, Sierra Club and Judicial Watch, alleged that energy industry executives participated in the task force that led to the development of the administration's energy policies. Under FACA, any advisory body consisting of individuals outside the government must follow specific guidelines: the committee must issue a charter for approval, include diverse and representative members, and hold open meetings that the public is notified about in advance.

The Court of Appeals for the District of Columbia Circuit unanimously found that the plaintiffs did not provide sufficient evidence that industry executives were members of the task force. The judge ruled that FACA does not apply to a committee of governmental officials even if nongovernmental individuals participate in the meetings, so long as these outside parties are not allowed to vote. Therefore, the court argued that any documents about the task force were not required to be publicly disclosed. In other words, so long as the industry executives did not vote on the committee, they can participate without being required to inform the public.

The administration has long argued that industry had no formal role in the task force, and that releasing any documents about it would hamper the executive branch's ability to acquire information and advice. The court did not allow plaintiffs to verify through discovery whether people outside the executive branch had voting authority. Instead the court relied solely on statements from the administration.

Many open-government advocates believe the court's actions -- defining participation for FACA as voting on issues and disallowing discovery to verify participation by nongovernmental individuals -- will tip the scale in favor of greater executive branch power. Since taking office, President Bush has pushed for centralizing power in the White House and enhancing executive branch powers.

This ruling could end the long legal battle through many courts to disclose the energy task force records. In June 2004, the Supreme Court declined to hear the case and remanded it to the lower court.

House Hears Changes Needed to Improve Freedom of Information Act

The House got a bipartisan earful last week about the need to address the growing problem of secrecy in government. At a hearing May 11 on putting teeth into the Freedom of Information Act, witnesses testified about how FOIA is becoming increasingly weaker in meeting public needs. On the same day, Rep. Henry Waxman (D-CA) announced he would reintroduce a bill to strengthen government transparency, addressing issues beyond FOIA.

The House Government Reform Committee's Government Management, Finance and Accountability Subcommittee held a hearing to assess how the 39-year-old FOIA is functioning. It was not a pretty picture.

Advocates for open government described the need to expand both the incentives for federal agencies to respond more quickly to FOIA requests and to invoke penalties for delay and noncompliance. Witness after witness, both conservative and progressive, including working journalists and the Government Accountability Office (GAO), described problems with public efforts to obtain documents from federal agencies through FOIA.

GAO Director of Information Management Issues, Linda Koontz, provided new data. Between 2002 and 2004 the number of FOIA requests by federal agencies jumped 71 percent, she reported, with about 4 million requests in 2004. While agencies have been processing more requests, the backlog has also increased, rising 14 percent since 2002.

Roughly half of FOIA requests go to one agency, the Department of Veterans Affairs (VA) because the agency treats requests for medical records as a FOIA request. (In fact, the VA and Social Security Administration accounted for 82 percent of all FOIA requests in 2004.) But the VA is not driving the increase -- in fact, the number to the VA declined between 2003 and 2004. Overall, FOIA requests increased 25 percent from 2003 to 2004; when dropping the VA from the equation, the increase jumps to 61 percent.

According to GAO, three federal agencies -- State, the Central Intelligence Agency (CIA), and the National Science Foundation -- made full grants of FOIA requests in less than 20 percent of the cases they handled. Less than 40 percent of the FOIA requests to the Department of Homeland Security, for example, were granted in full. GAO also noted that backlogs of pending FOIA requests increased between 2002 and 2004 for 13 of the 25 agencies they surveyed.

One witness representing the Department of Justice asserted small budgets and too stringent requirements on disclosing information posed the biggest problems to FOIA's implementation.

The same day, Waxman announced he would reintroduce legislation to reverse many of the new secrecy regimes put in place in recent years. The Waxman bill, the Restore Open Government Act, would eliminate the various ill-defined "pseudo-classification designations," such as "Sensitive But Unclassified." Such categories apply to information that government agencies wish to withhold even though it is public and cannot be classified. The proliferation of such vague, ill-defined categories of information begs the question whether new restrictions are needed when the existing classification system is riddled with well-documented overclassification.

The bill would also fund the Public Interest Declassification Board, which has five of seven members already appointed but has never met due to lack of funds. In addition, it would provide for the timely release of presidential records and nullify the "Ashcroft memo," which shifted agencies from disclosing documents to withholding them whenever possible.

See expert testimony from the May 11 hearing.

House Members to Offer Bill to Expand Lobbying Disclosure

In the wake of allegations of violations of House rules, particularly about lobbyists paying for congressional travel by Majority Leader Tom DeLay (R-TX), two Democrats plan to introduce a bill to increase disclosure of federal lobbying and tighten other rules affecting the influence of lobbyists. At the same time, Republicans announced their own plans aimed at tightening and enforcing House ethics rules. However, the Democrats' bill appears to have picked up steam when House Administration Committee Chairman Robert Ney (R-OH) expressed interest in crafting a bipartisan approach to reform.

Rep. Marty Meehan (D-MA), lead sponsor of the Lobbying and Ethics Reform Act of 2005, and co-sponsor Rep. Rahm Emanuel (D-IL) described their bill, not yet filed, in a press conference May 4, saying their purpose is to restore public confidence in Congress. They noted the Lobbying Disclosure Act has not been changed since 1995, but during the past decade the lobbying industry "has grown exponentially, while disclosures have become more infrequent and incomplete."

A decade ago the House, awash in scandal over banking violations and lavish travel junkets, reworked congressional gift and lobbying laws, which included passage of the Lobbying Disclosure Act. Many of the House rules and disclosure requirements were filled with loopholes and simply did not address various issues.

The Meehan-Emanuel bill is an attempt to revisit the loopholes and gaps left from 10 years ago. The bill will cover four major areas: increasing federal lobbying disclosure, slowing the revolving door between working for Congress and lobbying firms, rules for congressional travel, and tougher enforcement and congressional oversight.

More specifically on lobbying disclosure, the bill will:

- Change reporting under the Lobbying Disclosure Act from semi-annually to quarterly
- Require disclosure of grassroots lobbying expenditures
- Require coalitions to disclose lobbying activities and their funders

- Require disclosure of lobbying contacts with members of Congress and senior officials in the executive branch instead of simply reporting broad subject areas.
- Create a searchable electronic database so the public can easily access information in the lobbying disclosure reports

Nonprofits that lobby Congress and meet the registration requirements must report under the Lobbying Disclosure Act. Those charities that opt to use the lobbying expenditure test rather than the vague "substantial part" test can use the IRS Form 990 in lieu of the Lobbying Disclosure Act reporting forms. This was because the IRS Form 990 already requires charities to disclose direct and grassroots lobbying expenditures at the local, state and federal level -- far more than the Lobbying Disclosure Act. Although the Meehan-Emanuel bill is not expected to affect this provision, groups that remain under the substantial part test would need to comply with the new requirements.

The provisions relating to grassroots lobbying and coalition membership disclosure are said to be similar to the Stealth Lobbying Disclosure Act of 2005 Rep. Lloyd Doggett (D-TX) introduced earlier this year. (See summary in the April 4 *OMB Watcher*.) It appears the sponsors do not intend the bill to require registration based on grassroots lobbying expenses, and the coalition disclosure provision will exempt 501(c)(3) organizations. Other 501(c) groups that have "substantial" activities other than lobbying on a specific issue would also be exempt, but the term "substantial" is not defined.

Emanuel's participation in this bill heightens the political jockeying between Republicans and Democrats for political high ground on these ethical issues. Emanuel chairs the Democratic Congressional Campaign Committee. Republicans suspected Emanuel -- and Democrats generally -- were using this issue as a political sledgehammer to bash Republicans. They noted that the DCCC created the "Tom DeLay House of Scandal" on its website which ties Republicans to DeLay or his fundraising every week. Ney was the first Republican to be featured on the website.

On May 10, Emanuel made a statement on the House floor explaining the need for the bill. He noted that federal lobbying expenditures have almost doubled in the past six years, reaching $ 3 billion annually, and that 210 of the 250 top lobbying firms have failed to file complete lobbying disclosure reports under the Lobbying Disclosure Act. Emanuel pointed to "nonexistent oversight and toothless penalties" as a key reason why compliance has been a problem. According to the Center for Public Integrity, almost 20 percent of lobbying forms were filed late and some were not filed at all.

While Republicans reacted coolly to Emanuel's participation, Ney had already been expressing interest in pursuing a bipartisan bill. Emanuel said he would remove his name from the bill if that would help its chances of success. But even before that, Ney had said, "Despite having Rahm's name on the bill, I'm still going to consider it because of Marty Meehan. Everything that Marty Meehan says has credibility." This has given the bill new life in the House.

Meehan filed a similar bill last year, which also included provisions relating to the rights of the minority party in the House. See July 16, 2004 *OBM Watcher* for details. We will post a copy and summary of the bill when it is filed.

North Carolina Preacher Accused of Church Politicking Resigns

On May 5, nine members of the East Waynesville Baptist Church in North Carolina were excommunicated by their pastor for voting for former Democratic presidential candidate John Kerry. The pastor, Rev. Chan Chandler, allegedly told his congregants that voting for Kerry was against the tenets of the church. The pastor has since resigned from his position. There has been no information whether the Internal Revenue Service (IRS) is looking into the allegations of wrong-doing, although Americans United for Separation of Church and State has requested an investigation.

Congregants of the 100-member church stated that on Oct. 3, 2004, Chandler told his congregation, "If you vote for John Kerry, you need to repent or resign." Church members also told the media that prior to the election, Chandler frequently endorsed President Bush from the pulpit and attacked Kerry.

Church members have said that Chandler continued to preach about electoral politics after Bush won re-election, culminating in a church gathering last week in which nine congregants were ousted. Reportedly, Chandler called a meeting of the deacons on May 2, a day after a heated discussion during a Sunday service about his continuing political statements. A number of congregants also attended. Some reported Chandler announced the church was going to become politically active and anyone who didn't like it could leave. At that point, nine congregants left the meeting.

Other sources said about 20 members of the church voted out the nine members, who have retained a lawyer to look into the legality of their ouster.

The controversy brings increased attention to the issue of political partisanship in religious organizations. Under current law, churches and religious organizations are exempt from federal income taxes under Section 510(c)(3) of the IRC. To be eligible for tax-exempt status the 501(c)(3) must not: "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." This is an absolute prohibition. Violation of the regulation can result in the loss of tax-exempt status for a nonprofit.

Valerie Thornton, an IRS spokeswoman, could not comment on the East Waynesville case, but remarked, "in general if a church engages in partisan politics, it could put their tax-exempt status in jeopardy."

In his resignation sermon, Chandler implied that his endorsement of Bush was due to his strong feelings on abortion. He could have advocated on the abortion issue without limit or sanction, since non-electoral advocacy, focused on issues, is always permissible. However, there is an important distinction between partisan political campaign activities and issue-oriented advocacy activities. Tax law allows 501(c)(3)s to engage in issue activities during an election season if it is part of ongoing work and related to the group's mission. But these activities should not be increased or timed in order to influence the outcome of an election. By crossing the line into partisan electoral politics, Chandler has placed the tax-

exempt status of his church in jeopardy.

The prohibition on campaign intervention has brought 501(c)(3) organizations under increasing scrutiny. In a recent letter to Congress, IRS Commissioner Mark Everson reported that the IRS has seen an increase in the political activity of tax-exempt organizations during the last election. "Each election cycle we become involved with significant allegations of wrongdoing and this problem shows no indication of abating. In 2002, a midterm election year, our records indicate that we received approximately 70 complaints alleging campaign activity by charities. In 2004, a presidential election year, that number was over 200."

The current prohibition on partisan activity protects the integrity of charitable nonprofits by preventing individuals from using tax-deductible contributions to avoid campaign finance laws. It also prevents individuals from using charitable nonprofit organizations, which by definition are organized for public purposes, to advance their personal partisan political views.

Some members of Congress would like to open up religious organizations to campaign contributions and activity. Rep. Walter Jones (R-NC) has introduced a bill, H.R. 235, The Houses of Worship Restoration Act, that allow houses of worship to engage in political campaigns in support of or in opposition to candidates for public office.

As demonstrated by the East Waynesville case, this can lead to problems. Because of partisan politics, nine people were discriminated against because of their political beliefs. On a larger scale, mixing religion and partisan politics could lead to religious divisiveness. Under the Jones legislation, a large church, or a number of churches working together, could form a political machine. Religious groups could select candidates and support their campaigns. This would inevitably allow the largest denomination in each community to dominate political life.

Organizations classified as 501(c)(3) receive a tax exemption because their work is educational, religious or charitable, and benefits society as a whole. However, political parties and candidates could abuse the church's tax-exempt status and give generous sums of money to houses of worship, write off the donations as tax-deductible, then have the churches do political work on their behalf, essentially making churches part of a campaign money-laundering scheme.

Additionally, allowing churches to engage in partisan politics results in undue preference for religious speech. The Jones legislation would give religious organizations the right to engage in activities that would remain prohibited for secular 501 (c)(3) groups. Both types of groups receive tax-deductible donations, which costs the national treasury. Taxpayers should not be required to fund partisan activities.

Conservative Coalition Opposes Further Nonprofit Regulation

On April 28, a coalition of conservative groups sent a letter to Senate Majority Leader Bill Frist (R-TN) objecting to the Senate Finance Committee's effort to tighten rules governing charities. Shortly after that, the Independent Sector Panel on the Nonprofit Sector released its second set of draft regulations for review and comment by the sector.

The conservative coalition appealed to Frist to block Finance Committee Chairman Charles Grassley's (R-IA) efforts, which they said threaten the role of charities to further social and educational goals. "We request that, as majority leader, you do not allow proposals of the Senate Finance Committee staff or similar proposals, the effect of which would be to undermine the role of charities in American public life, to come to the floor of the United States Senate."

The groups cited proposals that would limit non-cash contributions and add new paperwork requirements for small nonprofits. They also criticized proposals to limit donations and impose new requirements on the way foundations and other charities are run, saying they would hamper many charities that are not involved in abuses.

Since Grassley's staff released a paper on ideas for changes in tax law last year, many charities have formed coalitions and hired lobbyists to slow down or influence the legislation. The largest effort has been undertaken by Independent Sector, which organized the Panel on the Nonprofit Sector to develop specific recommendations. The Panel issued a first round of recommendations and appears focused on tinkering with the proposals that might appear in Grassley's legislation. The coalition letter takes a different approach by demonstrating that religious and conservative groups oppose Grassley's efforts.

Sen. Rick Santorum (R-PA), who publicly stated his opposition to the reform measures at a Finance Committee hearing on nonprofit accountability, has been working to shore up opposition to the bill. In March, Santorum sent a letter to Adam Meyerson, president of the Philanthropy Roundtable, a consortium of conservative foundations and donors, asking it to convene a group to respond to Grassley's proposals.

Santorum also asked the Philanthropy Roundtable to provide his office with "specific facts, specific situations and possible 'unintended consequences' of the published proposals, as well as your suggestions for any alternatives to the existing proposals". Santorum is concerned a number of proposals in a Joint Committee on Taxation (JCT) report and the Finance Committee's staff discussion draft would impose too onerous a burden on small nonprofits. He has encouraged the committee to push for enforcement of current laws before enacting new legislation.

Santorum is not alone in his concerns. At the same Finance Committee hearing, Sen. Charles Schumer (D-NY) said the $ 300 billion in tax revenue that goes uncollected each year due to tax avoidance and evasion could be collected through better enforcement of existing laws, without new legislation.

Grassley has postponed introducing his bill, which was reported to look similar to the staff committee draft, in response to members' skepticism and pressure from outside groups.

At the same time, the Panel on the Nonprofit Sector, formed by Independent Sector in October 2004 at the request of the Senate Finance Committee, announced its Phase II recommendations hoping to influence the outcome of whatever legislation is introduced.

The Phase II recommendations, following the publication of the interim report in March, delve into issues that the Panel thought too technical for its initial report.

Among the Panel's Phase II recommendations are:

- Disclosure of the services provided by board members in return for compensation on the Form 990 or 990-PF by any organization that provides compensation to board members
- CEO compensation should be reported on the Form 990 or 990-PF, and nonprofits would be required to report whether they followed the "rebuttable presumption" procedures in determining compensation
- A minimum of three directors on the board of every 501(c)(3) organization, and periodic reviews of board size and structure
- A definition of "independent" board members incorporated into the tax code, and a requirement that one-third of the board be "independent"
- A best practices policy regarding payment and reimbursement of travel expenses, and Form 990 disclosure of such policy
- Legislation defining a "donor advised fund" and authority to the secretary of treasury to exclude specific types of funds
- Require every supporting organization to provide its supported organizations with its governing documents, Form 990 and an annual report of its activities
- Make tax-exempt entities subject to the same reporting requirements as taxable entities
- Require 501(c) applicants to provide more detailed information, and
- Require that the standards regulating non-cash contributions be strengthened and clarified.

Comments on the Panel's Phase II recommendations are due May 19, and can be submitted online. Additional recommendations regarding performance data of charitable organizations' activities and suggested revisions to Forms 990 & 990-PF will be forthcoming from the Panel.

Homeland Security Wins Power to Waive All Law

A stroke of the pen makes it final: President Bush signed into law the Iraq war supplemental, which includes a controversial provision giving the secretary of homeland security the power to waive all law when securing U.S. borders.

The provision was conceived originally in the previous Congress as a measure to give DHS the power to waive several specified environmental laws in order to expedite construction of fencing in the San Diego area. Reps. Duncan Hunter (R-CA) and David Dreier (R-CA) pushed an expanded version in the conference committee working on the 9/11 bill, which almost failed to reach an agreement until House GOP leadership promised that an immigration reform bill would be a top priority in this Congress.

That promise was realized early when the 109th Congress convened. The House moved quickly to pass H.R. 418 (the REAL ID Act), an immigration bill better known for restricting the rights of persons seeking asylum and for implementing more stringent national standards for driver's licenses. The Hunter/Dreier language from the previous Congress was included as section 102 of that bill.

The REAL ID Act faced an uncertain future in the Senate, so House Republicans guaranteed its passage by attaching that bill as a rider to the emergency supplemental spending bill for the Iraq war. Although some in the Senate at first threatened to delay the spending bill unless the REAL ID was stripped from it, the Senate Democrats caved into the political pressure to pass the Iraq spending bill at all costs. The fix was in when Minority Leader Harry Reid (D-NV) told the press, "I've had a senator come to me and say, 'We're going to filibuster this.' I said, 'Get real. It's not going to happen. It's a defense bill.'"

