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Minnesota Experiences Unprecedented Government Shutdown Due to Budget Deadlock

A budget deadlock in the Minnesota state legislature led to a partial shutdown of the state government, temporarily leaving thousands jobless and halting many important public services. This government shutdown, unprecedented in Minnesota, could have been avoided had the legislature passed a simple stopgap spending bill to fund the government at previous levels until a new budget could be worked out.

Hundreds of frustrated citizens and workers gathered in front of the state capitol last week to protest the government shutdown and call for passage of a spending bill or temporary resolution to end the deadlock. The shutdown did not prevent members of the legislature and other state politicians from continuing to draw their own salaries, while thousands of state government employees were left without a paycheck.

The budget negotiations broke down June 30, which coincided with the expiration of the previous fiscal year's budget. Lawmakers were specifically divided along party lines over financing for education and health care, and measures to raise extra state revenue.

Governor Tim Pawlenty (R), House Republicans, and members of the Democratic Farmer-Labor (DFL) party reached a tentative agreement concerning funding specifics on the morning of July 9, but the deal still awaits approval by the full legislature. Legislators are expected to hash-out final details over the next few days.

Not only were thousands left jobless, but vital state services were also affected by the week-long shutdown. The Transportation Department, with the most closings, temporarily discontinued issuing new driver's licenses. The government did call back several Health Department laboratory workers to handle what turned out to be a busy weekend investigating suspected cases of salmonella, Legionnaires' disease and West Nile virus. In addition, select judicial decisions, which some believe violated the state Constitution, allowed government functions in key agencies to continue without legislative appropriations.

For many who have monitored developments related to the shut down, the Minnesota state government took far too long to put partisan difference aside and reach a compromise. The temporarily unemployed workers were forced to use their vacation time during the budget crisis. Had the shut down continued through July 15, as it threatened to, these workers would have been laid off. According to Commissioner of Employee Relations Cal Ludeman, a continuation through July 15 of the shutdown would have left the state facing $211 million in severance costs, including accrued vacation and sick pay, as well as ongoing health and unemployment insurance payouts. Approximately $100 million of that amount, set aside for unemployment benefits, was not budgeted and would ultimately have needed to be made up with cuts to programs in whatever budget was agreed upon.

Minnesota was not the only state to miss a July 1 budget deadline, however it was the only state to have experienced a government shutdown.

Expiring Tax Cuts Will Prove Costly to Extend

The scheduled expiration in 2008 of a number of tax cuts put in place during Bush's first term has many Senate GOP tax writers looking to the budget reconciliation process to extend these costly measures. If included in the $70 billion reconciliation package, these tax provisions would be protected from a Senate filibuster, yet would add billions of dollars to the national debt through 2010, the five year window the reconciliation bill would cover. Many contend that reauthorization of provisions that benefit the wealthy disproportionately and at the expense of middle- and low- income Americans demonstrates our current Congress' misguided priorities with respect to tax policy.

Debate over these provisions has centered around two opposing views of the U.S. economy and federal deficit. So while many believe the federal government is currently flirting with fiscal disaster by eliminating essential revenue in the form of tax cuts while the deficit skyrockets, others maintain that increased revenue coming into the Treasury, as evidenced in the Congressional Budget Office's (CBO) monthly budget review, confirm our economy is sound enough for these tax cuts to be made permanent.

A Joint Committee on Taxation report, titled "Present Law and Background Information in Certain Expiring Tax Provisions," notes that the lowered tax rates on capital gains and dividends -- which are extremely contentious, as they almost exclusively benefit higher-income taxpayers -- would cost $20.55 billion to extend through 2010. Notably, 84 percent of total capital gains are reported by taxpayers earning at least $200,000 per year. Extending this provision, therefore, would benefit the highest earners in society, while adding over $20 billion to a debt that will undoubtedly be paid off in the future by raising taxes on low- and middle-income earners.

Recognizing they lack the 60 Senate votes to overcome Democratic objections, GOP tax writers in the Senate are looking to extend these provisions this fall in the reconciliation process, which is immune to the filibuster. Tax writers must, however, adhere to a $70 billion spending limit set by Congress in the budget resolution in order to ensure the reconciliation bill will be protected from a filibuster in the Senate.

Debate over these expiring provisions, and the likelihood that GOP tax writers will look to extend them through reconciliation, adds to a growing body of proposed tax legislation, including estate tax repeal and alternative minimum tax reform, which eases taxes on the rich at a cost of billions to the rest of the county.

The tax cut provisions were first passed in 2001, when economic projections forecasted a budget surplus of $5 trillion for the coming decade. In 2003, the acceleration of those tax cuts added $500 billion to the deficit over ten years. While most of the tax provisions passed in 2001 will expire at the end of 2010, a handful will expire between 2006 and 2008. Four of those, including capital gains and

dividends tax rates, were the subject of a June 30 Senate Finance Subcommittee on Taxation and IRS Oversight hearing.

Congress may be tempted to provide additional tax breaks for the wealthy in light of expected estimates that the deficit for the current fiscal year, while still substantial, is not as large as once projected. The White House Office of Management and Budget is scheduled to release its midyear assessment on July 13. Last week, the Congressional Budget Office said it expected the annual deficit to be between $325 billion and $350 billion, well below the administration's projected deficit of $427 billion provided last January. OMB's revision is likely to be in the same range as that of the CBO. One reason for the improving deficit picture is the increase in revenue from corporate and individual taxes. This is likely to be used as an argument that the tax breaks are working. However, by all accounts, longer-term estimates regarding deficits remain uncertain, if not bleak.