A *USA Today* story that was first to report Reid's concession is also an example of a larger pattern of incomplete reporting that has failed to inform the public of the imminent passage of this provision to give Homeland Security the power to waive all law. *USA Today* described it charitably as allowing DHS only to "waive local environmental laws to allow the federal government to complete a 14-mile fence near San Diego that separates the United States and Mexico." This provision will instead give the secretary of homeland security unprecedented power to waive any and all law, environmental or otherwise, anywhere in the vicinity of the borders, in order to expedite construction of fences and barriers and remove obstacles to the detection of illegal immigration. *USA Today* was not alone in this failure to describe the bill accurately.

The version of the measure that came out of the House-Senate conference committee left the breadth of this new power intact. A part of the measure stripping the courts of any power to hear cases arising from the decisions to waive law still denies access to the courts but was revised to permit court review of constitutional claims. Given that existing case law already demands access to the courts for constitutional claims, this revision is not a real improvement. Another change requires DHS to publish its decisions to waive the law in the *Federal Register* before they can go into effect.

The Senate passed the Iraq spending bill unanimously on May 10, and the White House signed it into law the next day. Already, some states are threatening not to comply with the driver's license standards.

Bush Allows Governors to Challenge Roadless Rule

In yet another attack on our nation's wildlife, the Forest Service published a final rule May 13 that will allow governors to petition for changes to state forest management plans, effectively undoing the Clinton-era forest regulations known as the "roadless rule."

Before leaving office, President Clinton protected 58.5 million acres of American untouched Forest Service land from any development, including logging and road building. The Forest Service received two million comments supporting the measure, a record amount of comments on a federal environmental action. Despite the overwhelming public support for the rule, the Bush administration immediately delayed the rule's effective date upon taking office and then later refused to defend the rule against legal challenges.

A new regulation will now open up 34.3 million acres of that land to potential development. The rule will allow governors to petition the Forest Service for changes in the land management plans protecting the roadless areas. Governors have 18 months to file petitions challenging the current land management plans.

This rollback is the culmination of a steady attack on the roadless rule. Several states have challenged the rule in court, seeking to overturn it. In 2001, a federal judge in Idaho overturned the measure, but it was reinstated on appeal in December 2002. In July 2003, a Wyoming federal court struck down the rule again. The Tenth District Circuit Court of Denver heard appeals earlier this month from environmental groups seeking to have the rule reinstated.

House Hearing Reveals Unethical Marketing of Vioxx

During a congressional hearing on May 5, the House Government Reform Committee harshly criticized both the Food and Drug Administration and drug makers for their role in approving and marketing Vioxx, an arthritis painkiller linked to heart disease.

Last September, Merck voluntarily pulled Vioxx from the market after it was found the drug's use led to increased risk of heart failure. Both Merck and FDA were aware of the potential dangers associated with Vioxx in 2000. Still, Merck continued to aggressively market it while FDA sat quietly on the sidelines. At the time Merck pulled the drug, Vioxx had already been on the market for 5 years and used by more than 8 million people. An estimated 88,000 to 140,000 Americans have suffered serious medical complications due to Vioxx.

Representatives from FDA and Merck both testified at the hearing. House members were critical of the questionable behavior of both the drug maker and the agency, whose financial ties to the pharmaceutical industry and legal limitations precluded it from acting despite mounting evidence of Vioxx's failures.

Aggressive Marketing

The committee released documents detailing Merck's aggressive marketing strategy. The product of the committee's six-month investigation of the Vioxx crisis, these documents revealed a pattern of using carefully crafted sales techniques and questionable presentation of scientific information in a campaign to push Vioxx and minimize its risks. The documents gave insight not only into the operations of one drug company but also to the sales and marketing strategies employed by a multi-billion dollar industry. As Rep. Henry Waxman (D-CA) asserted, "the documents may offer the most extensive account ever provided to Congress of a drug company's efforts to use its sales force to market to physicians and overcome health concerns." Merck's meticulous marketing strategy instructed its army of 3,000 Vioxx field representatives on everything from how to shake the doctor's hand to how to eat bread at dinner.

At the center of the controversy was a March 2000 study called *Vioxx Gastrointestinal Outcomes Research* (VIGOR), which showed that Vioxx was five times more likely to lead to a heart attack or stroke than naproxen. Rather than informing doctors about the study, Merck field representatives were instructed to avoid bringing up VIGOR. If doctors asked about the study, drug representatives were instructed to say, "I cannot discuss the study with you," and to refer the doctors to file a request for drug information with Merck.

According to Waxman's statement to the committee:

> Merck instructed these representatives to show physicians a pamphlet indicating Vioxx might be eight to 11 times safer than other anti-inflammatory drugs, prohibited the representatives from discussing contrary studies (including those financed by Merck) that showed increased risks from Vioxx, and launched special marketing programs -- named "Project XXceleration" and "Project Offense" -- to overcome the cardiovascular "obstacle" to increased sales.

Drug representatives also tried to persuade doctors that Vioxx is safe by using a "cardiovascular card" that purported to show Vioxx was safer than other painkillers. The card used aggregated data from several pre-approval studies but excluded the findings from the VIGOR study. FDA scientists told the committee the cardiovascular card used by Merck was not only misleading but "said that the relevance of Vioxx's pre-approval studies to the drug's cardiovascular safety was 'nonexistent' and that it would be 'ridiculous' and 'scientifically inappropriate' to present mortality comparisons from these trials to physicians."

Committee members were highly critical of both the drug maker for its use of such highly misleading information and FDA for allowing such a questionable practice. Several asked Stephen Galson, director of the Center for Drug Evaluation and Research at FDA, about the legality of such a card. Galson said the card was technically legal. FDA Director of the Office of

New Drugs (OND) John Jenkins did concede that, though technically legal, the card did not "present the entire picture."

Dennis Erb, Merck's vice president for global strategic regulatory development, testified that it is Merck's policy that field representatives only discuss data from the drug's label. Since the VIGOR study came out after the drug's approval, Erb argued, it was not included on the label and therefore excluded from the sales pitch. This answer prompted harsh language from several lawmakers. As Waxman pointed out, drug makers are barred from discussing off-label *uses* of a drug but can legally discuss *health risks* not mentioned on the label. Rep. Gil Gutknecht (R-MN) questioned whether FDA's response was ethical, even if it did follow the letter of the law. Galson responded that "ethics is an important part of what we do."

An Industry-Wide Pattern of Aggressive Marketing

The influence of drug makers on doctors' prescribing habits extends far beyond the pitch of a sales representative. Drug companies are the single leading source of information on drugs for many doctors, according to testimony by Dr. Michael Wilkes, vice dean for medical education at the University of California, Davis, School of Medicine, and drug companies spend $20 billion annually to market their products.

As Wilkes asserted in testimony, aside from sales representatives, doctors receive much of their information on new drugs from Continuing Medical Education (CME) conferences and journal advertisements, both of which are underwritten by drug companies. According to Wilkes, "CME has become an important part of doctors' professional lives and PhRMA money has become the life-line of CME." Drug companies and doctors "have an unhealthy symbiotic relationship that is pulling down the medical profession.... Medical journals, medical societies, and even medical schools fight to woo drug company sponsorship of educational events."

The pharmaceutical industry does much of its marketing to doctors through the guise of "educational outreach," but as is clear from the Merck investigation, the presentations of drug companies are intended to sell products rather than educate doctors. Wilkes pointed to one study of pharmaceutical advertisements that "showed that much information (42 percent) failed to comply with one or more FDA regulations, including 35 percent which lacked fair balance between risks and benefits." Wilkes' research has also shown that "40 percent of print ads in medical journals did not present fair balance, 58 percent contained images that expert reviewers felt minimized concerns about side effects, and that 47 percent of the ads did not appropriately highlight risks and contraindications in special populations such as the elderly."

Wilkes made it clear that Merck is not alone in its aggressive marketing of drugs and that the problems found at Merck are pervasive throughout the pharmaceutical industry. When questioned, Wilkes conceded that Merck's reputation is better than most other pharmaceutical companies. This admission prompted several representatives to call for another hearing featuring Merck's competitors.

FDA: An Ailing Agency?

Not only does the pharmaceutical industry have an unhealthy symbiotic relationship with medical professionals, it also has considerable influence over the FDA, the agency responsible for assuring drug safety.

In 2002, FDA began to work with Merck to change the label of Vioxx. Initially FDA wanted the label to explicitly warn physicians that Vioxx could cause heart attacks and other cardiovascular problems, but after negotiations with Merck, FDA backed away from its initial recommendations and listed the cardiovascular risk as merely a precaution. The agency also allowed Merck to include several studies that showed no increased cardiovascular risk in the label material and permitted the exclusion of some important findings.

The agency also argued that it is limited by law in its ability to regulate the drug industry after a drug has been approved. According to Jenkins, FDA has limited authority to require post-marketing trials of approved drugs. FDA can require post-marketing trials on pediatric drugs or when a drug is approved through accelerated approval. In other cases, according to Jenkins, FDA's authority to require more trials is "not so clear." The agency can, however, encourage a drug company to run more trials. FDA often advises companies on clinical trials and will occasionally request a written commitment from a drug company to run a trial. The agency will also review the protocol of studies and give the drug maker feedback.

FDA's ability to ensure the safety of pharmaceuticals may also be hampered by its internal structure. FDA's Center for Drug Evaluation and Research (CDER) houses both the Office of New Drugs (OND), which approves new drugs for the market, and the Office of Drug Safety (ODS), which investigates the safety of drugs already on the market. The first Vioxx hearing last November revealed mounting tension between these two offices. Though they 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, and this reluctance to act leaves patients at risk for serious side effects. The OND also receives money from drug companies to expedite the drug approval process.

In response to criticism of FDA's drug oversight, Secretary of Health and Human Services Mike Leavitt announced in February the creation of a Drug Safety Monitoring Board. The board will be responsible for overseeing drug safety policies and resolving internal disputes over drug risks as well as approving information and content for a new government website on drug safety information. Though a step in the right direction, the creation of the board does not address many of the maladies of FDA.

Strengthening FDA to Respond to These Unmet Needs

Several members of Congress asked about FDA's authority to discipline Merck or other drug companies that, as Rep. Dennis Kucinich (D-OH) put it, "unscrupulously continue promotion" of a dangerous product. Though FDA has some

authority to discipline a drug company, Merck's actions were permissible under FDA regulation, and that fact underscores the wide chasm between what is legally permissible and what is ethical.

Rep. Maurice Hinchey (D-NY) has put forward a proposal to reform FDA. His bill, the FDA Improvement Act of 2005, would prohibit FDA from taking money directly from drug companies. Instead, industry payments would go directly to the Treasury general fund. The bill would ensure that FDA funding would not be impacted but that drug makers would no longer have direct influence on FDA's funding. The bill would also attempt to bar conflicts of interest on FDA advisory panels, create an independent center for post-marketing research, and give FDA the authority to require drug makers to perform post-market research and change labels. The bill does not address, however, the aggressive marketing by the pharmaceutical companies or attempt to curb their influence over doctors.

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In This Issue

Senate Finance Committee Pushes Alternative Minimum Tax Repeal

A bipartisan coalition of Senate Finance Committee members, including Chairman Charles Grassley (R-IA), Ranking Member Max Baucus (D-MT), Ron Wyden (D-OR) and Jon Kyl (R-AZ), introduced legislation last week to repeal the federal individual alternative minimum tax (AMT). The bipartisan "Individual Alternative Minimum Tax Repeal Act of 2005" would amend the Internal Revenue Code of 1986 to end the AMT beginning in the 2006 tax year. In contrast to the position taken by Bush administration officials, Senate Republican tax writers say they do not want to wait for a complete overhaul of the tax code to enact permanent changes to the AMT.

The legislation would result in a loss to the Treasury of $ 611 billion through 2015, according to the Congressional Budget Office -- almost 10 times the amount of tax cuts authorized by the fiscal year 2006 budget resolution. If the 2001 and 2003 tax cuts are extended past 2010, the price tag for AMT repeal would be significantly higher at $ 900 billion.

This bill sends a clear message that repeal of the AMT is a priority for tax writers in the Senate and will be addressed sooner rather than later. President Bush directed his tax panel to develop a solution to the AMT problem, after initially promising the Treasury Department would make recommendations to Congress at the beginning of this year. But Congress will not act on the tax panel's recommendations until early 2006 -- too long to wait for some Senators.

The AMT requires taxpayers to calculate their tax bills both with and without certain deductions, then to pay the higher amount. For Americans above a specific income range, the AMT eliminates certain tax benefits such as personal exemptions, itemized deductions for state and local taxes, and deductions for children. It was originally enacted in 1969 to ensure America's wealthiest taxpayers could not make excessive use of deductions and loopholes to avoid paying taxes they owed. However, the AMT has not been indexed for inflation and now forces millions of middle-income Americans to pay higher tax bills than they should have to. The Internal Revenue Service's own National Taxpayer Advocate, Nina E. Olsen, has called it the most serious problem facing individual taxpayers today.

The Senate Finance Subcommittee on Taxation and IRS Oversight, chaired by Kyl, held a hearing May 23 entitled "Blowing the Cover on the Stealth Tax: Exposing the Individual AMT." The panel heard testimony from Deputy Assistant Secretary for Tax Analysis Robert Carroll, Congressional Budget Office Director Douglas Hotlz-Eakin, National Taxpayer Advocate Nina E. Olsen, and Leonard Burman, co-director of the Urban-Brookings Tax Policy Center. Both Carroll and Hotlz-Eakin urged the subcommittee to consider a legislative fix for the AMT in context with the broader tax overhaul effort being undertaken by the President's Tax Reform Panel. Kyl said the Senate Finance panel would not consider recommendations from the tax panel before the first half of next year, and he wants to enact AMT changes before that. Finance Committee Chairman Grassley is also eager to act but acknowledged Congress might have to pass another one-year temporary fix to ensure that over 16 million new taxpayers do not get caught by the AMT in 2006. Grassley suggested the one-year fix would be included in the Senate's reconciliation tax bill at a cost of $ 30 billion.

The temporary fix currently in place increases the AMT income exemptions, a mechanism often used to keep the tax from affecting even more Americans. This fix is set to expire at the end of 2005. According to the Congressional Research Service, the end of those exemptions would increase the number of taxpayers paying the AMT to more than 19 million next year -- up from 2.3 million in 2003.

The AMT was never intended to tax such a broad segment of the population or to be relied upon as a revenue base. But full repeal of the tax now may once again have the unintended consequence of allowing a significant number of wealthy individuals to avoid paying any income tax at all. A more responsible approach would be a compromise somewhere between full repeal and one-year extensions. Senators on the Finance Committee have indicated they intend to work together to consider all possible meaningful solutions to the problems posed for middle-class taxpayers by the AMT.

House Appropriators Speed Through Spending Bills

While the Senate was bogged down last week debating judicial nominations and a possible vote to end the use of the filibuster when considering judicial nominees, the House has been hastily forging ahead on appropriations bills at a furious pace. Soon after the bicameral budget resolution was agreed to April 28, House Appropriations Committee Chairman Jerry Lewis (R-CA) laid out 302(b) allocations to the 11 appropriations subcommittees and markups immediately began. Seven of the bills remain to be completed.

Congress has until Sept. 30 -- the end of the fiscal year -- to pass all the appropriations measures. To date, the House has completed four of the bills: Energy and Water, Homeland Security, and Military Quality of Life/Veterans Affairs. House members hope to send all 11 appropriations bills to the Senate by the Fourth of July recess.

One notable development yet to reach the House floor occurred May 23 when the House Appropriations Subcommittee on Science, State, Justice and Commerce reported a $ 57.45 billion spending bill excluding funding that would support President Bush's proposal to consolidate several economic development programs. In the administration's budget plan, 18 community development programs -- including the Community Development Block Grant Program (CDBG) -- would be consolidated into a new "Strengthening America's Communities Grant Program" administered by the Commerce Department (CDBG is currently administered by the Department of Housing and Urban Development). In addition to undercutting the mission of these programs by placing them in the Commerce Department, the president's proposal would also cut funding for the consolidated programs by one-third.

The bill reported in this subcommittee excluded funding for this consolidation, as the president's proposal has received widespread bipartisan opposition. Sen. Norm Coleman (R-MN) commented on the president's proposal in February, saying, "The cuts and changes to the community development block grant program -- lifeblood of community development and revitalization -- are non-starters." The House Appropriations Subcommittee including HUD has not marked up their spending bill yet, but they will most likely include funding for CDBG in the mark.

Senate Appropriations Chairman Thad Cochran (R-MS) is expected to begin marking up the appropriations measures soon after the Memorial Day recess, but the Senate is already so far behind schedule it is unlikely to meet the Sept. 30 deadline. This means Congress will most likely be unable to complete all 2006 appropriations bills by the end of this fiscal year. It will necessitate once again using irresponsible continuing resolutions and complex omnibus appropriations bills to continue funding the government.

Thomas Pushes for Social Security Tax Cuts

The House Ways and Means Committee made Social Security the focus of its work over the past two weeks, holding a number of hearings and announcing the intention to write legislation this summer. Rep. James McCrery (R-LA), chairman of the Subcommittee on Social Security, stated House lawmakers will be ready to write Social Security legislation by July 1. However, this legislation could very well include a number of deleterious tax cuts -- masked as savings incentives -- that would primarily benefit the wealthy, not fix the problem of Social Security solvency, and would further add to the nation's budget deficits.

Ways and Means Chairman Bill Thomas (R-CA), held a press conference April 29 in which he both reasserted his dedication to reforming Social Security and proposed the idea of combining benefit reductions with additional tax cuts on savings and investments. Thomas and McCrery believe by coupling benefits cuts with tax cuts in their Social Security reform plan, they would compensate middle- and upper-income earners for the losses they would accrue under a privatization plan. In reality, these regressive proposals would primarily benefit upper income Americans and simply serve to drive the nation deeper into debt.

Thomas has indicated his proposed legislation may consider the following components:

- Expanded tax breaks for Individual Retirement Accounts (IRAs)
- Making permanent the capital gains and dividend tax cuts enacted in 2003
- Providing other tax cuts and tax incentives on investment income and pensions

Thomas has made no mention of a plan to pay for any of these tax cuts, each of which would come with large and long-term costs. These tax cuts would mostly benefit those people who have already received the majority of President Bush's first-term tax cuts. The Tax Policy Center, a joint project of the Urban Institute and Brookings Institution, has estimated people with annual incomes of over $ 1 million will receive tax cuts averaging $ 136,000 when the 2001 and 2003 cuts are fully in effect.

The proposals mentioned by Thomas would not only be costly, but they would hurt low- and middle- income workers. Benefit checks received by low-income earners represent a much larger percentage of their total retirement income as compared to other income brackets. Thus, low- and middle-income earners are more seriously affected by any cuts, big or small, to Social Security. The tax cuts, which Thomas claims would offset any reductions in benefit, will help the wealthy far more than anyone else, leaving low- and middle-income Americans with little support.

One of the specific proposals Thomas is pushing -- raising the amount workers can contribute to retirement plans such as 401(k)s and IRAs -- reflects a core component of the administration's proposal for private accounts. Individuals under 50 can currently contribute $ 14,000 per year to a 401(k) and $ 4,000 a year to an IRA. This proposed tax incentive would not add to retirement savings for the vast majority of Americans -- it would only help a very small percentage who already contribute the maximum amount allowed. Studies by the Congressional Budget Office and the Treasury Department show only about five percent of those eligible for IRAs and 401(k)s contribute the maximum amount. Allowing this small percentage of workers a greater opportunity to contribute to their retirement savings and save on taxes does nothing to help the low- and middle-income earners who would experience more debilitating benefit cuts under a privatization proposal.

These pension and investment tax cuts have a number of supporters who have been waiting for an opportunity such as Social Security reform to have a salient platform to push their priorities. These cuts benefiting the wealthiest Americans are deficit financed and thus will cause more harm over time. For legislators who claim they want to shore up budget and Social Security shortfalls, these proposals would irresponsibly add to long-term deficits and ignore the small but real problems of Social Security solvency. They should be rejected.

Court Waters Down Toxic Release Inventory

A federal appeals court ruled May 10 that the Environmental Protection Agency (EPA) can no longer require chemical facilities to report methyl ethyl ketone (MEK) releases under the Toxic Release Inventory (TRI). According to the 2003 TRI data, facilities released over 26 million pounds of MEK to the environment.

The American Chemistry Council (ACC) filed the petition to delist MEK from the TRI. TRI is a publicly available database that provides annual information on toxic chemical releases. It was created under the Emergency Planning and Community Right-to-Know Act of 1986. The industry association first submitted the petition to EPA in 1998, but EPA rejected the measure, arguing that because the chemical helped in the formation of ozone, which is harmful to people, the chemical qualified as toxic and therefore could be regulated under TRI.

ACC took the matter to court with a lawsuit against EPA's decision. In 2004, a judge ruled in EPA's favor, stating that because MEK contributed to the formation of a compound that causes adverse impacts to human health it could be regulated under TRI. The May 10 appeals court decision overturns that ruling. The judge ruled more narrowly that MEK does not fall under the definition of toxic because by itself the chemical does not cause harm upon exposure to the chemical.

The agency's tests have shown that exposure to MEK does cause irritation to eyes, nose and throat. The tests also confirm that the chemical does not cause any major health effect by itself. EPA's primary concern with the chemical is its contribution to ozone. EPA proposed a 2003 rule to remove MEK from the list of hazardous air pollutants regulated under the Clean Air Act.

MEK is used in lacquers and surface coatings, adhesives, printing inks, paint removers, and special lubricating oils. It is also used in drugs and cosmetics. According to a fact sheet on MEK produced by the state of New Jersey, repeated high exposure to the chemical can damage the nervous system and brain.

EPA has not decided if it would challenge the latest court ruling and try to keep MEK among the chemicals tracked in TRI.

CHEMICAL	Total On-site Disposal or Other Releases	Total Off-site Disposal or Other Releases	Total On- and Off-site Disposal or Other Releases
Methyl Ethyl Ketone	25,972,269 pounds	421,047 pounds	26,393,316 pounds

SOURCE: 2003 Toxic Release Inventory

Journalists Find Chemical Plants Insecure

The *New York Times* recently uncovered startling security flaws at chemical plants in Dallas and New Orleans after a writer "milled about" for some time around the fence line of plants before even being approached by facility security personnel. Reporters have regularly penetrated chemical plant security with great ease, notwithstanding claims by the chemical industry that it is voluntarily improving security.

A May 22 *New York Times* editorial reported on these gaping security holes surrounding chemical plants that use large quantities of the most hazardous substances.

Unfortunately, the example used by the *Times* is neither the first one nor an isolated case. The Working Group on Community Right-to-Know, an OMB Watch project, has compiled nearly 20 similar news stories from across the country detailing more than 60 instances of chemical plant security failing to keep out uninvited reporters, thieves and security test personnel.

Despite these examples, the chemical industry continues to oppose any federal legislation for chemical plant security and risk reduction, maintaining instead that companies can best ensure the public safety if left alone.

Thus far, the federal government has bowed to pressure from the chemical industry and refrained from passing any legislation. However, as evidence continues to mount, such as the breeches detailed in the *Times* editorial and recent congressional testimony from chemical industry safety and security experts, Congress may finally pass a law requiring

minimum standards. In a post-9/11 environment, it makes enormous sense to impose requirements on chemical plants to tighten security and to take steps to minimize the use of unsafe chemicals. Several bills have already been introduced and more are expected.

On April 12, Rep. Vito Fossella (R-NY) introduced the Chemical Facility Security Act of 2005 (H.R. 1562). The bill does not require priority facilities to consider safer chemicals or processes, nor does it require all facilities to submit their security reviews to the government for approval. Nonetheless, no other representatives have agreed to cosponsor the bill yet.

More recently, on May 10, Rep. Frank Pallone (D-NJ) introduced the Chemical Security Act of 2005 (H.R. 2237). Pallone's bill places more requirements on facilities to safeguard their plants from a terrorist attack, but still does not require facilities to use safer chemicals and processes where practical. The bill currently has two cosponsors -- Reps. Edward Markey (D-MA) and Rush Holt (D-NJ).

Recently, Sen. Susan Collins (R-ME), chairman of the Senate Committee on Homeland Security and Government Affairs, held a hearing on chemical security at which Sen. Jon Corzine (D-NJ) was lead witness. Corzine has introduced several bills on chemical security during previous sessions of Congress. His legislation was opposed by the chemical industry and Sen. James Inhofe (R-OK), chairman of the Environment and Public Works Committee, offered an industry-friendly bill that stalemated any movement on Corzine's bill over the past few years. Collins and Corzine are reportedly considering development of a bipartisan bill to be introduced this year. However, security advocates fear that any strong chemical security legislation will be watered down by industry opposition.

Iowa's 2005 Legislation a Mixed Bag for Open Government

The 2005 legislative session in Iowa closed with passage of two laws that improve the public's access to government information. While a third law did not pass, open government advocates still thought this was a good year for the public's right to know.

One open government victory for Iowa citizens was the passage of Senate File 403 (SF 403), which limits the costs that state and local government agencies can charge people for making copies of requested public records. Excessive copying fees are a common barrier that the public encounters at the national level and in states around the country. Gov. Tom Vilsack (D) signed SF 403 into law May 4. The new law limits duplication fees to the direct costs of making the copies and bars local governments from raising the copying fees to cover increased overhead costs, such as salary, benefits, depreciation, or electricity. SF 403 was introduced by the Iowa Senate Committee on Government Oversight.

Another positive open government measure that became law in Iowa was House File 772 (HF 772), which toughens the state's open meetings and open records law toward violators. The new law adds a "two strikes and you're out" provision that would permit the removal of any state or local government officials from office for two convicted violations of the open records law. Previously it took three strikes before officials were fired for such violations and no one had ever been removed under the provision. While advocates view the HF 772 as a step in the right direction, they acknowledge they do not know of any examples of state or local officials that received two strikes. The Iowa House Committee on State Government introduced HF 772 on March 15 and it became law on May 3.

The third beneficial open government bill proposed during the 2005 session was House File 372 (HF 372). The bill, which never received a vote, proposed to ban "walking quorums" which are used by public boards to avoid open meeting requirements by splitting up into small groups to hear testimony or debate issues instead of performing these actions as a full board. It would also have expanded the definition of a public meeting to include small groups of board members. Many cities, counties and school boards opposed it and put pressure on state legislators to keep it from even being debated.

Overall, Iowa proponents of open government deemed the 2005 legislative year a success. Kathleen Richardson, executive secretary of the Iowa Freedom of Information Council, said, "We're considering it a good year at the Legislature for open-government issues."

Lobby Disclosure Bill Filed

On May 17, Reps. Marty Meehan (D-MA) and Rahm Emanuel (D-IL) formally filed H.R. 2412, the Special Interest Lobbying and Ethics Accountability Act (SILEA). The bill would amend the Lobby Disclosure Act of 1995 (LDA), which requires organizations that engage in a certain amount of lobbying activity to register and file disclosure reports. Of particular concern to nonprofits are four provisions that would increase disclosure requirements.

H.R. 2412 includes no general exemption for nonprofit organizations except churches and their integrated auxiliaries. The bill focuses on four main areas of reform: enhancing lobby disclosure, slowing the revolving door between former members of Congress and lobbying firms, curbing excesses in privately funded travel, and strengthening enforcement and oversight of ethics and lobbying disclosure.

The provisions that increase disclosure would require more frequent filing of reports, disclosure of coalition membership and grassroots lobbying costs. It also would require electronic filing of LDA reports. For details of the bill's provisions see our summary

The bill currently has more than 60 Democratic cosponsors, but so far lacks any Republican support. Meehan is continuing to seek Republican cosponsors for the bill. However, House Republicans, whose ties to lobbyists have received intense media scrutiny, have been cool to the proposal. They are also reluctant to work with Emanuel, who chairs the Democratic Congressional Campaign Committee (DCCC). However, GOP leaders have not completely dismissed the calls for reform of

the lobbying rules. Rep. Bob Ney (R-OH), chairman of the House Administration Committee, has stated that he is interested in many provisions of the bill and would consider working with Meehan. Additionally, Sen. Russell Feingold (D-WI) is reportedly considering offering companion legislation in the Senate.

State Charity Regulation Proposals Listed

The National Council of Nonprofit Associations (NCNA) has published a list of 24 legislative proposals to regulate charities that are pending in 15 states. A list summarizing 2004 results in 19 states was also published. Both are available on the NCNA website.

The topics covered in the bills primarily include financial accountability, increased reporting and fundraising. Some states are responding to financial pressures caused by cutbacks in federal funds by putting limits on property tax exemptions for nonprofits. This is a double-whammy for nonprofits since they, too, face cutbacks in federal funds.

It is surprising that states would try to reap money from nonprofits. States continue to face long-term financial pressure from the soaring cost of Medicaid, with costs rising 8.1 percent to $ 119 billion in 2004, according to the Centers for Medicare and Medicaid Services. But according to a USA Today survey, seven of 15 states surveyed (accounting for 46 percent of the U.S. population) reported their tax collections have grown more than 10 percent so far in this budget year. The same states had reported 2004 tax collections 7.2 percent greater than in 2003, for a record combined total of $ 600 billion, the biggest increase since 2000. Revenue in 2005 appears to be even better based on early reports with many states reporting double-digit increases through April. Analysts at the National Conference of State Legislatures report state revenues are at or above what they expected this year.

NCNA released a statement May 23 that reported increased interest in regulation of charities by state governments "in the context of continuing pressure on state budgets, high-profile scandals captured by media across the country, federal attention to nonprofit regulation" and other factors. The lack of coordination between state and federal efforts raises the possibility of duplicative but inconsistent reporting requirements and governance standards. NCNA Executive Director Audrey Alvarado said, "this state activity is going largely unnoticed, even though it has far more serious consequences for the day-to-day operations of charities across the country."

The list for 2005 includes each state's bill provisions, status and last day of its legislative session. NCNA plans to update the 2005 list with bills passed or defeated. The 2004 list summarizes the provisions and notes whether the bill passed. In 2004, six bills primarily addressing financial reporting were signed by the governors of California, Hawaii, Iowa, Massachusetts, Maine and New Hampshire. While several bills have been approved by legislatures so far this year, none has yet been signed by the state's governor.

Group Asks Supreme Court to Consider Constitutionality of Electioneering Restrictions

The Wisconsin Right to Life Committee (WRTL) appealed to the Supreme Court May 24 asking it to overturn a provision of the Bipartisan Campaign Reform Act of 2002 (BCRA) that prohibits the broadcast of ads that mention federal candidates within 60 days of a general election or 30 days of a primary. WRTL ran ads in the summer of 2004 asking Sens. Russ Feingold (D-WI) and Herb Kohl (D-WI) to support President Bush's judicial nominees. It had to discontinue the ads on Aug. 15, 2004 because Feingold was running for re-election. The group says the ads were grassroots lobbying communications that should be protected by the First Amendment, not partisan electioneering.

In August 2004, WRTL filed a lawsuit challenging application of the electioneering communications rule prohibiting it from airing the ads about judicial nominees and similar ads it may want to run in the future. The suit asked a special three judge panel for the U.S. District Court for the District of Columbia for an injunction against application of the rule to these facts, even though the Supreme Court had upheld the general provisions of the law in *McConnell v. FEC* in December 2003.

The District Court dismissed the suit, saying the language of the *McConnell* decision does not allow challenges to specific applications of the law, called "as applied" challenges. WRTL argued that the Supreme Court had rejected a broad challenge claiming the electioneering communications provision of BCRA is unconstitutional on its face, but had not precluded the "as applied" challenge. It called the lower court's position "unprecedented" and at odds with "reason, reality and justice."

In its Jurisdictional Statement seeking Supreme Court review, WRTL emphasized factors that distinguish grassroots lobbying from partisan electioneering. These include:

- The ad refers to a specific pending legislative matter and not the election
- The federal candidate is mentioned as a federal officeholder, not as a candidate
- There is no reference to a political party, the officeholder's character or fitness for office or his or her record on an issue
- Contact information is provided so the public can make their views known to their elected representative
- The organization has a long-standing interest in the issue at hand, and
- The ads appeared both inside and outside the 30/60 day blackout period required by BCRA.

WRTL is a 501(c)(4) organization that has endorsed Republican candidates. The group could have used "hard" dollars, raised and spent subject to federal campaign finance regulations, to pay for the ads. However, they said this placed an unconstitutional burden on them.

OMB Watch Comments on Combined Federal Campaign Anti-Terrorist Certification

OMB Watch has filed comments on the Combined Federal Campaign's (CFC) proposed anti-terrorist financing certification for fiscal year 2006 (FY06) that support CFC's shift away from its FY05 requirement that participating charities check employee names against government terrorist watch lists. The CFC is the federal government's workplace charitable giving program. The comments suggest ways the proposed certification can be improved to provide clearer guidance and suggest that CFC develop procedures for organizations to cure any noncompliance discovered during the program year. OMB Watch is one of 12 nonprofit plaintiffs that have challenged the current certification in federal court

In 2004, CFC added language to its funding agreement that required participating organizations to certify that they do not "knowingly employ individuals or contribute funds to organizations" listed as terrorists on various U.S. government watch lists. CFC interpreted this to impose an affirmative obligation for charities to check their employees' names, as well as groups they give money to, against the lists. The proposed rule seeks public comment on a new approach for the FY06 program. It has three elements:

- A certification by the charity that it is in compliance with all laws, Executive Orders and regulations that bar transactions with groups or individuals subject to sanctions by the Treasury Department
- Acknowledgement of awareness of lists of blocked entities and individuals on Treasury's website
- A promise to notify CFC if the group "becomes noncompliant" after the certification. CFC would then "take such steps as it deems appropriate under the circumstances," including suspension from the program and recouping funds already disbursed.

OMB Watch's comments praised CFC's shift away from the express requirement for employee list checking, noting that the new approach recognizes the variety of ways different types of organizations can comply with anti-terrorist financing laws. The new approach also recognizes the many structural protections against diversion of funds for non-charitable purposes that are inherent in charitable operations, including Internal Revenue Service (IRS) regulations and other CFC certifications on financial accountability and governance. The comments cite the Principles of International Charity developed by the nonprofit sector as a resource for charities to ensure their funds are not diverted to terrorist organizations.

However, the comments suggest the language of the proposed certification be clarified to recognize that no entity can ensure absolute compliance. For instance, standards drawn from the certification used by the U.S. Agency for International Development (USAID) provide a clearer and more realistic statement. It requires that charities certify they do not "knowingly provide material support or resources to any individual or entity" involved in terrorist acts, "to the best of its current knowledge." It also clearly states that checking government watch lists for names of beneficiaries of service, vendors and the others is not required unless the organization "has reason to believe" the person or entity is involved in terrorist acts.

The importance of encouraging due diligence and providing due process to charities participating in CFC is cited in the comment's recommendation regarding discovery of noncompliance during a program year. OMB Watch suggests that CFC provide a process that allows charities an opportunity to cure the problem without interrupting their participation in the program. In addition, the comments say that, absent negligence in oversight, the CFC should not attempt to recoup donations already received when a charity comes forward to report and cure noncompliance. Any other approach is inherently unfair and discourages charities from coming forward to report and correct problems.

The background information CFC published to explain and justify the proposed rules notes a "pattern of abuse of U.S. and foreign charities" by terrorists to divert funds for illegal purposes. The OMB Watch comments argue that only a small number of U.S. charities have been shut down for alleged terrorist financing activity. Overall, other sources of money laundering, including trafficking in drugs and weapons, cigarette smuggling and misuse of informal banking systems, present a greater danger of diversion of funds to terrorism than charities. A 2004 research paper, *Terrorism and Money Laundering: Illegal Purposes and Activities* by attorneys Victoria Bjorklund, Jennifer Reynoso and Abbey Hazlett reviewed alleged links between charities and terrorist organizations, and found "few, if any, of these 'links' alleged that U.S. charities were unwittingly being used to support terrorist activities." CFC needs to substantiate its claim about abuses by charities.

GOP Seeks Power to Restructure Entire Federal Government

The Bush administration's systematic dismantling of the public's protections could soon accelerate as Republican lawmakers prepare legislation that would permit the unrestrained restructuring of the entire federal government through results commissions and fast-track reorganization authority.

As we reported earlier, House Government Reform chair Tom Davis has vowed that a top priority for this Congress will be giving the White House the power to fast-track through Congress recommendations for restructuring the federal government. Now *Inside EPA* is reporting that Davis's office is drafting legislation to grant the White House power to develop restructuring plans that would be fast-tracked through Congress without the possibility of amendment. A source has told *Inside EPA* that Davis is awaiting the White House's imminent proposals for results and sunset commissions, which may include some version of fast-track reorganization authority.

Meanwhile, other lawmakers are proceeding with their own versions of commissions to reorganize government. As we reported earlier this month, one senator, probably Sen. Sam Brownback (R-KS), slipped into the budget resolution a "sense of the Senate" provision endorsing the concept of a results commission. Brownback is reportedly coordinating with Rep. Kevin Brady (R-TX) to develop a new proposal that combines elements of each member's proposals in past

Congresses for results and sunset commissions respectively. Rep. Todd Tiahrt (R-KS) has jumped on the bandwagon by reintroducing the Commission on the Accountability and Review of Federal Agencies Act, a version of the results commission concept. The CARFA Act would link performance data, such as the simplistic reviews currently carried out in the Program Assessment Rating Tool (PART) assessments, with recommendations to consolidate or eliminate federal agencies. (See more about the CARFA Act.)