OMB Watch Wins in Court for Access to Risk Management Data

After almost four years of silence, the Environmental Protection Agency (EPA) released updated information on Risk Management Plans (RMPs) filed by facilities with large quantities of hazardous chemicals onsite, in order to inform communities about the risks. The agency released the information to OMB Watch after the organization sued EPA for failing to respond to its request filed under the Freedom of Information Act (FOIA). OMB Watch has posted the executive summaries of the RMPs on its Right to Know Network website.

Shortly after the 9/11 terrorist attacks the EPA removed the RMP database from its website, replacing it with a message explaining that in light of attacks the database had been "temporarily removed." The message also states that the agency hopes to make the information available online again "as soon as possible." However, after almost four years EPA has not reestablished online access to any of the RMP information.

The RMP Database contains the plans for facilities that store hazardous chemicals, such as chlorine gas, which pose significant risks to nearby communities if released due to accident, natural disaster, or terrorist attack. Facilities submit RMP reports to the EPA explaining their operations, safety equipment, accident prevention and response plans, and an accident history. The RMP information allows the public to make informed decisions about its own safety.

The chemical industry has lobbied hard against public access to this information, seizing on terrorism to justify curtailing public access to information on industry and shirking corporate accountability. Public interest groups have maintained that the RMP information is the first step in identifying and solving any vulnerabilities that exist at chemical plants and in making our communities safer.

Since EPA discontinued public access to the RMP data, the only online resource for this information has been OMB Watch's Right-to-Know Network (RTK NET) website. However, EPA refused OMB Watch's efforts to update the information on RTK NET. The agency refused the organization's 2003 request under the Freedom of Information Act for electronic copies of the RMP executive summaries. The agency's claims for refusing the information, which by law is collected specifically to inform communities about chemical risks, were based on the reports being part of internal agency rules and therefore exempt from public release.

OMB Watch immediately filed an appeal noting the requirement under the Clean Air Act Amendments of 1990 that RMP reports be collected and released to the public and that reading rooms around the country provide access to paper versions of the documents. The appeal also pointed out that under the Electronic Freedom of Information Act Amendments, agencies may not deny requests for electronic format if the information is releasable.

After waiting for almost two years for EPA to respond to the appeal, OMB Watch retained legal counsel and filed a complaint in court. After only 30 days, the agency provided the data without ever filing a counter-argument or offering an explanation for its early refusals.

Last week Congressman Edward Markey (D-MA) released a Congressional Research Service report that utilized the RMP data to demonstrate that chemical security is a nationwide issue. See related story.

The updated executive summaries can be searched and accessed here.

Congressional Report Uncovers Chemical Security Risks Throughout the Country

An analysis prepared for Rep. Edward Markey (D-MA) by the Congressional Research Service (CRS) reveals that chemical plants endanger millions of Americans in every state. The report demonstrates widespread problems with chemical security and highlights the need for a national policy that will reduce these risks.

CRS used information submitted by chemical facilities under the Environmental Protection Agency's (EPA) Risk Management Plan (RMP) program to produce its analysis. The RMP database covers almost 18,000 facilities that use large quantities of toxic and flammable chemicals. (On July 11, OMB Watch made available updated information from the RMP on RTK NET. See related story.) The report reveals that more than 100 facilities place upwards of 1 million people at risk from a chemical release and more than 400 additional 400 facilities place between 100,000 and 1 million people at risk.

The CRS report highlights the need not just for provisions to increase security, but also to reduce risk, at these facilities. Any federal chemicals security legislation should include incentives for using safer chemicals and technologies to reduce the number of people at risk from chemical releases. With so many communities at risk throughout the country, the report also demonstrates the need for public access to information on what is being done to protect communities and how well facilities are performing.

"There are night clubs in New York City that are harder to get into than some of our chemical plants," notes Markey in a release accompanying the report. "These facilities which pose security risks exist in all 50 states. Twenty-three states, including Massachusetts, contain at least one facility at which a worst-case accident or terrorist attack could threaten more than 1 million people."

Markey offered an amendment that included provisions to strengthen security at chemical plants during the April 2005 mark-up of the Department of Homeland Security Authorization Act. However, party-line voting defeated the amendment. Chemical security legislation has faced strong opposition from power chemical industry associations and the Bush administration. However, the administration has recently appears to have reversed its position on chemical security legislation and now supports federal requirements.

"While the Bush administration has claimed to abandon its own earlier approach of allowing the chemical industry to regulate itself," explains Markey, "it has refused to put its money where its mouth is and commit to any meaningful security upgrades."

As of yet, there are no details on the chemical security provisions that the administration supports.

New York Assembly Passes New Environmental "Right to Know" Bill

The New York State Assembly passed the Environmental Community Right to Know Act of 2005 (A. 1952) on June 4. The bill would create a single location online for the public to access and search all environmental information collected by the state on hazardous substances released into the environment.

The New York State Department of Environmental Conservation already collects enormous amounts of data on the release of hazardous materials through permits, pollution monitors, and facility reporting. The bill, introduced by Assemblyman Ryan Scott Karben along with over 30 cosponsors, would require the agency to compile that information and make it searchable online. This new resource would give citizens more complete pollution profiles of companies, industries, and geographic areas.