In addition to his bill for unconstrained authority to eliminate and restructure government agencies, Tiahrt has been busy in the last couple of weeks proposing several amendments to major appropriations bills for federal agencies to limit their ability to develop new protections of the public interest. His most recent effort was the appropriations bill for soldiers and veterans. Read more in our blog **REG•WATCH**.

These proposals are all supported by good government rhetoric and appear initially to be technical proposals about the structure rather than the substance of government. The problem is that structural overhauls can be a technical cover hiding major substantive changes that will adversely affect the public interest. The most recent structural change proposed by the White House -- the controversial proposal to eliminate the Community Development Block Grant as we know it and combine it with other community development programs -- is a case in point. When combined in the proposed new "Strengthening America's Communities Grant Program," the old programs would have lost not only their distinctive character but also much of their funding: a 34 percent reduction, without adjusting for inflation. Subtle clues in the fiscal year 2006 budget submission -- referring to "focuse[d] resources" and a "targeted, results-oriented approach" -- indicated the White House also intended to change the direction and purpose of the original community development programs.

Creating the possibility of wholesale reorganization of the federal government is a particularly troubling idea given this administration's hostility to protections of the public health, environment, safety and public welfare. As we have documented elsewhere, the defining characteristic of the Bush administration to date is a special interest takeover of the federal government that is systematically dismantling public protections. While dismantling existing protections, the administration has also been building a record of allowing unmet needs to fester, in a larger pattern of failure to serve the public. Wide-ranging powers to reorganize and eliminate government programs may prove disastrous for the public health, safety, civil rights, environment and other public interest concerns.

House Considers CDBG But Avoids Attacking PART

In the wake of the White House's attempt to put the Community Development Block Grant (CDBG) program on the chopping block, a House subcommittee held a hearing to determine whether a program as diverse and flexible as CDBG could be evaluated using OMB's one-size-fits-all performance measurements.

Factors Influencing the Hearing

The hearing focused on CDBG in isolation from other programs that fared poorly under OMB's performance measurement process, but the hearing did not address the systematic problems of that process. The popularity and importance of CDBG do not alone explain the form the hearing ultimately took. Instead, there are political factors at play that prevented the hearing from addressing these larger problems.

Political Context

Foremost among the many heated disputes inspired by the White House's fiscal year (FY06) budget submission was the proposal to eliminate CDBG in its current form and to combine it, at significantly reduced funding levels, with several other programs to be administered by the Department of Commerce rather than Housing and Urban Development (HUD). The White House justified its proposal by claiming that CDBG failed to produce results, as measured by the Program Assessment Rating Tool. Although Congress ultimately rejected that proposal, the problem remains that the White House failed CDBG in the FY 06 PART and could do so again in the future.

The consolidation proposal proved controversial for lawmakers on both sides of the aisle, because CDBG is an enormously popular program. Administered by HUD's Office of Community Planning and Development (CPD), CDBG gives federal money to state and local governments to support a variety of activities aimed to assist low- and moderate-income communities. State and local governments are given great flexibility in developing a program that best meets the needs of their given community. CDBG money has been used to enforce housing codes, build sidewalks and sewer systems, clean up and redevelop brownfields, and build affordable housing, among other activities.

The proposal to cut CDBG based on its supposed ineffectiveness put Republican lawmakers in a difficult bind. On the one hand, constituent pressures prevented them from agreeing with PART's assessment of CDBG. On the other hand, PART is a powerful tool that enables this administration to use the notional objectivity of quantified performance measurement to justify predetermined political outcomes; Republican lawmakers were thus constrained from attacking PART in its entirety. Moreover, a Republican member has sponsored a bill, recently reported out of committee, that would essentially codify the PART. When the House Government Reform Committee's Subcommittee on Federalism and the Census held its May 24 hearing, GOP members resolved this tension by seeking inputs on improvements to PART that could allow it to accommodate the special characteristics of CDBG, while ignoring the larger problems of PART.

CDBG and the Broader Context of PART

Although the House hearing focused entirely on CDBG, that program fared poorly in its PART assessment for the same reason that many other block grants -- and, for that matter, many programs important to the public interest--also fared poorly.

PART is, by design and in practice, a one-size-fits-all test focused less on meaningful assessments of actual effectiveness than on the political whims of the budget examiners conducting the assessment. The White House's Office of Management and Budget (OMB) has used PART since 2002. Under the guise of a neutral scientific tool, PART evaluates programs using questionable criteria, some of which conflict directly with programs' authorizing statutes. Although OMB purports to have specialized sets of questions for different types of programs (research and development, regulatory, block grants, and credit programs), in practice the questions for each type of program are essentially indistinguishable. Within each type of program, OMB does not even pretend to particularize its performance inquiry depending on the specific characteristics of a given program. After conducting these problem-ridden assessments, OMB then uses the PART scores to justify changes in program budgets.

PART is particularly ill-suited for all block grant programs, not just CDBG. The basic purpose of block grant programs is to send funds to the states with minimal strings attached. Imposing nationwide performance measurement requirements would force the states to gather uniform data, whether or not their specific programs were designed with those data end-points in mind. In contrast with the states' rights agenda that drove the development of many block grants, federal performance measurement (in particular a one-size-fits-all test like PART) aggressively trumps the states' own performance measurement processes and could have the effect of holding states accountable for consequences beyond compliance with basic legal requirements. Holding the block grant program itself accountable for failing to gather uniform performance data counters Congress's intent for the program.

In fact, the evidence indicates that the White House has used PART in a systematic attack on block grants, including CDBG. Grant programs rate significantly lower than in PART reviews than all other programs on average. For example, in the FY05 PART reviews, OMB scored no block grants as effective even though it gave that rating to 11% of all programs, and it rated only 5% of all programs as ineffective but gave that failing score to 43% of all block grants. This trend continued in the FY06 PARTs, in which only 27% of block grants were deemed effective while 47% of all other programs received the highest score.

The Hearing as a Balancing Act

Although CDBG was not alone in being slated for deep cuts justified by a failing PART score, the May 24 hearing focused on CDBG in isolation. The House has already rejected the controversial proposal in the White House's FY06 budget submission to combine CDBG with 17 other programs from five different agencies as the new Strengthening America's Communities Initiative, which would be relocated to the Department of Commerce and funded at $3.7 billion -- a 34 percent cut, without adjusting for inflation, from the programs' FY05 $5.6 billion budget. As to be expected from the political context, the hearing avoided the deeper systematic problems of PART and instead attempted to find a middle ground between saving CDBG from the ax while not rejecting PART altogether.

Disputing the CDBG PART Assessment

Instead of addressing the larger problems of PART, participants in the hearing disputed the basis for the program's rating of "ineffective." Critics within the agency and in the hundreds of communities served by CDBG have argued that the performance measures used by OMB do not adequately capture this flexible and dynamic program. Witnesses at the hearing focused in particular on OMB's decision to score CDBG a zero for clear programmatic purpose, based on the argument that "the program does not have a clear and unambiguous mission. Both the definition of 'community development' and the role CDBG plays in that field are not well defined."

HUD deputy secretary Roy Bernardi refuted OMB's PART rating and defended the performance of CDBG, saying the program has a purpose clearly outlined in the Housing and Community Development (HCD) Act of 1974, which established CDBG. Bernardi further asserted that HUD follows the intent of the law in its administration of the program. Congress intentionally designed the law governing CDBG to minimize HUD's role and allow communities to develop programs that meet their specific needs. In fact, in 1981, Congress specifically modified the act to reduce HUD's role from making qualitative assessments of grantee programs to simply assuring that grantees complied with the governing statute. In its hands-off approach to administering CDBG, HUD is following the directive from Congress.

Neither Bernardi nor the other witnesses used this occasion to emphasize that CDBG was not alone in being penalized under PART for following Congress's stated intent. For example, OMB penalized the Consumer Product Safety Commission, Occupational Safety and Health Administration, and Mine Safety and Health Administration for failing to use cost-benefit analysis in rulemakings, even though these agencies operated under statutory authority and, in the case of OSHA and MSHA, Supreme Court precedent forbidding the practice.

Also not discussed is an additional constraint on HUD's ability to collect performance information: the Paperwork Reduction Act. The PRA limits an agency's ability to collect any information from 10 or more people -- in other words, almost every occasion that an agency would be collecting information -- by requiring OMB approval. Agency information collections, no matter how important to the public interest, are collectively subject to a fictional budget of "burden hours," or the estimated time required to complete information collection. That budget in turn is subject to periodic reduction goals. The PRA mandates an annual reduction in burden hours, putting pressure on agencies to minimize the collection of information notwithstanding the need to gather more information about performance.

Saving Face for PART

All the participants in the hearing walked a political tightrope when the hearing shifted its focus to question of applying performance measures to CDBG. The performance measurement movement has been so successful in altering the mindset of many in government, the nonprofit sector, and elsewhere that there is little critical thinking about the underlying assumptions of performance measurement - namely, that it is possible to think of "performance" as a discrete set of activities susceptible of measurement in politically neutral, quantified data, and that these performance measures should be central rather than subsidiary to high-quality fiscal and management decisions. Moreover, the political context constrained any in-depth discussion of the problems of PART itself.

Accordingly, Bernardi and state and local groups at the hearing argued that performance measures can be established for CDBG and that PART simply used the wrong measures. For Bernardi and many of CDBG's proponents, the solution is that performance measures should be developed by the local communities rather than handed down by OMB. The "genius" of the program, as one state group called it, is its flexibility; it can cater to the specific needs of a given community. Since programs are developed by the community and tailored to community needs, that community knows best what the outcomes of the program should be and how they should be measured. As Bernardi stated in his testimony before the subcommittee, "because the CPD formula block grant programs promote maximum flexibility in program design and since the use of these funds is driven by local choices, HUD believed that performance based measurement systems should be developed at the state and local level."

In fact, HUD has been working with OMB and stakeholders since 2003 to develop better performance measures for the program. In September 2003, CPD issued a notice to all program grantees outlining its efforts to improve performance measures and encouraging grantees to develop their own local systems for measuring program outcomes. In response, 43 percent of grantees reported using performance measures or that they are working to develop such systems. Since that time, a working group of representatives from an array of national housing and community development associations came together to develop performance measures that reflected the objectives and outcomes of their programs. The resulting system allowed grantees to determine their own objectives "based on the intent of the project and activity. While program flexibility is maintained, the system offers a specific menu of objectives, outcomes and indicators so that reporting can be standardized and the achievements of these programs can be aggregated at the national level," according to Bernardi's testimony.

The witnesses sidestepped the systematic problem built into PART itself: namely, that the OMB budget examiners applying PART look only for a couple of measures applied across the board in a program. Despite HUD's work on developing performance measures that reflect the diverse objectives of the program, OMB still chose to evaluate CDBG using the one-size-fits-all PART measurements that not only failed to capture the intricacies of the program but also evaluated CDBG grantees on criteria that fell outside the scope of the authorizing statute. The one-size-fits-all reductiveness of PART cannot accommodate the multiple, project-specific outcome measures envisioned by the witnesses. Forcing PART to accommodate these program-specific concerns for CDBG alone, moreover, would do nothing for all the other programs suffering under the crudely mechanistic rigidities of PART.

The witnesses also danced around the problem of using such a flawed tool in making management and budget decisions. OMB budget examiners appear to launch PART assessments with predetermined political outcomes in mind, and the White House then uses the good government rhetoric of "results" to justify slashing the budgets of programs that fail the assessment. Though even CDBG's advocates noted problems with the programs, none of the witnesses suggested that cutting the budget was a solution. In fact, Sheila Crowley, president of the National Low Income Housing Coalition, argued that HUD is often crippled by lack of proper resources. Over the past decade, HUD has continued to administer the same public services with an ever-diminishing budget. PART is, naturally, oblivious to these resource constraints.

The witnesses argued for an alternative role for performance measurement: using performance measures as a management tool rather than a guide to budget decisions. Subcommittee Chair Michael Turner (R-OH) asked witnesses repeatedly if and how performance measures can be used not just to *prove* the effectiveness of a program but also to *improve* program effectiveness. Turner's questions prodded the witnesses to find a role for performance measurement as a vehicle for determining best practices and quality case examples to be circulated among CDBG grantees (but not imposed upon them). In Turner's alternative vision, HUD would gather project-specific performance information and then share the success stories of one grantee with others.

Currently, HUD gathers performance information only to ensure compliance with laws and regulations. In the mid-1990s, HUD introduced the Integrated Disbursement and Information (IDIS) reporting system, which allowed grantees to input data about program activities. While IDIS tracks the financial status of CDBG grantees, it does little to integrate that information with the various performance reports required of grantees. Turner seemed to see HUD's emphasis on compliance not as the result of the HCD Act and the 1981 follow-up minimizing HUD's role but, rather, as a missed opportunity for this kind of best practices consultation. HUD is currently working to improve the IDIS system in a way that will make aggregating data possible.

This interesting alternative approach is not possible in the current performance measurement climate. PART itself still demands an over-all assessment of the performance of CDBG and other programs in their entirety, without regard for the separate successes of individual projects or even the block-grant philosophy that the states themselves, as the fabled laboratories of democracy, should be experimenting on a state-by-state basis. The stated purpose of PART and the larger government performance movement is that budgetary and management decisions should both be determined by a shared universe of "performance" data; the alternative approach of performance measurement that determines neither but results only in nonbinding suggestions runs counter to that purpose. Finally, a bill pending in the House, the Program Assessment and Results Act, would give OMB a blank check to continue with its current approach and would do nothing to reshape performance measurement in the more palatable ways suggested by Turner and the witnesses at the hearing.

Despite the impossibility of Turner's alternative approach, the hearing concluded on that note. Several witnesses stated that, with better performance data, HUD could provide this kind of best practice information to grantees. Further representatives from state and local groups said that they would benefit from best practices guidelines and technical assistance from HUD.

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In This Issue

Economy and Jobs Watch - Steady Job Growth Threatened by Higher Oil and Gas Prices

The number of new jobs created in May declined to a steady 248,000, according to the Department of Labor. The unemployment rate remained unchanged at 5.6 percent. This data reinforces the past two months' data and shows that the labor market continues to tread water - much higher jobs numbers will be necessary to bring the unemployment rate down.

However, recent developments in oil and gas prices are threatening the status quo. The price of oil has periodically broken the $40 dollar a barrel mark over the past several weeks. With consumers sending more money overseas to pay for oil, there will be less money for other domestic spending.

According to a recent Gallup poll, about half of those surveyed said recent gas price increases have caused them financial hardship and about one-third said they have reduced other spending significantly.

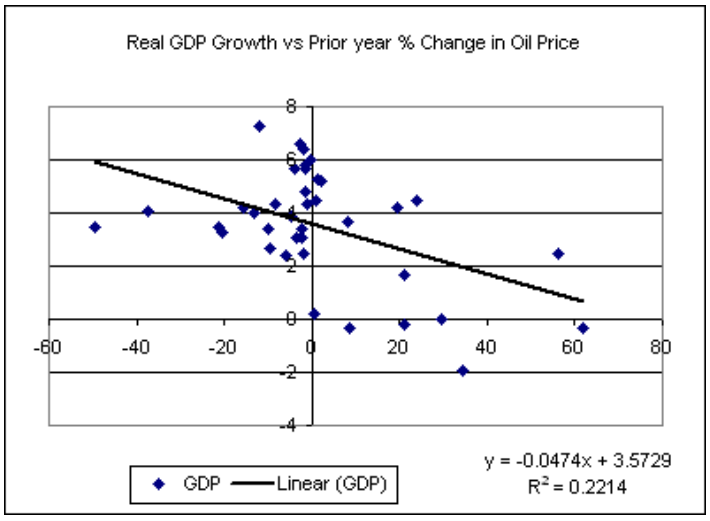
Importantly, and as one might expect, the number of people cutting back is dependent upon income levels -- while only 15 percent of those making $75,000 or more reported having to cut back, a much larger 55 percent of people earning less than $30,000 a year reported having to cut back on spending.

Oil prices will have less of an impact than they did 25 years ago, because oil now represents a smaller fraction of

the U.S. economy. However, there is still likely to be an impact on spending and the economy as a whole.

Reductions in consumer spending on non-gas related items will cause the economy to slow and eventually harm job growth. Just how much, and when the impact will be felt, remains to be seen.

As a side note: an illustrative (but not rigorous) analysis of the relation between change in oil prices and economic performance from 1960 to 2000 shows how changes in oil prices might impact the economy. According to the data, on average, a 10 percent increase in the price of oil precedes about one-half of a percentage point reduction in real GDP. So, an increase in the price of oil from $30 a barrel to $40 a barrel, we might expect real GDP growth to be lower by about a percent and a half. See graph below.



Beware of Bad Economic Policy - The Balanced Budget Amendment Set to Return

The long-ago defeated proposal for a balanced budget amendment is rearing its ugly head once again. Unable to pass a budget this year and desperate to create the appearance of being fiscally responsible, the Republican leaders in the House of Representatives are promising a vote on the measure.

A constitutionally mandated requirement to balance the budget every year would have terrible consequences. For starters, it would destabilize the economy and 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 this Treasury Department memo by Brad DeLong, written 10 years ago.

In addition, more than 1,000 economists have publicly opposed the amendment, as have dozens of nonprofits comprising the Coalition for Budget Integrity.

It would be unfortunate if the return of this inherently misguided amendment distracts Congress when they have so many important issues to address.

No Budget - But Appropriations Are Moving Forward

In spite of the lack of a budget resolution, Congress is moving forward with the appropriations process.

The House, having passed a FY 2005 budget resolution back in May, is rapidly moving forward with appropriations bills, based on an overall discretionary spending cap of $821 billion, including both domestic and military. The House has also approved the division [302(b) allocations] between the 13 appropriations bills, defeating an amendment by Appropriations Committee ranking member David Obey (D-WI) to increase spending by $14.2 billion by rolling back tax cuts. Last week, Appropriations considered the Homeland Security and Interior bills, which are expected to reach the House floor this week. Next will be the Defense bill. The Energy and Water subcommittee was also working on appropriations last week, and subcommittees are expected to work on the Agriculture, Commerce-Justice-State, and Legislative Branch bills during this week.

In the Senate, efforts continue to find a compromise that will allow passage of the budget resolution. Republican Senators McCain (AZ), Chafee (RI), Collins (ME), and Snowe (ME) remain firm in their opposition to any resolution that does not include "Pay-Go" rules -- rules requiring offsets for both tax cuts and entitlement spending. A possible deal that is in the works would extend Pay-Go rules for taxes and spending for three years, but would still allow an exemption this year for three expiring tax cuts, at a cost of $27.5 billion. These would include: the $1,000 per child tax credit, the standard deduction for married couples, and the expanded 10 percent tax bracket. It is uncertain whether that deal will be closed. If there were no budget resolution, the Senate spending cap would remain at last year's level of $814 billion. Additionally, there would be no special protection for the three expiring tax cuts, which could lead to filibusters that require 60 votes for passage, and require offsets for the cost.

Senate Appropriations Committee Chair Ted Stevens (R-Alaska) has said he will move forward with appropriations, starting with Homeland Security or the Defense bill, if no budget resolution is passed by June 15. The Senate Appropriations Committee is preparing to divide up the $814 billion discretionary cap. BNA reported June 10 that the preliminary draft allots the same amount to 12 of the appropriations as the House version, cutting the defense appropriation by $7.2 billion.

After resuming work today, the House and Senate will both recess June 25 and return July 6.

Bush Administration Refuses Congress Again, Hides Memos

Last week, Attorney General John Ashcroft testified before the Senate Judiciary Committee and repeatedly refused several Senators' requests to produce a copy of the recently leaked Justice Department memo that explored the legal justifications for torture.

The 50-page memo [download links below], written for the CIA and addressed to White House Counsel Alberto Gonzales, argues that "necessity and self-defense could provide justifications that would eliminate any criminal liability" for torturing prisoners. Pentagon lawyers used that same memo in a March 2003 report assessing interrogation rules governing the Defense Department's detention center at Guantanamo Bay, Cuba.

Congress not only has a right to review this and other memos but a clear obligation. We are in the midst of a major Congressional investigation into prisoner abuse -- a Justice Department torture memo is extremely relevant. But the Attorney General refused to cooperate with Congress and provide a copy of the memo because he believes the president has the right to receive advice from his attorney general. However, the memo was not candid advice from Ashcroft alone; it is the product of extensive work by taxpayer-paid Justice Department lawyers.

There are only two legal reasons Ashcroft can refuse to provide the memo. The first would be if President Bush invoked executive privilege, claiming the memo was protected as presidential material. Ashcroft made it clear at the Senate hearing that the president had not yet invoked executive privilege. The second reason would be if an established law expressly protected the memo from disclosure to Congress. During questioning, Ashcroft never cited any law that would allow for protection of the memo, only his opinion that disclosure would be bad policy.

Unfortunately, this is not the first time this administration has been uncooperative with Congress' efforts to get to the truth. The White House was uncooperative with the Congressional commission investigating the 9/11 attacks, refusing to release information such as the president's daily briefings and almost barring National Security Advisory Condoleezza Rice from testifying under oath. When the Government Accounting Office, Congress' investigating office, probed Vice President Cheney's Energy Task Force, the White House resisted releasing information at every turn.

Hopefully, Congress will successfully break through the administration's stonewall to discover the truth and apply the checks and balances instituted to hold all aspects of our government accountable.

Download full DOJ Memo Part I (pp. 1-25)

Download full DOJ Memo Part II (pp. 26-5)

Politics, Not Science, Alters Air Quality Models

Government air quality modeling experts from around the country are opposing a new Bush administration policy, which they contend threatens air quality and public health. They are among a growing number of scientists and other critics, who charge the Bush administration with manipulating science to support predetermined political outcomes. Most significantly, this may be the first time such criticism has been leveled from scientists inside a federal agency.

The administration overrode regional EPA officials and altered air quality modeling for North Dakota's national parks and wilderness. The air quality modelers in all but one of the Environmental Protection Agency's 10 regions have publicly stated that the new policy represents "substantial changes from past air quality modeling guidance ... and accepted methods."

North Dakota wants to capitalize on its massive coal deposits by building additional power plants to export energy around the country. However, under the Clean Air Act, the air over national parks and wilderness areas receives special protection. Previous modeling revealed that pollution in North Dakota had significantly increased since 1977, the baseline year. Using that analysis, the state would have to take steps to reduce pollution before new power plants could be built.

The new policy permits the state to choose the baseline year, inviting manipulation of the modeling. Selecting a baseline year with higher pollution levels would allow more pollution in the future. An EPA analysis estimates that allowing flexibility in selecting the baseline year could more than double the pollution levels in the area. Another change that the modelers charge will permit higher pollution in the future is letting the state use average annual emissions, rather than periods of peak emissions.

Bush administration officials involved in the new policy denied the accusation that the science had been altered to meet political goals. They asserted that the regulations permit the new flexibilities offered to North Dakota.

Nonprofit News Briefs

*** June 22 hearing on nonprofits at the Senate Finance Committee**
*** House Bill on IRS Rollovers**
*** Emily's List asks the Federal Election Commission to reconsider its controversial Advisory Opinion 2003-37**

Senate Finance Committee Hearing

On June 1, Senate Finance Committee Chair Charles Grassley (R-IA) and Ranking Member Max Baucus (D-MT) announced a hearing on charitable giving problems and best practices. The announcement said the hearing, scheduled for the morning of June 22nd, will address governance and best practices of charities, charities accommodating tax shelters, donor gifts of tangible and intangible property and current problems and issues in the charitable community.

IRS Commissioner Mark Everson told the IRS's Advisory Committee on Tax-Exempt and Government Entities that he has "great concern" about abuse of the tax system, and discouraging abuse by charities is one of his four major priorities.

Charities that wish to submit statements for the record at the hearing can send them to:
Senate Committee on Finance
Attn: Editorial and Document Section Room SD-203
Dirksen Senate Office Building
Washington, DC 20510-6200

IRS Rollover Bill Introduced

A new bill to allow taxpayers age 59 1/2 or older to make tax-free charitable contributions from rollover of individual retirement accounts has been introduced by three members of the House Ways and Means Committee. Reps. Phil Crane (R-IL), Earl Pomeroy (D-ND) and Jim Ramstad (R-MN) introduced HR 4488 on June 2. A similar provision is included in the CARE Act, which has passed both houses of Congress but is stalled at the conference committee stage.

Emily's List Asks FEC to Reconsider Advisory Opinion

The political action committee Emily's List wrote the Federal Election Commission (FEC) on June 7 asking that it withdraw its controversial Advisory Opinion 2003-37, Americans for a Better Country. The request said the FEC's subsequent decision to delay action on a proposed regulation redefining political committees was a rejection of many of the legal positions in the Advisory Opinion.

Global Health Council Condemns HHS Funding Cut

Global Health Council president and CEO, Dr. Nils Daulaire, used his keynote address at the organization's conference June 2 to sharply condemn the Department of Health and Human Services' (HHS) April decision to cut funding for the event. Daulaire said that HHS "bowed to election-year political pressure." The Traditional Values coalition and other conservative groups had objected to the participation of two family-planning groups set to take part in the event. HHS claimed the funds were withdrawn because the Council was using them to lobby. However, the Council's conference followed the same practice commonly accepted to segregate federal funds from lobbying activity, holding an advocacy day separate from the rest of the agenda.

After HHS announced its decision in April, the Council reacted cautiously and attempted to resolve the issue. This was the Council's 31st annual conference, which brings together public health professionals from around the world. The federal government has subsidized the conference for decades, and federal officials often participate, including the Secretary of HHS in 2001, the Administrator of the Agency for International Development in 2002 and the Director of the Centers for Disease Control in 2003.

The trouble began when House Republican aides Sheila Maloney and John Casey e-mailed a message to alert pro-life (anti-abortion) groups that the International Planned Parenthood Federation and the United Nations Population Fund would take part in the conference. These groups have objected to the global gag rule that bars clinics, which receive federal funding, from discussing abortion with their clients. After the message was sent, the Traditional Values Coalition and other conservative groups asked HHS to withhold the funds. Twelve members of Congress also wrote HHS opposing the conference funding.

Although HHS told the press the Council was spending federal funds for lobbying, an HHS spokesperson told OMB Watch that the Council was unable to demonstrate that federal funds had not been used for lobbying. This approach puts the Council in the impossible position of having to prove a negative. Federal regulations do not require grantees to use a specific accounting method or keep federal funds in segregated accounts. HHS has used this broad latitude to make vague, politically motivated accusations about improper use of federal funds in other cases as well, including that of STOP AIDS of San Francisco last year.

HHS bowed to "a small group of right-wing extremists," Daulaire said. "Not one person in that clique has ever spent a day in a clinic in a developing country ... And they have clearly never spent a minute reflecting on the global cost in human lives that might result from acting out their Washington-centric games." He also said, "we have a responsibility to stand up and challenge those who hold positions of public trust when they are wrong -- and on this, they are wrong. And challenge them we will, not because of our one conference, but because of who might be next."

Politics-and-Religion Issue Surfaces in Congress, Campaign

Church Electioneering Provision Dropped from Jobs Bill

The House Ways and Means Committee has dropped a provision (Section 692) that would have allowed religious organizations to violate the tax code's ban on partisan election activity up to three times a year without losing their tax-exempt status. At a June 14 review of H.R. 4520, Rep. Nancy Johnson (R-CT) offered an amendment stripping Section 692 from the bill. She was supported by Reps. Amo Houghton (R-NY), John Lewis (D-GA), Charles Rangel (D-NY) and others. Her amendment was approved on a voice vote. Last minute technical changes to Section 692 failed to correct the fundamental problems with the proposal. Advocates of legislation (H.R. 235) proposed by Rep. Walter Jones (R-NC) that would legalize partisan activity for religious organizations objected to Section 692 because it did not go far enough. Opponents, including OMB Watch, objected to unequal treatment of religious and non-religious 501(c)(3) organizations, creation of a new soft money loophole and politicization of houses of worship. H.R. 235 is pending before the House Ways and Means Committee. THANKS to all of you that responded to our action alert on this issue. The public opposition to this proposal was forceful enough to stop it.

The provision inserted into the jobs bill by House Republican leadership would have allowed religious organizations to violate the ban on partisan election activity without losing their tax-exempt status. It was introduced shortly after the Bush campaign was criticized for e-mailing messages to supporters seeking help with re-election campaigns by recruiting "friendly congregations." That messages were sent the same day the President announced expansion of his faith-based initiative, including $1.1 billion in grant funds.
As a result of press attention to the pending legislation, the IRS took the unprecedented step of sending a letter to all political parties reminding them that current law prohibits partisan activity by charities, including religious organizations.

For background information on Section 692 and how it got into the jobs bill read Church Electioneering Provision Added to Jobs Bill.

Also, see the full text of the OMB Watch letter to the Ways and Means Committee opposing Section 692.

Bush Campaign Seeks "Friendly Congregations" To Aid Re-election Campaign

In early June, the Bush campaign sent 1600 emails to clergy and other individuals saying it is looking for "Friendly Congregations in Pennsylvania where voters friendly to President Bush might gather on a regular basis." It further states that the re-election campaign would like to distribute general information "to supporters." The campaign's email (see full text below) is part of a larger national effort.

The Interfaith Alliance and Americans United for Separation of Church and State (AU) strongly criticized the action as encouragement to congregations to violate the tax code's ban on partisan electioneering by 501(c)(3) organizations. In a press release, AU executive director Rev. Barry Lynn said "The last thing this country needs is a church-based political machine." Some conservative church leaders criticized the plan as well. Richard Land, president of the Ethics and Religious Liberty Commission of the Southern Baptist Convention, was quoted by the *New York Times* as saying, "If I were a pastor, I would not be comfortable doing that. I would say to my church members, 'We are going to talk about the issues, and we are going to take information from the platforms of the two parties about where they stand on the issues.' I would tell them to vote and to vote their conscience."

Here is the full text of the Bush campaign email:

"Subject: Lead Your Congregation for President Bush

Dear [recipient]:

The Bush-Cheney '04 national headquarters in Virginia has asked us to identify 1600 'Friendly Congregations' in Pennsylvania where voters friendly to President Bush might gather on a regular basis. In each of these friendly congregations, we would like to identify a volunteer coordinator who can help distribute general information to supporters. I'd like to ask if you would like to serve as a coordinator in your place of worship. We plan to undertake activities such as distributing general information/updates or voter registration materials in a place accessible to the congregation. If you are interested [contact info given]."

Bush Expands Faith-Based Initiative

On the same day the Bush campaign sent emails seeking support from "friendly congregations" in Pennsylvania,

the president announced expansion of his faith-based initiative. At the first White House National Conference on Faith-Based and Community Initiatives, he announced creation of new faith-based offices in the Departments of Commerce, Veterans Affairs and the Small Business Administration. He also noted funding for faith-based groups increased $144 million in programs funded by the Departments of Health and Human Services and Housing and Urban Development. A June 3rd Scripps-Howard News Service report said the administration also announced $1.1 billion in overall grants to faith-based organizations, with the president saying, "We've reached more than 10,000 faith-based and community groups with the message that we want your help, the federal government now welcomes your work."

The simultaneous expansion of federal funding to religious organizations and recruitment of "friendly congregations" for the president's re-election campaign creates, at best, an appearance of exchange of federal funding for political support. At worst, it creates pressure on religious organizations that depend on federal funding for social service programs to enter the partisan political fray, putting their tax-exempt status at risk.

IRS Letter To Political Parties Warns Against Involving Charities

Increasing public attention to the religion and politics issue and the pending action in Congress prompted the Internal Revenue Service (IRS) to take the unprecedented step of sending a letter to national political parties warning against involving 501(c)(3) organizations in campaigns. The letter provides details about what nonpartisan activities are allowed for charities and says the information is meant "to help you ensure that during this election season your committee and the candidates you support do not, inadvertently or otherwise, jeopardize the tax-exempt status of any charitable organization." The letter says the IRS has a duty to continue enforcing current law, even while Congress is considering changes.

In a press release, IRS Commissioner Mark Everson said the letter was sent "because we want to ensure that the political committees and the candidates they support understand the current rules." For example, the letter noted that candidates can be invited to speak at events sponsored by 501(c)(3) groups, as long as all candidates are given the same opportunity, no favoritism is shown and no fundraising takes place. The IRS enclosed a copy of its April 28 advisory (IR-2004-59) *Charities May Not Engage in Political Campaign Activities*.

Is Advocacy Charity or Not? Groups Denied Access to Annual Giving Drive

Minnesota's state employee relations commissioner has made a decision not to allow any advocacy oriented organizations to participate in the annual state employee deduction charity drive.

The annual drive, Minnesota State Employee Giving Campaign, gives state employees the opportunity to donate money to their favorite charity through the payroll system. The donation is then used as a tax deduction for employees. The giving campaign started in 1980. Only this year, Department of Employee Relations Commissioner Cal Ludeman has single-handedly made the decision to deny a United Way alternative, the Community Solutions Fund (CSF), from participating in this year's drive.

Removing the Community Solutions Fund -- which raises money for such groups as the Minnesota Senior Federation's Metro Region, the Minnesota Coalition for Battered Women, Missing Children Minnesota, the Greater Minneapolis Day Care Association, Jewish Community Action, and 42 other groups -- would cut its total annual fundraising efforts in half. CSF has filed an appeal seeking to reverse Ludeman's decision. "The decision by Commissioner Ludeman unfairly targets grassroots organizations. His actions threaten all nonprofits who do any form of advocacy or whose mission is at odds with the Commissioner's values," says Marsha Frey, executive director of CSF.

Ludeman explained his decision in a Opinion Editorial printed in the *Star Tribune* in order to combat the bad press that has surrounded his decision. In the editorial he writes, "Their [the Community Solutions Fund's] continued expansion of affiliated agencies that expressly engage in social change advocacy is in direct conflict with the laws governing the state employee charity campaign...The law provides a specific and narrow definition of "charity" as devoting a substantial amount of its activities to direct social services to individuals."

Conversely, Nina Rothchild, former Department of Employee Relations Commissioner, explains that a lawsuit and legislation got the CSF access to the drive in the early 1980s. The legislation that Ludeman is interpreting "was written specifically to allow them to be part of the payroll deduction system," Rothchild told the *Star Tribune*. "Our department strongly supported it," she said.

The Minnesota Attorney General, Mike Hatch, recalled approving registration for the Community Solutions Fund when he was state commerce commissioner in the 1980s. "I know when it was granted, advocacy was considered to be part of the service...One could ask what has changed to make it not be qualified," Hatch told the *Star Tribune*.

Judge Strikes Down Law Censoring Marijuana Ads

A U.S. District Court Judge issued a permanent injunction against Rep. Ernest Istook's (R-OK) amendment to the Consolidated Appropriations Act of 2004, saying that, "there is a clear public interest in preventing the chilling of speech on the basis of viewpoint." The permanent injunction prohibits the enforcement of the law.

Istook's amendment, which was signed into law with the rest of the omnibus appropriations bill by the president, prohibits any transit agency receiving federal funds from running advertisements from groups that want to decriminalize marijuana or other Schedule I substances for medical or other purposes. On February 18, 2004, a coalition of national drug policy reform groups -- including the American Civil Liberties Union, Change the Climate, Inc., the Drug Policy Alliance, and the Marijuana Policy Project -- brought suit against Secretary of Transportation Norman Mineta and the United States, because their free speech right to advocate on behalf of policy issues was being violated.

The coalition argued, and the Judge later supported, that the law:

1. "imposes impermissible content- and viewpoint-based restrictions on speech in a public forum in an effort to silence one side's message in a serious political debate;
2. imposes restrictions that are unconstitutionally vague and overbroad; and
3. is an unlawful exercise of Congress' spending power because it violates an independent constitutional prohibition on the conditional grant of federal funds."

Judge Paul L. Friedman of the U.S. District Court for the District of Columbia ruled that the government's attempt to censor the ads was "illegitimate and constitutionally impermissible." As a result, Change the Climate and other groups can again display their once rejected ads criticizing drug policies back on the subways and bus stop shelters.

Read the full opinion.

Senate May Soon Consider Anti-regulatory, Anti-worker Bill

Rumors are circulating on Capitol Hill that H.R. 2728, a bill that threatens protections of public health, safety and environment across the board and specifically weakens protections of workplace health and safety, may soon be taken up in the Senate.

Among the rumored scenarios are that the bill could be appended to a pending bill that would alter interstate class action lawsuits and that it could be offered as an amendment at any point in which a Democrat-sponsored minimum wage increase is offered.

Because of the particular threat posed by H.R. 2728 to public safeguards, in particular its advancement of the cause of regulatory budgeting, OMB Watch will continue to monitor this bill.