Currently New York, like most states, has several laws and regulations addressing environmental protection, resulting in many different databases containing information collected in different formats and at different times. Therefore, a state resident would find it nearly impossible to track all types and amounts of pollution produced by a factory in his or her community.

The Environmental Community Right to Know Act of 2005 seeks to overcome this problem by pulling data from different locations and formats into an easily searchable public database. While the bill will not require the collection of any new information, it would provide the public with a new level of access to the environmental information already being collected.

State Senator Charles Fuschillo (8th Senate District) has introduced the bill (S. 1773) to the New York Senate, and lawmakers are hopeful that it will pass before the end of the legislative session.

NIH AIDS Division Director Fired Possible Retaliation for Whistleblowing

Dr. Jonathan Fishbein, a National Institutes of Health (NIH) researcher and director of the AIDS research division's Office of Policy in Clinical Research Operations, blew the whistle on poor scientific practices and inappropriate, unprofessional conduct by the department. NIH fired Fishbein on July 1 citing poor job performance, in what some believe to be retaliation. A review report for the NIH director's office confirms many of the issues that Fishbein raised about the agency's AIDS research division, adding to the speculation that his dismissal constituted a retaliatory action.

Fishbein disclosed that the agency failed to enforce rules regarding good clinical practices in AIDS drug trials in Uganda. He directed his criticism at extensive standards violations by researchers and an attempted cover-up by NIH officials.

An August 2004 report that reviewed the AIDS division, obtained by the Associated Press, supports Fishbein's description of the division. The report calls the department a "troubled organization" and found that its managers have engaged in unnecessary feuding, sexually explicit language and other inappropriate conduct.

Sens. Charles E. Grassley (R-IA) and Max Baucus, (D-MT), the chairman of the Senate Finance Committee and ranking minority member respectively, are questioning Fishbein's dismissal. In a letter dated June 30 to NIH Director Elias A. Zerhouni, Grassley and Baucus demanded an explanation for the firing of Fishbein. The letter also noted that retaliation against an employee for reporting misconduct is "unacceptable, illegal and violates the Whistleblower Protection Act."

Flaws in Delaware's Open Records Law Keep Information out of Public Hands

Illogical exemptions and poor implementation appear to be preventing Delaware's Freedom on Information Act (FOIA) from fulfilling its purpose to provide the public with access to important government-held health and safety information. Delaware's *News Journal* conducted an investigation into the function of the state's open records law and found significant problems and loopholes.

The News Journal recently submitted several FOIA requests to assess the effectiveness of the state law. The newspaper requested air quality data and emission-testing results from power plants; odor-complaint records and monitoring reports from landfills; and waste-management plans from farmers. While the agencies provided thousands of pages of documents in response, most of the response consisted of basic bureaucratic forms, which revealed little about the issues being researched by *The News Journal*. The documents did, however, uncover some serious public health hazards that hint at a broader problem, including shallow pits filled with rotting cow and chicken carcasses that threaten drinking water supplies.

Delaware's FOIA has become riddled with exemptions that withhold documents and close meeting doors to the public. These exemptions include information on concealed-weapons permits, criminal files, and driver's licenses.

Also exempt is information on farm manure and fertilizer management. In 2000, state lawmakers created the Nutrient Management Commission and declared records on these major sources of water pollution off-limits to the public. This exemption now prevents concerned citizens from finding out if the tons of animal waste generated by chicken farms in the state annually represent a threat to their drinking water.

Other problems arise from poor implementation by local and state agencies. One woman, who was

curious about the position of town manager in her area, was inappropriately denied a copy of the contract, which should be publicly available. The Delaware Solid Waste Authority has used a lawsuit between a landfill contractor and the agency as grounds to deny requests about emissions and odors from the landfill. Citizens contend, however, that the lawsuit is about day-to-day operations at the landfill and should not interfere with their right to information about methane and other gases released near their homes.

Other states facing similar problems of excessive loopholes and poor implementation are attempting to strengthen their FOIA laws. For example, Arizona is considering legislation that would create a state funded 'public access counselor' to provide expert advice to citizens and state officials regarding requests for state-held information. Additionally, there are several national bills before Congress that would strengthen federal FOIA law.

CA Nat'l Guard Investigated for Surveillance of Peace Activists

On June 26 the San Jose *Mercury News* published email correspondences between Gov. Arnold Schwarzenegger's press office and senior California National Guard officials that detail surveillance of a Mother's Day peace rally sponsored by three organizations. Separate investigations have been launched by a California state legislator and federal officials, and public reaction has been strongly negative, with comparisons to domestic spying targeted at anti-war and civil rights groups during the Vietnam era.

The extent of the surveillance remains unclear. A National Guard spokesperson said that none of its personnel attended the rally, but that it simply monitored news reports of the event. However, an American Civil Liberties Union (ACLU) spokesperson said, "We fear that the surveillance of the Mothers' Day Parade rally is just the tip of the iceberg..." The Guard unit involved, dubbed the Information Synchronization, Knowledge Management and Intelligence Fusion (ISKMIF) program, was created in 2004 to coordinate anti-terrorist efforts. Its nine personnel have broad authority, with the focus of their work intended to be centered on monitoring the safety of bridges and other public facilities.