Related Reading

Fact Sheets About H.R. 2728

H.R. 2728 Summary: Bill Threatens Public Welfare & Weakens Worker Safety DOC PDF

H.R. 2728: First Steps to Regulatory Rationing DOC PDF

H.R. 2728: Fictions in the Findings of Fact DOC PDF

H.R. 2728: A Step Back for Worker Safety and Public Safeguards PDF
(courtesy of AFL-CIO)

From the OMB Watch Archives
Anti-worker, Anti-regulatory Bills Pass House

Mexican Trucks Allowed to Run Over Environmental Law

A unanimous Supreme Court has held that the Federal Motor Carrier Safety Administration (FMCSA) did not violate U.S. environmental law by failing to conduct an environmental impact statement (EIS) of increased pollution from allowing Mexican trucks to operate in the United States beyond limited border zones.

The Court's decision reversed the opinion of the Ninth Circuit Court of Appeals. That ruling required FMCSA to consider the pollution increase in a full EIS prior to issuing regulations governing applications and safety inspections for Mexican trucks to operate in the United States.

See full story and background.

OMB Role in Fuel Economy Change Exposed

White House staff prompted the development of a controversial proposed overhaul of the entire structure of automobile fuel economy regulation aimed at diminishing standards. Foremost among the architects of the change was John Graham, administrator of OMB's Office of Information and Regulatory Affairs (OIRA).

According to documents obtained by Public Citizen, high-ranking administration officials began working on changes to automobile fuel economy regulation as early as summer 2001. Leaders of powerful offices, ranging from the Office of the Vice President to the Council of Economic Advisors to top staff from a wide array of government agencies, began meeting in earnest and circulated numerous draft proposals and e-mail correspondence on the issue.

At the same time that substantial resources were being invested in the corporate average fuel economy program (CAFE), Jeffrey Runge, administrator of the National Highway Traffic Safety Administration (NHTSA), claimed that NHTSA was unable to develop safety standards to prevent SUV rollover, because the Ford-Firestone crisis had preoccupied too much of NHTSA's time.

CAFE regulates automotive fuel efficiency in a two-tiered system that divides the auto fleet into two classes, passenger vehicles and light trucks, and accords different fuel economy standards to each. Highway safety advocates argue that the current standard, which demands 27.5 miles per gallon for passenger vehicles and only 20.7 for light trucks, encourages the production of more vehicles designated as light trucks, and in turn increases the risk of death and serious injury in two-car collisions with passenger cars.

NHTSA announced, in an Advanced Notice of Proposed Rulemaking that the very structure of CAFE regulation could be overhauled, with one possibility being dividing the vehicle fleet based on vehicle weight. Public Citizen criticized that proposal in its formal comments, arguing that NHTSA's proposal is based on a study that is deeply flawed.

In these comments, Public Citizen appended summaries from documents it received under the Freedom of Information Act (FOIA). FOIA excludes from its disclosure requirements most interagency consultations conducted in advance of agency decisions, but Public Citizen was able to unearth details of the extent to which high-ranking officials were meeting on CAFE. It acquired calendar notes and other logs, which document that meetings had occurred.

Among the revelations is that OIRA's Graham was prominent in CAFE discussions, and the proposed structural change based on weight classifications mirrors Graham's overemphasis on vehicle weight in two articles he

worked on at the industry-funded Harvard Center for Risk Analysis.

Kentucky Reconsiders Homeland Security Exemption for Open Records Law

After unsuccessfully pushing a bill to create a homeland security exemption to Kentucky's Open Records Act, Democratic Representative Mike Weaver intends to re-propose the bill after the state's homeland security director requested such a provision.

In the years since the 9/11 attacks, many states have considered broad-scoped and vaguely worded exemptions to public records and open meeting laws. Often these laws already have exemptions for issues pertaining to national security and criminal investigations. As a result, important health and safety information is being withheld from the public based on the small possibility that it could be misused.

During the 2004 General Assembly, the Kentucky House unanimously passed Weaver's homeland security exemption, but the Senate altered it to include additional records. House leaders elected to forego enacting the measure rather than accept the altered version.

Recently, Erwin Roberts, executive director of Kentucky's Office of Homeland Security, reported to the Interim Committee on Seniors, Military Affairs and Public Safety, that various documents such as "vulnerability assessments" needed to be removed from public access.

Based on this report, Weaver has committed to preparing a new bill to introduce when the General Assembly reconvenes in January 2005.

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Rhetoric Heats Up On Estate Tax as Political Reality Pushes Compromise

The Senate appears headed for another showdown on repeal of the estate tax, possibly before the August recess. With permanent repeal costing around $1 trillion over the first 10 years, there is discussion between Senate Republicans and Democrats on possible reform options. It is unclear whether these discussions on reform may turn into a back-door approach by pro-repeal groups to push through legislation that would amount to a virtual repeal of the estate tax.

This spring, Senate Minority Leader Harry Reid (D-NV) asked the chair of the Democratic Senatorial Campaign Committee, Sen. Charles Schumer (D-NY), to begin investigating a possible compromise with Senate Republicans on the estate tax issue. Advocates of permanent repeal have needed 60 votes in the Senate to achieve their objective, but have fallen short of the mark. Even after Republicans picked up four Senate seats in the last election, it is unlikely that repeal advocates have enough votes.

Nonetheless, pro-repeal groups, primarily business leaders and conservatives, have used the estate tax as a political wedge issue. For example, the National Beer Wholesalers Association has run print ads in support of repealing the tax. Many believe that similar ads were a factor in the loss by Minority Leader Tom Daschle in his re-election bid last November. Democrats, particularly senators up for re-election, remain nervous about the power of such ads.

On the other side, Sen. Jon Kyl (R-AZ), who is a champion of permanent repeal, is leading the reform negotiations for the GOP. Realizing that full repeal is out of reach in the Senate for at least the next

two years, Kyl and other Republicans are feeling pressure to compromise as well. Unlike their Democratic colleagues, however, it is not concerns over re-election, but rather over budget deficits, that is putting pressure on Republicans.

It is clear both sides agree the phase-out of the estate tax passed in 2001 is poor tax policy and needs to be changed. But any change or compromise that would raise the exemption levels or lower the rate (or in fact any reform that would extend the changes implemented in 2001) would have a drastic impact on the federal budget. Full repeal of the estate tax would cost close to $1 trillion over the first 10 years of repeal when debt interest is included. With deficits already soaring and many other high priority issues needing to be addressed (such as the Alternative Minimum Tax, Social Security, and huge increases in health care and defense/war costs), each year Republicans wait to act on the estate tax makes it that much more difficult to pass a compromise that is closest to repeal.

Strikingly, as time marches on, some who supported repeal of the estate tax are now questioning their position. For example, Sen. Ron Wyden (D-OR), who has regularly voted to repeal the estate tax recently told the publication Tax Analysts, "The deficit picture is different today and the choices are pretty darn hard… There's three or four horses in this race, and I wouldn't bet against the AMT." Wyden, and other Senators who have supported repeal in the past, such as Sen. George Voinovich (R-OH), are starting to realize they will have to make choices between some very expensive options.

Yet despite these realities, thus far the negotiations have not yielded many tangible results. Kyl and other Senate Republicans, including Majority Leader Bill Frist (R-TN) appear to be growing increasingly frustrated with the lack of a compromise. Both Frist and Kyl have been issuing statements in the press with threats of a vote on full repeal in order to force Democrats into a bad compromise. Such maneuvering is leading many to question whether Kyl is genuine in his desire for a compromise on this issue.

Negotiations are also being slowed by rumors of Kyl's unwillingness to move far from the proposal he introduced in a stand-alone bill earlier this year of a $10 million exemption ($20 million for couples) and a rate of 15 percent for the estate tax. This proposal, which would cost the federal government 90 percent as much in revenue as full repeal and is thus tantamount to full repeal, is largely unacceptable to Democrats.

Even costlier still, Kyl has floated a slight modification by lowering the amount exempted from the tax to $8 million ($16 million), but tying the taxable rate to the capital gains rate, rather than setting it specifically at 15 percent. If this were to take place and Republicans succeed in their efforts to lower or zero out the capital gains tax, the estate tax would be repealed. It is highly likely that the President's Advisory Panel on Federal Tax Reform will include in its recommendations lowering the capital gains rate significantly from its current level of 15 percent, perhaps even to zero percent. Even more so than Kyl's original proposal contained in his bill, this proposal opens the backdoor to full estate tax repeal.

As the negotiations move forward, it is essential for Democrats and moderate Republicans not to agree to a compromise at any cost. The importance of the estate tax, in terms of the progressivism it adds to the tax code, the incentive for charitable giving it provides, and the revenue it brings in for essential services and investments in communities compels a call for responsible reform. Bad reform could remove the estate tax as a hot-button election year issue, but it could lead to a back-door repeal of the estate tax.

Senate Investigates the Program Assessment Rating Tool

On Tuesday, June 14 the Senate subcommittee on Federal Financial Management, Government Information, and International Security held a hearing on accountability and results in federal budgeting. Specifically, the hearing was held to investigate the specific metrics and tools used by the Office of Management and Budget (OMB) to measure the effectiveness of federal programs, the advantages and disadvantages of using these systems of measurement, and how information obtained is used to increase accountability in federal budgeting. The most widely used mechanism, called the Program Assessment Rating Tool (PART), was the main topic of the hearing.

Four witnesses presented testimony at the hearing: GAO Comptroller David Walker, OMB Deputy Director Clay Johnson, Eileen Norcross, Research Fellow for the Mercatus Center, and Beryl Radin,

Professor of Government and Public Administration at American University.

The hearing was attended by the chairman and ranking member of the committee, Sens. Tom Coburn (R-OK) and Tom Carper (D-DE), and for a short period by Sen. Frank Lautenberg (D-NJ), who made a point of appearing to express concerns about Congress developing a new reliance on mechanisms like PART that are primarily White House tools. He expressed doubts about the unbiased nature of PART assessments and his hope that performance results are not manipulated to reinforce predetermined partisan or ideological conclusions about government programs, but rather to increase effectiveness in government.

The hearing reflected two key themes: the importance of implementing effective measurement tools in order to gauge program success, and how to use these tools to fund programs accordingly, so as to "get the most for the least amount of money." It was clear all four witnesses, as well as members of the subcommittee, agreed performance tools, if designed and used correctly, were a necessary part of working to enhance performance and increase accountability. There were differences, however, in which tools would be most valuable and in what context the information gained from the tools should be understood.

Walker began his testimony by once again stating that government is on an "unsustainable fiscal path." He voiced his belief that a comprehensive and cross-cutting approach to assessing policies is necessary and stated there must be a greater buy-in by Congress regarding holding programs accountable, and a resulting shift in fiscal policy priorities. Notably, Walker expressed multiple times his conviction that the performance and accountability process should be made less partisan. He suggested an organization such as the GAO, for example, should have a role in assessing programs along with more politically driven agencies such as the OMB.

Johnson testified on behalf of OMB. His testimony defended PART, saying agencies are better managed than they ever have been. His short and often simplistic testimony included somewhat aggressive pre-emptive responses to recurring criticisms of PART, many of which would later be summarized by Beryl Radin during the second panel. Specifically, Johnson iterated the claims that PART *has* had an effect on authorization, appropriations and oversight and that all programs *are* alike and thus can be assessed using a single tool. Yet these claims are directly contradicted by an analysis done by OMB Watch earlier this year and by the positions of scholars such as Radin. Many of the findings of the OMB Watch research were outlined in an opinion piece that appeared on tompaine.com in March. Johnson's testimony often strayed from the main focus of the hearing to touch on radical proposals the Bush administration is attempting to implement in the federal government. Johnson spent much of his time discussing sunset and results commissions as well as performance based pay for federal employees, rather than the merits of PART. Johnson commented sunset commissions are not just a way to "get rid of programs [the administration does not] like." He said we all "want to get programs to work better… and drive better program performance." In the long run, focusing on results, he said, would be better for taxpayers. Coburn stated his support for both requiring programs to justify their existence every ten years and for presidential commissions that would recommend consolidation or elimination of duplicative programs. These proposals represent yet another vehicle proposed by the Bush administration to extract and preempt the role of the Congress in assessing, authorizing and appropriating funds for government into a system controlled by the White House. Strong support for these proposals, as well as the PART, will only weaken the power of Congress in relation to the executive branch.

Norcross and Radin testified in the second panel. Norcross testified the underlying role of the PART in linking goals and objectives with budgets and holding programs to fact-based, rather than value-based standards, was positive. But she complained that budget requests from OMB had little or no relation to the ratings assigned to programs under the PART. She presented to the committee important PART statistics showing a lack of correlation between funding requests and PART ratings, stating that, of the 154 programs recommended for termination, only 22 of them had even been PARTed by the OMB. Norcross was forced to admit the PART has many limitations. She pointed out that fourteen agencies show no linkage of costs in operation to goals for output, that the "yes/no" format with which PART rates programs simplifies many agencies' answers, and that a degree of subjectivity does exist in the way ratings are assigned in PART.

Radin made clear in her testimony the many serious reservations she has about the PART, stating it was not the appropriate way to measure program performance. Many programs, she said, have multiple and conflicting goals that are not reflected in the PART process. Radin said the federal government's diverse array of programs is far too complex for a one-size-fits-all approach. In

addition, the PART process does not recognize purpose, priorities, and program guidelines instituted in statute by Congress. Radin pointed out that often programs end up being penalized for following the will of Congress instead of measures like cost-effectiveness that OMB would like them to use. In this way, the PART acts as a mechanism to replace the intent of Congress with the priorities of the administration. Radin also mentioned other limitations of the PART in her testimony, including that OMB budget examiners have a limited perspective on many programs, that a yearly budget is not the only way to measure detailed and complex programs, and that OMB calls for new data sources agencies can not always collect (due to both a lack of resources and a requirement in the Paperwork Reduction Act to reduce paperwork by five percent per year).

Radin suggested an alternative to mechanisms like PART during the hearing. She suggested the authorizing committees and other members of Congress should be more involved in program evaluation not only because they are more familiar with the programs, but also because Congress is in a unique position to utilize existing resources in order to develop more robust and diverse systems to determine effectiveness and results.

DeMint's Social Security Plan Gets Attention, But Does Nothing to Address Solvency

Sen. Jim DeMint (R-SC) revealed a proposal for Social Security overhaul last week that has received the attention of both the White House and the House Ways and Means Committee. According to DeMint, the proposal -- dubbed the initiative to Stop the Raid on Social Security Act (S. 274) -- would stop members of Congress from spending Social Security funds that exceed the amount currently needed to pay benefits on other priorities. Many analysts believe, however, that the DeMint proposal will not cause a change in policy makers' spending behavior, and will bring risk to a currently risk-free benefits program and increase what are already record-high deficits.

The DeMint proposal is co-sponsored by Sens. Rick Santorum (R-PA), Lindsey Graham (R-SC), Mike Crapo (R-ID), and Tom Coburn (R-OK). The DeMint legislation, according to his aides, would end the prevailing practice of artificially reducing the deficit by the size of the Social Security surplus and would instead treat the obligations to Social Security accounts as regular outlays. The government, however, could continue to spend the surplus on other needs, since the money would be invested in treasury bonds (just as payroll taxes are today). DeMint's plan also calls for the creation of an independent board that, starting in 2008, could offer individuals the opportunity to diversify their accounts into more risky stocks and away from bonds and mutual funds.

Senate Finance Committee Chairman Charles Grassley (R-IA) has had a lukewarm reaction to DeMint's plan. Grassley, who has been working to bring a separate Social Security overhaul bill out of the Finance Committee, told reporters at the Capitol, "It's a proposal that I would see as a fallback proposal.... It's not my first choice, but right now I don't have a majority for anything." Grassley has stated in the past that his first priority is to pass legislation making Social Security solvent. While he supports the creation of private accounts, Grassley lacks a majority on the Finance Committee backing the accounts, as all Democratic members as well as Sen. Olympia Snowe (R-ME) have voiced continued objections. Grassley stated, "I might have a majority for solvency on my committee, but I don't have a majority for personal accounts, so everything's on the table."

Many lawmakers and policy analysts have been quick to speak out against the DeMint plan, which they see as both costly and not sufficient to address solvency. Finance Committee Ranking Member Max Baucus (D-MT) characterized the DeMint plan as being part of a "bait-and-switch" strategy that will likely see the House approve a personal account plan and wrap it in a non-amendable conference report in an attempt to force enactment. House Minority Whip Steny Hoyer (D-MD) released a statement saying the proposal would do nothing to address solvency issues, and "would actually weaken Social Security's solvency by diverting the surpluses that are expected over the next several years and depleting the Social Security Trust Fund even sooner."

Social Security expert Jason Furman of the Center on Budget and Policy Priorities has stated in recent congressional testimony that the proposal would drain $600 billion from the Social Security trust fund in its first 10 years and would also increase the deficit to nearly $500 billion in 2007 -- more than double the projected deficit for that year. Much of the cost would be administrative, with Furman noting that thousands of new federal employees would be needed to administer the accounts.

The Social Security Actuary Committee has also looked at the DeMint proposal and released a memo

warning it would increase levels of public debt, both by driving up deficits and also increasing the interest paid by the government on the national debt. The memo said, "The total debt held by the public is increased indefinitely due to the incomplete compensation of the trust funds through benefit offsets.... Annual unified budget balances remain worsened throughout the period due to additional interest on the [increased] debt held by the public."

Meanwhile, the House Ways and Means Committee unveiled a proposal of its own on June 22, called "Growing Real Ownership for Workers" (GROW). The plan attempts to paint the creation of private accounts as more worker-friendly than they actually are. Under the plan, workers could elect to have their share of the Social Security surplus set aside in a private account.

Critics have stated, however, that both Congress and the administration continue to miss the point as the proposal also does nothing to solve the issue of solvency. Rep. Jim Kolbe (R-AZ) stated, "If it's an attempt to get us off dead center, to move us forward, that's fine. But it doesn't fix the solvency [problem]: You'd have to borrow the money from some place else." The Center on Budget and Policy Priorities has estimated this extra borrowing to be $89 billion in 2006, with expected increases in subsequent years.

The Ways and Means Subcommittee on Social Security also continues to hold hearings on the issue in preparation for a broad retirement reform bill that might possibly be offered by Chairman Bill Thomas (R-CA) later in the year. House aides are uncertain when exactly this legislation will be considered.

On June 23 the subcommittee held a notable hearing to examine various privatization approaches. While the hearing was meant to bring opposing parties together on the issue to attempt to find compromise, the testimony instead touched on a wide range of views on how complex privatization might be.