According to the *Mercury News*, however, three days before the Mother's Day rally, an aide in Schwarzenegger's press office sent the Guard a notice of the event. The Guard chief of staff then emailed the Major General in charge and Col. Jeff Davis, the officer overseeing the ISKMIF program, writing here is "information you wanted on Sunday's demonstration at the Capitol." The response from Davis read, "Forwarding same to our Intel folks who continue to monitor."

When the story broke a Guard spokesman said the military would be "negligent" not to track anti-war rallies because they could turn into riots, and "who knows who could infiltrate that type of group and try to stir something up?" The groups involved in the rally are well known pacifist organizations- Code Pink, a national peace group; Gold Star Families for Peace, made up of parents of soldiers killed in Iraq; and the Raging Grannies of the Peninsula Area, whose members' average age is 72. Public reaction to the Guard's attempt at justification was understandably negative. Joseph Onek of the Liberty and Security Initiative for the Constitution Project at Georgetown University called it "ludicrous."

Two elected officials announced investigations shortly after the surveillance became known. State Sen. Joseph Dunn (D-Garden Grove), who sits on the budget committee that oversees the Guard's budget, has ordered the Guard to turn over all documents about the ISKMIF unit and all information it has gathered about individuals. The Guard claims it has no information on individuals, and if information exists it will be difficult to obtain, because Davis, who oversaw the program, recently retired and all of his computer files have been erased.

There is also response at the federal level, with Rep. Zoe Lofgren (D-CA), member of the House Homeland Security Committee, planning to question Guard officials about the incident in an upcoming hearing. The U.S. Army Inspector General, the federal National Guard Bureau, and the National Guard legal division are also investigating the surveillance allegations.

The California chapter of the ACLU called on the governor to "take immediate steps" to stop Guard spying on domestic groups, including disbanding the ISKMIF unit or strictly regulating it to prohibit "monitoring and collection of information on individuals and organizations engaged in First

Amendment protected activity." The statement also called for guidelines that make it clear "that protest activity -- including civil disobedience -- is not terrorism." A spokeswoman for the governor said the administration is concerned and is looking into the situation.

Medea Benjamin, co-founder of Code Pink, said the incident will not deter the group from its work, but will make them more wary, more likely to look around for unfamiliar faces at meetings, and less free to organize and brainstorm.

Update on 527 bills

Two campaign finance bills, one that would allow more contributions to political parties and the other to restrict contributions to 527 organizations, are headed for a vote in the House. One bill has implications for charities that wish to make issue advocacy communications that mention federal candidates during election season.

On Wednesday, June 29, the House Administration Committee held a markup of H.R. 513, the 527 Reform Act of 2005. The legislation, which would subject independent 527 organizations to the same restrictions as political parties and campaigns, was voted out of committee on a party-line 5-3 vote without a recommendation for passage.

House Administration Committee Chairman Bob Ney (R-OH), has indicated his preference for H.R. 1316, the 527 Fairness Act (Pence-Wynn), which would allow the political parties to raise more money to compete with independent political groups. He used the hearing to criticize Democratic support of unregulated independent political groups. Democrats have come out against both the 527 Reform Act and the 527 Fairness Act, and Ney is eager to send them both to the floor and force the Democrats to choose between the bills, forcing them to choose between regulating 527 organizations or allowing political parties to raise more money.

An amendment proposed by Rep. Chris Shays (R-CT) would exempt 527 organizations that are engaged entirely in state election activity, even if they conducted get-out-the-vote efforts, as long as those campaigns did not mention federal candidates. The amendment also passed by a party-line 5-3 vote.

The Pence-Wynn bill was sent to the floor earlier this month without the support of any Democrat on the House Administration Committee.

Most worrisome for nonprofits is that the Pence-Wynn bill would allow various types of nonprofit organizations, such as social action groups (501(c)(4)), labor unions (501(c)(5)) and trade associations (501(c)(6)) organizations, to make electioneering communications but does not address 501(c)(3) organizations or unpaid broadcasts. The anomalous situation created by such legislation could result in a ban on broadcasts close to elections for the most nonpartisan of nonprofits, charities, while allowing broadcasts by more partisan groups, such as labor unions and trade associations. This could create a virtual blackout of nonpartisan, non-electoral advocacy communications by nonprofits.

The House is expected to take up the Pence-Wynn bill before the August recess; however, it is unlikely that any campaign finance legislation will emerge from Congress this year. Sen. Majority Leader Bill Frist (R-TN) has said that he does not intend to clear floor time for a 527 bill this session. Additionally, with appropriations bills and one definite Supreme Court nominee confirmation debate, the possibility of a conference committee to resolve the issue seems slim.

FEC Holds Hearing on Regulation of Internet Communications

The Federal Election Commission (FEC) held a two-day public hearing in late June to consider comments on its proposed regulation of Internet communications about federal elections. The testimony focused on the role of bloggers and whether they should be required to post disclaimers notifying readers if they receive funds from a candidate or campaign. OMB Watch's testimony focused on the Internet's importance to civic participation and government accountability and urged a minimal approach to regulation. No date for publication of the final rule has been set.

Many witnesses highlighted the need to protect First Amendment rights on the Internet. Reid Alan Cox of the Center for Individual Freedom said, "The Internet, quite simply, is both the most powerful and the most democratic communications medium the world has ever known." Michael Bassik of the Online Coalition said regulation of the Internet should not be increased based on a "hunch" that corruption may become a problem in the future. Trevor Potter of the Campaign Legal Center said the FEC already regulates some Internet communications and should focus on corporate communications, not those of individuals.

Former FEC Commissioner Karl Sandstrom of the law firm Perkins Coie, LLP, testified on behalf of OMB Watch, calling the Internet an instrument of civic participation. He said proposals to use the FEC's media exemption to leave bloggers unregulated ignore fundamental differences between the traditional press and the Internet. Attempts to categorize bloggers as either media or non-media would be futile, he said. Instead, OMB Watch proposed an exemption for all Internet postings and emails on one's own site, which would "allow people full use of the Internet to engage in politics without fear...", but "would leave unaffected payments made for banner ads or other forms of Internet advertising on other people's websites."

Commissioner Ellen Weintraub probed Sandstrom about the proposal, asking if it would respond to a court order requiring the FEC to reconsider its exemption of Internet communications. Sandstrom said that it would, even if no additional regulation is put in place, since the threshold of regulation should be based on the potential for corruption, not value. Trevor Potter of the Campaign Legal Center, also a former FEC Commissioner, said the OMB Watch proposal addresses the issues in the rulemaking, and rule based on it could still require disclosure of paid advertising on the Internet, and disclaimers on them.

The issue of whether disclaimers should appear on blogs that receive payments from candidates or parties was also debated. FEC Commissioner Bradley Smith noted that traditional media are not required to post such disclaimers. The Online Coalition noted that campaign buttons and other media are not subject to a disclaimer requirement, and it would be inappropriate to impose such a requirement on the Internet. A campaign technology company, ElectionMall Technologies, Inc., has proposed a "Blogger Identity Seal" program that would allow bloggers to voluntarily disclose whether or not they receive funding relating to federal elections. The information would appear as a seal on the blogger's site.

GOP Attempt to Intimidate Religious Leader Highlights Broader Problems with Issue Advocacy in Church

On May 9, the Rev. Lisa Doege, of the First Unitarian Church of South Bend, IN, received a phone call from an Indiana State Representative, who warned her that a church program she had planned might threaten her church's tax-exempt status. Representative Luke Messner (R- Shelbyville) warned Doege against an upcoming program on Social Security, raising once more the issue of the role religious institutions have to play in the public sphere and in issue advocacy.

Social Security has become a hot-button issue in South Bend, even eliciting a visit from President Bush. Republicans have put a great deal of effort into covering up Rep. Chris Chocola's (R-IN) history of vacillating on the phasing out of Social Security. In 2000, he advocated a complete phase-out then subsequently opposed a phase-out. Currently, he favors a partial phase-out.

Doege had planned to hold a program on the evening of May 9 to discuss Social Security with her parishioners. Speaking that evening was Notre Dame Professor Teresa Ghilarducci, a pension policy expert and member of the Pension Benefit Guaranty Corporation advisory board and the Board of Trustees of Indiana Public Employees. Messner, who is executive director of the Indiana Republican

Party, claimed to have placed the call to Doege, because it was his understanding "that Ghilarducci was active in Democratic politics and contributed to the campaign of Joe Donnelly, who ran against Chocola in last year's election." He said that information on the church program had come from Chris Faulkner, Chairman of the St. Joseph County GOP. However, there was no indication that Ghilarducci would speak about any candidate or upcoming election during her talk on Social Security.

Doege was "shaken" by the call, but the event went on as scheduled. "They called for a reason, and maybe that reason was to cut off free speech," she explained.

Messner continues to question the nature of the church's Social Security talk. "I guess the question is whether her (Ghilarducci) speaking is a partisan activity. Some folks in the South Bend community believe it probably was." Messner is erroneously equating advocacy on an issue -- where a church or charity's right to state a point of view is protected by the First Amendment -- with advocacy on elections or the defeat of candidates, which is prohibited for 501(c)(3) organizations.

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 tax code. To be eligible for tax-exempt status a 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," according to the IRS. This is an absolute prohibition, and violation of this regulation can result in a nonprofits loss of its tax-exempt status.

However, churches can address public policy concerns, ranging from abortion, gay rights and gun control to poverty, civil rights and the death penalty. They may support legislation pending in Congress or at the state level, or call for such legislation's defeat. They may also endorse or oppose ballot referenda. The discussion of public issues is a common practice in religious institutions -- and charities -- all over America.

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. This unequivocal provision of federal law has served as a valuable safeguard for the integrity of both religious institutions and the political process.

White House Demands Power to Restructure Government

The White House finally released last week its proposal for legislation that would grant the executive branch wide-ranging powers to restructure government programs and force agencies to plead the case for their very existence every 10 years.

Called the Government Reorganization and Program Performance Improvement Act, the proposal is the latest effort to give the White House sweeping powers to reshape federal programs. Two bills are pending in Congress that, similar to measures in the White House proposal, would establish a commission charged with developing government restructuring proposals, and earlier reports have suggested that Sen. Sam Brownback (R-KA) and Rep. Kevin Brady (R-TX) could be collaborating on a proposal to fuse their interests in restructuring authority and programmatic sunsets. In addition, Rep. Tom Davis (R-VA) has gone on record that giving the White House fast-track reorganization authority would be a priority this term, and current speculation is that he will be a backer of the White House proposal.

About the White House Proposal

There are three working parts of the proposal:

1. results commissions, for restructuring government programs;
2. sunset commissions, forcing agencies to plead the case for their existence every 10 years; and
3. fast-tracking commission decisions in Congress.