Barbara Bovbjerg, GAO's director of education, workforce, and income security issues, was pessimistic about private accounts, and testified that implementing private accounts would create major difficulties as lawmakers attempt to put into practice a system based on minimizing costs and unravel the complex administration process to make it work.

Francis Cavanaugh, a former investment policy official in the Treasury Department, testified that private accounts are highly impractical and more expensive to manage than pro-privatization forces are willing to admit. He said the administration's estimate of a 4.6 percent return for investors was unrealistic; pointing out that it is much higher than the Congressional Budget Office figure of 3.3 percent. He said the cost to most of the nation's small businesses would be too high to "provide the investment, recordkeeping, counseling and other services" to pay for the system. Large investment service managers that now provide similar services to large corporations for 401(k) plans, Cavanaugh said, are costing about $3,000 per year per employee.

Despite these repeated warnings of the risk and difficulties of private accounts, and despite the fact that no proposal for private accounts fixes the solvency problems of Social Security (in fact, most of the proposals make the system more insolvent), Republicans in Congress continue to make attempts to put private accounts into the Social Security system.

Senate Needs to Follow House's Lead On Appropriations in Order to Avoid Omnibus

The House has approached the appropriations process for FY 06 with the intent of completing work on the bills well before the start of the fiscal year in October. And while many on Capitol Hill are hoping the Senate will be able to focus mainly on appropriations during the month of July, it appears that Senate Majority Leader Bill Frist (R-TN) also plans to use that time to move other high-priority bills. Frist has stated his intent to work on both matters of border security and economic growth. However, legislation in the Senate has been slow moving all year due to repeated legislative and partisan disputes, so the ambitious agenda put forward by First has little chance of being completed.

If the current House schedule is met, all 11 spending bills will be passed before the July 4 congressional recess. In fact, the House only has the Foreign Operations and Transportation/Treasury/HUD/Judiciary/District of Columbia spending bills left to consider on the floor, while the Senate has not considered a single bill yet. The frantic pace with which the House is moving on appropriations work has not been seen in a decade of House GOP control, and is partially due to the new chairman of

the Appropriations Committee, Rep. Jerry Lewis (R-CA).

Last week, the House voted on both the Legislative Branch and Labor-HHS spending bills, on June 22 and June 24, respectively. In addition, last week, the House passed its version of the defense appropriations bill on June 20 by a vote of 398-19. The $408 billion bill allocates $363.7 billion in base military spending -- $3.3 billion below the budget resolution. The spending measure also includes $45.3 billion in emergency "bridge" funds to cover the cost of operations in Iraq and Afghanistan from October to March 2006.

On the other side of the Hill, Senate leaders are discussing plans to move at least five and as many as seven spending bills before the August recess, including two next week, leaving larger and more complex appropriations bills for this fall. What is unclear is the timing for work on the Senate's defense spending bill, which the White House and congressional leaders want signed into law before Sept. 30 to avoid potential interruptions in troop funding.

Senate GOP leaders are considering moving to a $26.2 billion FY06 Interior spending bill as early as June 27 and are pushing to complete work on a $30.9 billion FY 06 Homeland Security measure, which aides said is a priority to send to the president's desk before August. Yet much work still remains on all the other bills. Senate Appropriations Chairman Thad Cochran (R-MS) has iterated his major goals are to complete all Senate spending bills on time, and stay within the strict spending limits Congress has set for itself under the guise of "fiscal discipline."

With Frist's plans to possibly move legislation on both economic growth and border security, the Senate may begin to run out of time to devote to the spending bills before the end of the fiscal year. If so, as has become increasingly common in recent years, all unfinished spending bills may be folded together into one big omnibus package.

Omnibus bills are bad legislative practice: they remove transparency and accountability from the appropriations process and usually lead to fiscal irresponsibility. The bills are massive, with plenty of cover to hide extra spending items, legislative changes, and special interest items that end up making the bill more fiscally irresponsible than if the bills where passed separately. Removing transparency and accountability from the process by which Congress allocates government funds, even for other members of Congress, is troubling.

The Senate should follow the House's lead in order to avoid omnibus bills which have, in the past few years, seemed to have replaced the regular appropriations process with a complex, unaccountable, and irresponsible system.

President's Tax Reform Panel Gets Two Additional Months

The deadline by which the President's Advisory Panel on Federal Tax Reform needed to report their recommendations to Treasury Secretary John Snow was pushed back two months by order of President Bush last week. On June 16, Bush signed an amendment to the executive order establishing the parameters of the panel allowing the report to be sent to Treasury by September 30, a full two months after the original July 31 deadline. It is unknown whether this change was due to political calculations by the president and his advisors or if the panel was behind schedule and simply needed more time.

The president's tax reform panel was established in January to examine the U.S. tax code and make reform recommendations to the treasury secretary that would make the system simpler, more fair, and more growth-oriented. The panel has held nine public meetings around the country, has heard testimony from over 90 witnesses, and has received more than 4,300 written comments.

This delay essentially eliminates any chance President Bush had to institute comprehensive tax reform this year. It will then fall on the president to convince Congress to undertake his tax reform priorities in the heated atmosphere of an election year. With the president unable to convince Americans of the utility of his Social Security overhaul plan, this delay may be an acknowledgement that the president is running low on political capital to spend on his priorities. Having to operate on his two biggest second-term priorities simultaneously might have been too much.

Senate Votes to Stop Sweeping Secrecy Laws

The Senate voted on Friday, June 24, to better explain when Congress keeps information from the public. The move is intended to push Congress to be clear when keeping secrets from the public and stop secrecy that Congress does not intend.

The bill (S. 1181), introduced by Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT), would require legislation enacted after July 1, 2005, that exempts government-held information from public access to specifically say so. The bill sets the intent of Congress that documents should be available to the public under FOIA unless Congress explicitly creates an exception. Congress can either specifically state that the information is intended to be held secret "in such a manner as to leave no discretion on the issue" or refer to particulars that should be exempt under provisions of the Freedom of Information Act.

In addition to Cornyn and Leahy, the bill was co-sponsored by Sens. Lamar Alexander (R-TN), Russ Feingold (D-WI), Johnny Isakson (R-GA), and Arlen Specter (R-PA). It was passed on a voice vote in the Senate.

The bill amends what is commonly known as the (b)(3) exemption in FOIA, which states that records that are specifically exempted by statute may be withheld from disclosure. According to data from the Justice Department, the number of identifiable statutes exempting information from FOIA stands at approximately 140, and many other laws encourage government employees to "protect," "safeguard," or otherwise think twice before providing public access to a government document. For example, one bill currently in Congress, the Port Security Act (H.R. 173) would require the heads of all U.S. seaports to "secure and protect all sensitive information, including information that is currently available to the public, related to the seaport." The bill does not specify whether the information should be completely withheld from the public or how the port captain should decide whether to make public or keep secret certain information. In fact, the bill defers all these questions to the port captain. Less-than-explicit exemptions result in ambiguity and court battles. The bill modifies the (b)(3) exemption provision in FOIA to require Congress to explicitly state its intent to withhold the information from the public and to specifically say it is intending to creating a (b)(3) exemption.

The bill, if passed by the House and signed by the president, could change the current secrecy climate in at least two small but significant ways. First, the bill asks agencies and courts to err on the side of disclosure when a statute is vague about whether certain government-held information should be kept secret or made available to the public. This should help reduce costly court deliberations. Second, it would allow better tracking of the number of laws currently on the books that call for exemptions from public disclosure.

A number of public access advocates supported the bill, including many members of the OpenTheGovernment.org, co-chaired by OMB Watch. Cornyn was pleased to announce that three conservative groups -- Defenders of Property Rights, One Nation Indivisible, and Liberty Legal Institute -- also endorsed the bill.

The bill was originally part of a broader package of FOIA reforms that Cornyn and Leahy put together in the OPEN Government Act. The two senators broke off this narrow provision to attract broader support for reforming the nation's open government laws and begin to address the problem of excessive secrecy in government. It is expected that the senators will pursue other parts of the OPEN Government Act in the future.

Citizens Protest New Jersey's Proposed Homeland Security Secrecy

Workers and environmentalists picketed outside the office of New Jersey Attorney General Peter Harvey on June 22 to protest proposed changes to the state's Open Public Records Act (OPRA). Harvey has proposed exempting various facilities from the public records law, including chemical plants, in the interest of homeland security. Protesters expressed concern that the new exemptions are too broad and would conceal from the public important information about toxins in their communities.

More than 50 protesters waved signs saying "Stop the Information Lockout" and "Safety, Not Secrecy," outside of Harvey's office, demanding that the attorney general withdraw the proposed rule.

New Jersey's 2002 OPRA is one of the strongest 'open records' acts in the country. The proposed revision attempts to safeguard critical infrastructure targets from possible terrorist attack by withholding government records concerning these facilities from the public. Unfortunately, toxic-chemical inventories and other records widely used to monitor health, safety, workplace and environmental issues could be included among the restricted information.

If approved, the new provisions would place the burden on the public to convince a state official of their "need-to-know" before being able to get certain information. Protesters urged that the process be reversed and that records about any hazards posed by a chemical facility remain public unless government officials can prove that disclosure would hamper homeland security.

According to Rick Engler, executive director of the New Jersey Work Environment Council (WEC), "The proposed rule to roll back New Jersey's Open Public Records Act would restrict the right to know about genuine hazards to our health, safety, and environment -- without reducing the threats or consequences of terrorism. The public deserves safety, not secrecy." WEC advocates for safe, secure jobs and a healthy, sustainable environment.

State open records laws not only provide people with health and safety information but also help citizens hold government officials accountable. For example, a previous *OMB Watcher* article reported that two citizens used Virginia's Freedom of Information Act to uncover that state officials paid for vacations with public funds.

New Jersey officials note that the rule has not been finalized and have scheduled a July 22 public hearing on the rule.

American Chemical Society Tries to Limit Public Database of Chemicals

Congress is considering intervening in a dispute about publicly available scientific information. The American Chemical Society (ACS) has asked that Congress limit or refocus the National Institute of Health's (NIH) PubChem database. PubChem is a freely accessible database that provides information about small molecules primarily used by medical researchers. ACS has raised its objections because PubChem overlaps with its commercial enterprise, Chemical Abstracts Service (CAS) Registry.

ACS wants PubChem limited to cover only compounds derived from NIH research. The industry group objects to the government becoming a publisher of scientific data. However, the group ignores the fact that the federal government has long been a major publisher of data and that it has a duty to collect and disseminate data that will help protect health and safety.

Their complaint that the government should not compete with the private sector has been advanced before. Industry advocates have contented that public-private competition should be the paramount issue. Fortunately, public health and welfare have continued to be the deciding factor. Often, public health is better served by freely available and objective scientific data. This has been NIH's position as it has rejected repeated complaints from ACS on the PubChem database.

Unfortunately, some in Congress appear to be listening to the industry advocates this time. After receiving input from ACS the House Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies added language on PubChem to a report accompanying the

Labor, Health & Human Services (HHS) & Education appropriations bill.

The subcommittee, chaired by Rep. Ralph Regula (R-OH), added the language requesting NIH reevaluate the database. Specifically, "The committee is concerned that NIH is replicating scientific information services that already exist in the private sector. In order to properly focus PubChem, the committee urges NIH to work with private-sector providers to avoid unnecessary duplication and competition with private-sector chemical databases."

It remains to be seen what impact this new language from Congress will have on the PubChem database. Since it does not require the database to be scaled back, it places the issue back in the hands of NIH.

Louisville, Kentucky Finalizes New Air Quality Program

On June 21, the Louisville Air Pollution Control Board unanimously approved the Strategic Toxic Air Reduction (STAR) program to require industrial facilities to reduce emissions of hazardous air pollutants. The process that led to the program, which will be implemented July 1, demonstrates how invaluable public access to environmental information is in protecting the health and safety of communities.

For years Louisville residents have been plagued with poor air quality. Environmental Protection Agency (EPA) air monitors throughout Louisville showed dangerously high levels of 18 hazardous air pollutants. Citizens and local officials connected the air monitoring data with information from the federal Toxics Release Inventory to identify the facilities responsible for the hazardous air pollution. This connection led directly to the city's formulation of the STAR program.

According to Tim Duncan, a member of Rubbertown Emergency Action (REACT), "Without the air monitoring, and citizen access to that data, industries could have kept saying there is not a problem, and we would not have been able to push the city to deal with the industrial sources of our air pollution problems."

OMB Watch comments on the STAR proposal

Louisville Courier Journal STAR program article

Past Government Secrecy Takes its Toll on Steelworkers

Proponents of government secrecy would do well to consider the story of Bethlehem Steel when pushing for greater secrecy in the name of homeland security. The federal government admitted in 2000, that it had knowingly exposed thousands of workers in steel mills to radiation without any protection or warning during the 1940s and 50s. The workers, kept in the dark about the exposure because of national security concerns, have paid for years -- at times with their very lives.

In the late 1940s and early 50s national security concerns were as high as our homeland security concerns are now. The federal government contracted with Bethlehem Steel to produce rolled uranium for use in nuclear bombs. However, the contract also required that the nature of the material being handled be kept secret from workers and the public.

As a result, workers spent long hours working on the material without any special protective gear to shield them from the radiation, breathing in radioactive dust as they moved about the plants. As the decades passed, the steelworkers developed numerous types of cancer at much higher rates then the general public. The Cold War ended and still our government said nothing.

After finally acknowledging the catastrophic consequences to workers wrought under the secrecy of national security, Congress passed the Energy Employees Occupational Illness Compensation Program Act of 2000 that provides government compensation to the thousands of exposed steelworkers and their survivors. Over 1,200 families have filed claims under the program.

The misfortune of these workers and their families offers us a cautionary tale of how easily government secrecy can spin out of control and wind up harming the people it's claiming to protect.

Panel on Nonprofit Sector Makes Final Recommendations to Senate Committee

On June 22, the Panel on the Nonprofit Sector released its Final Report on reform for charities, saying the measures are "intended to strengthen the ability of the nation's 1.3 million charities and foundations to serve as responsible stewards of the public's generosity." The 116-page report, which makes over 120 recommendations in 15 areas of nonprofit governance and financial reporting, was well received by Senate Finance Committee Chair Charles Grassley (R-IA) and Internal Revenue Service (IRS) Commissioner Mark Everson.

The panel involved "thousands of people representing diverse organizations," according to the final report, in which many of these organizations are listed. Independent Sector, a coalition of leading nonprofits, foundations and corporations, put considerable resources into shaping the final recommendations to Congress. For example, they created working groups to assemble recommendations. Interim recommendations were developed and presented in local, state, and regional meetings. Moreover, Independent Sector presented information about the recommendations on conference calls and accepted comments via the Internet from coalition members and other stakeholders.

Despite this effort, which remarkably was completed in a matter of months, the process was largely an inside-the-beltway style of operation that mostly engaged very elite players. The panel membership did not reflect the diversity of the sector: small groups, community-based organizations, and rural groups were not on the panel. Community-based groups, to the extent they were consulted, were invited to comment on recommendations that were already developed and limited to a narrow scope of topics.

Independent Sector argued that limits had to be placed primarily because of time constraints imposed by the Senate Finance Committee. The Senate committee required recommendations to be made by this summer in order for that the committee to use the input in developing its own legislation regarding nonprofit oversight and governance. In this context, the panel moved with incredible alacrity.

The panel's first recommendation was greater IRS enforcement of current laws and increased funding by Congress to allow the IRS to accomplish this. The panel further recommends modification of the law to allow the IRS to share information with state charity regulators. Many feel that this is the heart of the problem; in fact, Everson praised the idea of changing the law to allow the IRS to share information with state enforcers.

For years the nonprofit sector has argued that the IRS needs greater resources to implement effective enforcement. Several have pointed out that recent abuses identified by the news media were mostly violations of existing law that could have been prevented by improved enforcement.

Strikingly, even though the first recommendation of the panel's report was aimed at enforcement, the main message, conveyed by the panel, its director, a press release, and even the report's title, is that of encouraging self-regulation and voluntary compliance (e.g., greater transparency). Many in the nonprofit sector resist new requirements and greater intrusion by government. It appears the panel tried to balance these competing interests of self-regulation and governmental regulation, but may have missed the mark.

The panel provides tough-minded recommendations in a very small number of areas (e.g., donor-advised funds), but avoids some of the biggest issues, such as abuses by foundations. It proposes no caps for foundation trustee fees; nor does it make recommendations on compensation for board members, beyond suggesting the reimbursement for expenses be subject to explanation and disclosure. These issues have emerged in the news media as potential abuses, yet go unaddressed by the Panel.

It appears the panel mostly developed recommendations that were responsive to a paper developed by the staff of the Senate Finance Committee. That paper, prepared last year, provides a number of recommendations in a wide range of areas.

This raises a broader question about the purpose of the panel's recommendations. The panel provides no introduction that describes the problem that needs to be resolved. Are there systemic violations of law? Are there gaps in laws that need to be addressed? Is there a problem with existing enforcement? Should that enforcement be controlled by the federal government, state governments, or both? The report never defines the problem to be corrected, but rather establishes a rebuttal to the Senate staffer's paper of last year. In the end, the report seems like recommendations in search of a problem.

This is not to say that the panel's recommendations are bad or wrong-headed. It is simply that it is difficult to evaluate the need for them. For example, the panel report relies heavily on the numerous changes to the Form 990, the tax return nonprofits file annually, as a means of establishing nonprofit transparency. However, many in the nonprofit sector, lead by the Urban Institute, have been proposing improvements to Form 990 for years. The IRS has been in the process of revising it for a long time, without result. Yet there is no evidence that having myriad check-offs on the 990 will create greater accountability. It certainly will, however, create more busy work for nonprofits. Greater detail in financial reporting, along with increased penalties proposed, is a move in the right direction. But what is the objective to be achieved by more 990 check-offs?

There are other recommendations, such as development of performance-based measurements that should be disclosed on the 990, that seem highly controversial. The federal government has been unsuccessfully trying to develop performance measures for federal programs for some years. The problem stems from uncertainty about the appropriate benchmarks to use when it comes to social values and services, along with a heavy emphasis on quantification of such measures. Applying performance measures to nonprofits will be equally difficult and will have the added challenge of assuring consistency from one organization to another on what measures are used.

The role of state charity regulators is not given adequate attention, beyond information sharing with the IRS, and the report fails to follow through on the potential this sharing can have. For example, as the primary regulators of nonprofits, many states require all organizations to file annual reports, or register if they raise funds in the state. The National Association of State Charity Officials has a Unified Registration Statement program (see http://www.multistatefiling.org) that is "an effort to consolidate the information and data requirements of all states." Yet, the recommendations would create a largely duplicative annual reporting requirement for nonprofits that are so small they do not file Form 990.