Results Commission

The results commission section of the proposal would give the White House the power to empanel one or more results commissions that would be charged with reviewing a White House proposal for restructuring, realigning, and consolidating government programs. The call for a commission would have to be authorized by statute, and the White House would "consult with" the minority and majority leaders of both chambers of Congress when selecting commissioners.

The commission would be free to deviate from the White House's original plan when devising its own suggestions, but only when "such changes are necessary to better accomplish the stated purpose of the President's reorganization proposal." The criteria for results commission review are incredibly broad: program areas in which multiple federal programs have "similar, related, or overlapping responsibilities" under the jurisdiction of multiple executive branch agencies and committees of Congress, and program areas in which reorganization may "improve the overall effectiveness, efficiency, or accountability of Executive Branch operations." The White House's announcement in the FY06 budget submission that this proposal was under development suggested that the results commissions would base their decisions on performance data, of the sort produced by the White House Program Assessment Rating Tool. The two pending bills that would establish similar restructuring commissions do, in fact, explicitly base commission decisions on performance data -- which, as has been discussed elsewhere, amount to politically manipulable rhetoric rather than neutral information.

Under the White House proposal, when a results commission returns its proposal, the White House would then have the option to endorse or reject the commission's proposal. If the White House approves of a result commission proposal to restructure programs, it would then forward the proposal to Congress, where it would be fast-tracked for approval.

Sunset Commission

The proposed sunset commission would be a standing body before which each federal program would be forced to plead the case for its very existence every ten years based on the following criteria:

- cost-effectiveness and achievement of stated purposes or goals;
- the necessity of the program in general , as well as in its current form;
- the existence of duplicates or conflicts with other programs *or the private sector*;
- whether statutory changes would improve program performance; and
- whether the program would benefit, in general, from reorganization in the executive branch.

Programs would automatically expire two years after the White House submitted a sunset commission report to Congress, unless Congress affirmatively reauthorizes the program or stays its demise for an additional two years. Note that the two-year expiration applies whether or not the sunset commission proposal is positive.

The proposal adds that any program "related to enforcing" health, safety, civil rights, or environmental regulations would be excluded from automatic sunsets "unless provision is made for the continued enforcement of those regulations." It does not, however, require that any such "provision... made" for continued enforcement be at the same level of funding or committed resources as the expiring program, and it does not mention programs not related to *enforcement* per se -- such as research programs that close existing data gaps -- that are still vital for sound regulatory policy.

Fast-Track

In both the sunset commission and results commission sections of the White House proposal, there is some provision for fast-tracking decisions through Congress -- be it results commission proposals or the schedule for sunset commissions to review programs.

The fast-track process constrains committee review and floor debate with a tight timeframe. Resolutions of approval of results commission proposals or of the sunset commission's schedule cannot be amended and are not subject to points of order. The final caveat is that the fast-track limitations are considered rules changes, subject to later rules changes as the chambers see fit.

Problems

There is no need for it. Congress already has the power to reorganize government programs when it determines the need to do so. Congress creates the agencies by statute in the first instance, and it revisits their effectiveness and continued existence each year through the budget process. The White House's proposal would usurp power from Congress by entrusting unelected commissions with important decisions about the structure and function of all government services.

The creation of the Department of Homeland Security is a case in point. The White House proposed realigning a number of programs in different cabinet departments into a new cabinet-level department, and Congress followed up in record time, illustrating its ability to move quickly when demonstrated need or political exigencies demand swift action. Congress should nonetheless retain the option to proceed more deliberately when White House proposals would have the effect of weakening public protections or needed services.

It would muzzle Congress when careful discussion is needed most. Decisions about the structure, function, and very existence of government services are too important to be ripped from the representatives who have been democratically elected to make them. Decisions this crucial -- about the government's priorities on issues such as health care, retirement security, environmental protection, and even homeland security and defense -- deserve the full debate and consideration of elected bodies. The proposal gives the White House the power to ram its proposals through Congress and imposes such severe limitations on debate that it would effectively muzzle our elected representatives from speaking on these vital issues.

It would decrease agency effectiveness. Agencies would be forced to draw precious time and resources away from their missions of protecting the public , in order to defend themselves against extinction or being restructured into irrelevance. Agencies would be required to comply with requests from sunset and results commissions for data and any other information the unelected commissions demand -- even information the agencies would have to create or obtain from scratch. The result is agency staff would be forced to divert time, energy, and resources that should be devoted to their congressionally-mandated missions of protecting the public interest. Imposing yet more analytical requirements will induce paralysis by analysis. Meanwhile, key battles that were fought and won in the past over civil rights, human services, and more would have to be fought again and again every 10 years.

It leaves room for bias. Both the sunset and results commission would be exempted from the open government and balance requirements of the Federal Advisory Committee Act. The commissions could therefore be packed with industry lobbyists and representatives from industry-funded anti-regulatory think tanks, and they could conduct their business -- about important issues of the structure and function of government services -- in secrecy. There are provisions in the White House proposal for public hearings and other forms of stakeholder participation, but those provisions are merely optional.

It puts the public interest at risk. The key provision that exempts programs responsible for enforcing public interest regulation from sunsets does not make this proposal any less a threat to the public interest. First, the exemption applies only to sunsets; key agencies are still vulnerable to being restructured into irrelevance. Second, the exemption addresses only programs related to *enforcement* of regulations; it does not address programs within agencies that conduct needed scientific research or that develop new protective standards. Finally, this proposal is only the first of many steps to come. Conservatives have vowed to produce regulatory sunset legislation that would apply to individual regulations, and press reports suggest that planned budget process reforms would sunset entitlement programs such as Medicaid and foster care for abused and neglected children.

Report of Newest U.S. Mad Cow Case Highlights USDA Failures

After seven months of silence, the U.S. Department of Agriculture (USDA) confirmed the second U.S. case of mad cow disease on June 24, highlighting the need for more stringent regulatory protections of the nation's beef supply.

Seven months before the USDA announcement, government scientists ran a test that indicated that a U.S. cow was infected with mad cow disease. The result of this test was never publicly disclosed. According to the *New York Times*,

> The explanation that the Department of Agriculture gave late Friday, when the positive test result came to light, was that there was no bad intention or cover-up, and that the test in question was only experimental.
>
> "The laboratory folks just never mentioned it to anyone higher up," said Ed Loyd, an Agriculture Department spokesman. "They didn't know if it was valid or not, so they didn't report it."

Inadequate Protections

The USDA's failure to promptly confirm and report the newest case underscores the inadequate protections currently in place at USDA to adequately protect the nation's beef supply. Safeguard against mad cow disease include surveillance requirements and direct interventions to prevent the spread of mad cow disease in cattle. The revelation of the second confirmed case of mad cow disease in the U.S. is a stark reminder that both of these elements of the mad cow firewall are insufficient.

Insufficient Surveillance

While Japan tests every cow and Europe tests one in four, the U.S. tests only one in 90. That low number is still an improvement from 2003, when the U.S. tested only 1 in 1,700. In order to fill in this testing gap, USDA relies on statistics.

Further, USDA has been resistant to implement the more stringent "Western blot" test for mad cow disease preferred in Europe. Interestingly, it was not the U.S.'s "gold standard" of mad cow testing, but rather the "Western blot" test performed by a British scientist, that confirmed the most recent case of mad cow disease.

Gaping Loopholes

Still, testing alone does not prevent the spread of mad cow disease but, rather, only monitors its occurrence in the cattle population. The greater threat to the U.S. beef supply lies in USDA's failure to close the significant loopholes that exist in the safeguards designed to prevent the spread of the disease. Despite promises made more than 18 months ago, USDA has yet to close those loopholes.

Mad cow disease is known to be spread through ruminant-to-ruminant feeding -- the rather innocuous term for the practice of feeding cows parts of other cows. Although the USDA banned direct ruminant-to-ruminant feeding in 1998, several loopholes still exist. For instance, cattle can be fed poultry litter that is contaminated with cattle meal; formula that contains cow blood; and even restaurant leftovers that include beef, all of which could transmit the deformed protein (or prion) that causes mad cow disease.

These loopholes have not yet been closed. "Once the cameras were turned off and the media coverage dissipated, then it's been business as usual, no real reform, just keep feeding slaughterhouse waste," John Stauber, an activist and co-author of *Mad Cow USA: Could the Nightmare Happen Here?*, told the Associated Press in June. "The entire U.S. policy is designed to protect the livestock industry's access to slaughterhouse waste as cheap feed."

Pattern of Cover-Ups?

Government inaction on mad cow disease may well stretch back to the early 1990s. Federal

investigators are now probing allegations from a former USDA veterinarian that the USDA covered up concerns over mad cow from the very beginning of USDA's mad cow surveillance program in 1990.

Moreover, the Canadian Broadcasting Corporation (CBC) recently uncovered that the USDA may have mishandled two 1997 tests of suspected mad cow. In one, an independent university lab concluded that the cow "had a rare brain disorder never reported in that breed of cattle either before or since -- not the dreaded [mad cow disease]." CBC discovered, however, that "key areas of the brain where signs of [the disease] would be most noticeable were never tested. The most important samples somehow went missing."

Hearing on Hit List Addresses Larger Regulatory Policy Issues

A House subcommittee hearing on the White House's anti-regulatory hit list became a venue for stakeholders to voice their positions on the broader ongoing debate over public protections and political interference in regulatory policy, pitting corporate-conservative talking points against evidence of the need for stringent safeguards.

The June 28 hearing of the regulatory affairs subcommittee of the House Government Reform Committee was the second to address the White House's hit list of regulatory protections to be weakened or eliminated. This time, the committee focused on regulations targeted by the hit list from the Department of Transportation (DOT) and Department of Labor (DOL), and in particular on two rules important to worker and public safety. The first protects workers from exposure to the carcinogen hexavalent chromium, while the second limits the number of consecutive hours that trucking companies can allow their drivers to work.

In the course of debating the merits of those pending rulemakings and whether they should even be included in a hit list of protections to be rolled back, the committee members and witnesses found themselves engaging in several larger and recurring debates in regulatory policy: transparency and political interference in protective policy; the relationship between regulatory protections and the competitiveness of American companies in a global marketplace; and the diversion of agency resources into navel-gazing analyses instead of action to protect the public.

Specific Rules

Little was learned about either the hours of service rule or the hexavalent chromium rule, because each is still a pending rulemaking about which the agencies were reluctant to divulge anything not already in the administrative record. Nonetheless, discussion of the two rules highlighted the public needs at stake in the White House hit list project.