The panel's report should prove useful as the Senate Finance Committee begins to draft legislation addressing the oversight of nonprofit organizations. The committee recently held a hearing on the subject and appears to be headed toward legislation addressing conservation easements, donor advised funds, abusive tax shelters and other accountability measures.

What we find most striking about the panel's effort to develop recommendations is the speed with which the nonprofit sector took action. Clearly, leaders in the nonprofit sector see the need to address governance and oversight issues and provided the resources to make things happen quickly. So the question remains: why can't the nonprofit sector leadership address other high-level crises with the same vigor and commitment of resources?

Nonprofits today are concerned about the rapidly diminishing public resources available for social service programs, infrastructure that supports education, transportation, health and safety protections, environmental protections, the arts and humanities, and other basic government services. Why can't the leadership of the nonprofit sector -- from foundations to grantseekers -- put the same level of energy and resources into challenging the threats that nonprofits really face as it has into addressing the threat of abuse by a few bad apples?

Scam by Lobbyists Could Have Negative Consequences for Legitimate Nonprofits

A June 22 hearing of the Senate Indian Affairs Committee revealed details of a scam by lobbyists Jack Abramoff and Michael Scanlon to pocket millions of dollars in donations to nonprofit groups they controlled or on whose board they sat. They used these groups as intermediaries, with subgrants going to other nonprofits and consulting firms they controlled, and ultimately into their pockets. This abuse, and other recently reported cases of professional lobbyists using nonprofits to avoid ethics and disclosure rules, has raised questions about the need for greater transparency and oversight of the identity of donors and of financial transactions between groups.

Sen. John McCain (R-AZ), chair of the Indian Affairs Committee, called the emerging scandal "simply and sadly a tale of betrayal." Abramoff, a former Republican lobbyist, and Scanlon, a former spokesman for House Majority Leader Tom DeLay (R-TX), appear to have pocketed $6.5 million of $7.7 million in fees charged to the Mississippi tribe of Choctaw Indians. The fees were supposed to pay for lobbying and public education efforts on behalf of the tribe's casino gaming operations. The Justice Department is now investigating these transactions.

On Abramoff's advice, the tribe made two donations to the National Center for Public Policy Research, (NCPPR) a conservative think tank where Abramoff served on the board of directors. The president of NCPPR, Amy Ridenour, said she believed the funds were for an education campaign on the benefits the tribe received from its casino operations. The first donation of $1 million, made in October 2002, was re-granted on Abramoff's instructions to:

- $450,000 to the Capital Athletic Foundation (CAP), which is controlled by Abramoff, which re-granted funds to a school in Maryland that Abramoff founded, as well as a sniper school in Israel
- $500,000 to Capital Campaign Strategies, which was controlled by Scanlon
- $50,000 to Nuremberger and Associates, purportedly for project coordination, but apparently used to pay off a personal loan of Abramoff's.

In 2003 NCPPR received $1.5 million from the tribe for the project, and, again on Abramoff's instructions, re-granted $250,000 to CAP and paid $1.25 million to Kaygold, an operation Ridenour that believed Scanlon operated but was, in fact, owned by Abramoff.

Ridenour told the committee she had expected to be involved in the educational campaign, but was not. Abramoff did not respond to her requests for documentation of project expenses. When she learned he controlled Kaygold, Ridenour determined Abramoff had violated NCPPR's conflict of interest policy, and he resigned from the board. Another witness, David Grosh, testifying on the American International Center, a research organization founded by Scanlon, stated its only function was to divert money from Abramoff's clients to personal use. Abramoff and Scanlon did not testify before the committee as requested, invoking their Fifth Amendment protection against self-incrimination.

Around the time NCPPR first received a grant from the Choctaw tribe, it was funding a much publicized trip to Scotland by DeLay. Congressional ethics rules make it illegal for registered lobbyists to pay for member travel, and the funding from NCPPR, with registered lobbyist Abramoff on its board, has come under scrutiny. USA Today, in a story entitled "Lobbyists showing Congress the world" recently reported on a number of groups with ties to lobbying firms that have funded expensive congressional travel. The story said, "The nonprofit groups don't have to disclose their donors; lobbyists, by forming these groups, can evade rules designed to limit their influence…"

These abuses may cause serious problems for legitimate nonprofits engaged in public policy work. At the Indian Affairs Committee hearing, Ranking Member Byron Dorgan (D-ND) said these nonprofit issues are not within the committee's jurisdiction, and asked McCain to seek joint action with the Senate Finance Committee. The Finance Committee has written to Abramoff seeking information on CAF and NCPPR, among other groups, but there has been no announcement of further committee action.

The Finance Committee letter asked Abramoff for an explanation on why donations should not be viewed as attempts to influence legislation and public policy. This is a troubling question, since it is perfectly legal for nonprofits to influence policy and lobby. The First Amendment ensure this nonprofit right to participate in the democratic process. Although individuals seeking to avoid disclosure and taxes could donate to a nonprofit, the intent of the donor should be irrelevant if the group spends the

funds on legitimate program activities. If a group is a sham, the donor has illegally abused the nonprofit form.

Dorgan also expressed concern about funds transferred from one group to another with little documentation or accountability. The example cited was the Choctaw donation to Americans for Tax Reform (ATR), a 501(c)(4) organization run by conservative Grover Norquist, that passed funds on to conservative activist Ralph Reed for anti-gambling campaigns. The donation to ATR was made at Abramoff's suggestion. The question in this case is whether the funds were spent for a legitimate purpose or used for personal benefit.

Panel Explores Threats to Charity in the Post-9/11 Regulatory Environment

On June 14 the Georgetown Public Policy Institute's Center for Public and Nonprofit Leadership (CPNL) hosted *Safeguarding Charity in the War on Terror*, a panel discussion on the impact of government anti-terrorism programs on the nonprofit sector. A diverse group of scholars and practitioners charged that the government's campaign against terrorist financing has proven ineffective, inefficient, and harmful to philanthropy and charitable programs.

Panelists included:

- Teresa Odendahl, 2004/2005 Waldemar A. Nielsen Chair in Philanthropy, CPNL,
- David Cole, Professor of Law, Georgetown University Law Center,
- Nancy Billica, Political Advisor, Urgent Action Fund for Women's Human Rights,
- Daniel Mitchell, McKenna Senior Fellow in Political Economy, The Heritage Foundation, and
- Laila Al-Marayati, Chairperson, KinderUSA.

The centerpiece of the government's anti-terrorist financing campaign is the Treasury Department's Anti-Terrorist Financing Guidelines: *Voluntary* Practices of U.S. Based Charities. The Guidelines were released in November of 2002 in response to a request by Muslim charities for a set of due diligence standards that would help them avoid sanctions. Yet, far from offering guidance and a safe harbor, the procedures outlined in this document are widely regarded as unrealistic, impractical, costly, and potentially dangerous. Drafted and released without meaningful consultation with the nonprofit sector, the guidelines betray a startling lack of knowledge about domestic and international grant-making and the body of laws already in place to ensure fiscal responsibility and due diligence.

Odendahl opened the discussion with the charge that charities have been inaccurately identified as significant sources of terrorist financing and unfairly targeted in the war on terror. Cole gave an overview of the constitutional rights and freedoms at stake, noting that the war on terror has led to the erosion of freedom of association. Billica noted her concern that current policies lead to increased administrative burdens that have a disproportionate impact on small organizations with few resources. Mitchell pointed out that the government's campaign against terrorist financing fails a cost/benefit analysis: for the billions of dollars it has cost and the sweeping invasion of privacy involved, the effort has simply failed to yield significant results. Al-Marayati concluded the discussion by reporting the effects post-9/11 policies have had on the Muslim community, accusing the government of singling out Muslim organizations for investigation and prosecution. Click here for a detailed summary of their remarks.

Clashing 527 Bills Moving in the House

On June 23, Rep. Robert Ney (R-OH), chair of the House Administration Committee, sent a letter to Reps. Martin Meehan (D-MA) and Christopher Shays (R-CT) informing them he intends to schedule their proposed legislation, H.R. 513, the 527 Reform Act, for committee consideration. Ney also said that, although he supports a competing 527 bill, he will vote to send the Shays-Meehan proposal to the floor.

Ney prefers H.R. 1316, the 527 Fairness Act, introduced in March by Reps. Mike Pence (R-IN) and Al Wynn (D-MD). Ney believes that the Bi-Partisan Campaign Reform Act (BCRA) went too far in regulating the fundraising and coordinating capabilities of the national political parties, state parties and committees.

At a June 23 debate sponsored by the Campaign Finance Institute, Wynn called the 527 Fairness Act "philosophically a different take on the regulation of 527 organizations than the Shays-Meehan bill." While Shays-Meehan strives to heavily regulate the independent 527 organizations, Pence-Wynn does not impose contribution limits and other regulations on them. Instead, it eliminates aggregate limits on how much money individuals can give to influence federal elections, removing the choice between contributing to parties, candidates and other groups. The Pence-Wynn bill also allows state and local party organizations to spend unlimited funds on voter registration drives (GOTV) and sample ballots.

At the debate both Wynn and Cleta Mitchell, an attorney with Foley & Lardner LLP who helped author the Pence-Wynn bill, advocated for allowing donors to contribute funds into the hard money system where it is regulated and documented, and allowing 527 groups to continue with their work unhindered. Shays and Trevor Potter, of the Campaign Legal Center, disagreed. Shays said that the point of BCRA was to take legislators out of the game of raising money. Although BCRA did this in the 2004 election, he is concerned about millionaires that gave large donations to independent 527 groups.

The drive to regulate independent 527 organizations appears to come from a desire by some members of Congress to suppress the ability of those organizations to run advertisements against candidates. Shays, in response to a question, took exception to a comment that 527 groups did much needed GOTV work. He responded that the independent 527s primarily ran attack ads. Both proponents and opponents of the competing 527 bills are concerned that the two bills will be melded together in a House-Senate conference, creating a situation which greatly undermines BCRA and restricts the First Amendment rights of nonprofit organizations to participate in the political process.

OMB Report on Regulation Misguided, Misleading

An annual draft report from the White House Office of Management and Budget (OMB) misleads the public on regulatory safeguards and makes OMB appear poised to impose misguided anti-regulatory policies, OMB Watch and other public interest groups told the White House last week.

About the Report

OMB's annual report on the costs and benefits of federal regulations is required by what is often referred to as the "Regulatory Right to Know Act." *See* Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, 114 Stat. 2763A-161 to -162, App.C §§ 624-25 (2000). Under the act, OMB is also required to submit a draft of each year's report for public comment and peer review.

This year, as in years past, the Bush White House has used the annual report as a vehicle to promote controversial anti-regulatory initiatives. In 2001, 2002, and 2004, OMB used the report to solicit from industry a hit list of regulatory safeguards to be weakened or eliminated. Last year's hit list is still an active controversy. In 2003, OMB used the report to propose new policies to govern cost-benefit analysis by agencies in rulemaking.

This year's report does not propose any new policies to alter the regulatory process, but it does have a chapter that invites reform suggestions. In one section of the report, OMB finally acknowledges the objections from public interest groups that agency cost-benefit analyses rely on estimates of

compliance costs that are significantly overblown. After a discussion of the value of studies that look back to compare *ex ante* estimates with *ex post* results, OMB lists a limited number of currently available look-back studies and invites the public to suggest reforms to the regulatory process that would follow from new insights gained by conducting more look-back studies.

The White House and industry leaders have been repeatedly calling for automatic sunsets of regulatory protections. Such sunsets would theoretically apply even to proven protections, such as the ban on lead in gasoline. As a first step to such a destructive policy, one bill would increase the number of reviews conducted under the Regulatory Flexibility Act and would call on agencies to ask, during these reviews, whether existing protections should be eliminated. The draft report's emphasis on look-back studies and regulatory "reforms" could be laying the groundwork for a new regulatory sunset policy.

In a separate section, OMB explores net benefits as an alternative method of regulatory accounting. In the past, OMB has tallied up the total range of estimated costs for a subset of "major rules" and set that range side by side with the total range of estimated benefits. This year, OMB offered an alternative approach that tallies net benefits rule-by-rule by picking the central tendency of each rule's cost and benefit estimates, subtracting cost from benefit for each rule to derive a net, and then totaling the sum of all major rules' net.

Comments

OMB Watch and other public interest groups used their opportunity to file comments to call OMB to task for its hostility toward regulatory protections of the public interest.

OMB Watch's comments on the regulatory policy sections of the report hit five main points:

1. OMB needs to improve the transparency of this annual process and must be more responsive to the public's comments. Among other problems, OMB has repeated several mistakes in this year's report that were brought to its attention last year. Some of these mistakes have been pointed out multiple times over the years.

2. OMB continues to present the unproven argument that regulation to protect the public interest impedes the competitiveness of American businesses in the global marketplace. OMB offers evidence that is not only weak but, worse, irrelevant to this argument. As to be expected, OMB ignores the wealth of evidence that regulation does not impede national competitiveness but, instead, *improves* business operations by encouraging companies to create innovative new technologies and to discover more efficient ways of doing business.

3. OMB's section exploring net benefits as an alternative regulatory accounting methodology is both misguided and misleading. It masks highly debatable moral and ethical concerns in a simplistic final number that means, ultimately, nothing for reasonable social policy to protect the public welfare. It appears to be useful for little more than a public relations game, in which OMB's careful caveats about the methodological flaws and limitations of the net benefits numbers are buried far from the pages on which those numbers themselves are presented, allowing the Bush administration to present its pattern of failure to protect the public as though it signified real accomplishment.

4. OMB has provided a puzzlingly limited bibliography of look-back studies, some of which are so deeply flawed that they do not belong on any reasonable list of studies that have something meaningful to say. OMB must take steps to ensure that its use of look-back studies does not result in uninformed "reforms" of the regulatory process.

5. Whatever might be learned from any new look-back studies, we already have a significant body of research that has proven, again and again, that regulatory protections of the public interest not only satisfy their public interest purposes but also improve the economy. Any future reforms, therefore, should not add further burdens to the regulatory process but, instead, should remove unnecessary constraints on agency action, eliminate navel-gazing, and facilitate regulation to protect the public interest.

OMB Watch's information policy group also filed a separate set of comments addressing a chapter of the report on implementation of the Data Quality Act.

Other public interest groups filing comments include the Center for Progressive Reform and Public Citizen.

Costs of Work-Related Harms Underestimated but Soaring

Even as the cost of serious workplace injury continues to soar, new research concludes that those costs are significantly underestimated.

A recent report by insurance company Liberty Mutual revealed that the cost of serious workplace injuries has skyrocketed in recent years. After adjusting for inflation in both health care costs and wages, Liberty Mutual calculated that the cost of serious workplace injuries increased by 12.1 percent between 1998 and 2002, with over half of that increase occurring in 2002.

In fact, the costs have soared while the number of serious injuries has actually dropped in those four years. Thus, even if there are fewer serious injuries in the workplace, they are costlier than ever.

The problems of work-related injury and illness may well be greater than the Liberty Mutual data suggest. According to a new literature review in the June issue of the *Journal of Occupational and Environmental Medicine*, data on the incidence and cost of occupational illness and injury are significantly underestimated because of data gaps and systematic methodological flaws in research on the burden of workplace harm. These limitations include the following:

Making the Link with Workplace Conditions

Because many workplace illness and injuries are either not reported as work-related or not reported at all, their actual incidence rate is likely underestimated.

- Occupational disease and injury have long been recognized to be underreported.
- Many primary care providers are untrained in occupational health and, thus, may not recognize a disease as work-related.
- The U.S. lacks a comprehensive occupational health data collection system. What we know about occupational health comes from "piecemeal data sets produced by systems not designed for surveillance. These systems filter out work-related health problems at each step," according to the report.
- Diseases often have many possible causes. Workplace-related etiology may be neglected entirely in many cases.
- For illnesses with multiple potential causes, some researchers assess the attributable risk (AR), counting only a fraction of disease incidence based on workplace exposure risk. (AR is the percentage of disease incidence that would be eliminated if the workplace risk disappeared.) "The standard definitions of attributable fraction of disease, resulting from an exposure, capture only excess cases and not all cases that are etiologically linked by the exposures in question," according to the report.
- The limited time horizon of some AR methods can also miss cases with earlier or later onsets than assumed by the time frame of the study.
- Job turnover can also limit studies of the burden of occupational illness and injury. Some more recent studies of occupational carcinogens and respirable particulates such as silica and asbestos are now beginning to account for turnover.

Getting a Good Count

Some methodological flaws constrain efforts to assess the bigger picture of workplace-related illness and injury.

- Some researchers measure the burden of occupational injury and disease through disability-

adjusted life years, or DALYs. DALYs, like the much maligned quality-adjusted life years (QALYs) measure, are an attempt to count cases of occupational health problems in common units and in terms of time affected. If 0 is death and 1 is one year of perfect health, a DALY would take one year spent in some disabled condition as a fraction between 0 and 1. Moreover, the cases themselves are not counted as whole entities but, instead, as units of time in the disabling condition. The disabled health state fraction is multiplied by the number of years afflicted. "The definition of DALYs combines information on morbidity and mortality with value choices such as disability weighting, age weighting, and discounting. These value choices may lead to an inaccurate portrayal of the true burden of occupational disease and injury because of differential valuation of effects on young workers and failure to account for long-term effects in older workers and retirees," the study maintains.

- It can also be challenging to get a birds-eye view of population patterns for occupational health, in part because the burden of work-related injury and illness is not distributed evenly among the population. According to the report, some occupations are riskier than others: "For example, although healthcare workers globally are 0.6% of the population, they experience an appreciable proportion of disease from bloodborne pathogens acquired through 'sharps' contacts."

Calculating the Cost

Measuring the economic costs also results in underestimates of the burden of occupational illness and injury. Given that agency cost-benefit analyses for potential regulations sometimes use cost of illness estimates to put a cash value on the future benefits of regulation, these limitations could have significant policy consequences. Among the deficiencies are the following:

- According to an earlier literature review, "most studies tended to underestimate the true economic costs from a social welfare perspective, particularly in how they accounted for occupational fatalities and losses arising from work disabilities. Many of the estimates of costs of occupational disease and injury depend on a combination of methodolgic assumptions, extrapolation methods, and known and unknown biases."
- Most cost estimates ignore the wider social consequences of one person's injury for "labor relations, family dynamics, domestic activities, community involvement, and personal mental health."

The article concludes with recommendations for occupational health advocates to improve the evidence supporting their calls for workplace health and safety protections, including heightened surveillance and further epidemiological study. Given that this administration, which is already averse to workplace health and safety protections, demands a cost-benefit justification for new health and safety rules, these data limitations may make strong new safeguards even less likely.

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