Hours of Service

Rep. Stephen Lynch (D-MA), subcommittee ranking member, expressed concern that the hit list includes the Federal Motor Carriers Safety Administration's (FMCSA) current rulemaking on the hours truckers are allowed to work in a given time period. Public Citizen previously brought and won a lawsuit against the agency for issuing a rule that actually increased the number of hours truckers could drive consecutively, in the face of overwhelming research that shows a significant degradation in performance after 8 hours on the job. The U.S. Court of Appeals for the District of Columbia Circuit, in a ruling last July, held that the agency violated its statutory mandate by failing to consider the effect on the health of truck drivers and ordered the agency to revise its rules consistent with its opinion.

In the wake of the court decision, the agency rushed to petition Congress to reinstate the overturned rule for one year while it is reconsidered by FMCSA. This temporary measure expires in September.

Lynch expressed outrage that the agency had never considered the health of the driver, much less the safety consequences of having tired drivers operating large trucks on the nation's highways. Joan Claybrook, president of Public Citizen and former head of the National Highway Traffic Safety Administration, added that the White House Office of Management and Budget (OMB) has yet to explain why this rule was added to the hit list, when it is still actively in the rulemaking process in the wake of the federal court's rejection of the rule as an unwarranted rollback of already weak

safeguards.

Hexavalent Chromium

Claybrook testified that the Occupational Safety and Health Administration's (OSHA) hexavalent chromium rulemaking similarly should not be included on the White House hit list, citing near unanimous agreement in the scientific community that the substance is a lung carcinogen. Despite overwhelming evidence of health risks posed by the chemical, OSHA has dragged its feet for years on promulgating a lower permissible exposure limit (PEL). In 2002 Public Citizen sued, and the U.S. Court of Appeals for the Third Circuit ruled that OSHA's years of failing to promulgate a lower standard in the face of well documented and grave public health risks exceeded the bounds of reasonableness.

Industry groups continue to oppose the resulting proposed PEL of 1 microgram per cubic meter via OMB's hit list, citing a small, industry-backed study. Lynch and Claybrook pointed out the methodological superiority of a much larger study that reveals a much greater risk. They also suggested that the PEL could be specially tailored to accommodate two small industry subcategories that would be hardest hit by the costs of the rule, rather than altering a proposed PEL that is already within the reach of most of the affected industries.

Larger Problems

In the course of addressing the specific issues of the hit list's inclusion of hexavalent chromium and hours of service, the hearing addressed larger issues that recur throughout regulatory policy debates.

Lack of Transparency

The hit list is only the latest in a long line of OMB interventions in the regulatory process shrouded in secrecy. In this case, although there was transparency in the process of soliciting nominations for the hit list, it is unclear how the OMB and agencies chose which rules to include on the final hit list. Throughout the hearing, Lynch attempted to shed light on this murky process. Despite diligent questioning and obvious frustration with the process's lack of transparency, Lynch was unable to elicit from witnesses testifying on behalf of either DOL and DOT a clear picture on how the agencies derived the list of rules designated for "reform." DOT General Counsel Jeffrey Rosen even suggested that the final decision was made by OMB itself.

Claybrook testified that the hit list is an unwarranted political intrusion in agency decisions. "There are two fundamental hypocrisies in OMB's interference in agency activities in the form of the 'hit list,'" she said. "One, the nomination and selection process for OMB's hit list lacks the minimum indicia of accountability and transparency that it would reasonably expect of any agency process; and, two, its unwarranted and unauthorized interference in agency and congressional priorities is unsupported by any analysis of the costs and benefits of the regulatory rollback it recommends or of the harm caused by delay in agency issuance of important new rules. The consequence of these two flaws is that OMB's list is intellectually incoherent."

Regulation as Scapegoat

Rep. Candice Miller (R-MI), subcommittee chairperson, repeatedly blamed government and regulation for the ills of the manufacturing sector. Claybrook pointed out that this justification for the assault on regulation might be "convenient lobbying strategy," but "it is far easier to blame the rules than deal with the truth. A wealth of research shows that direct labor costs, such as the wages for comparably skilled workers, are the major driver for industrial decisions to relocate jobs, not regulatory costs, which are less than one percent of the cost of shipped goods." Instead of regulation, the problems of manufacturing may be caused by unfair trade agreements that turn international labor cost differences into a significant problem for domestic industry.

In fact, research suggests that stringent health, safety and environmental protections in industrialized nations may actually *stimulate* growth and competition. In the face of dramatic evidence to the contrary, Miller's remarks at the hearing seemed to suggest that all the U.S. government needs to do is to roll back environmental, health, and safety regulations and the hemorrhaging of U.S. jobs to countries with far cheaper labor costs would stop.

Value of Regulation

Miller and industry witnesses repeatedly equated *older* regulations with *outdated* rules. They repeatedly cited examples of industry consensus standards, which may be written in more contemporary terms than some decades-old regulations but may not necessarily be more stringent than existing regulations. They also stressed their enthusiasm for the hit list project, which industry uses as one-stop shopping for attacking regulation. In addition, they expressed their support for regulatory "sunsets," automatic expiration dates for all rules on the books, even such proven protections as the ban on lead in gasoline. At one point in the hearing, Miller cryptically added that legislation would be introduced soon, although it was unclear if she was referring to codifying industry consensus standards or to mandating regulatory sunsets.

Claybrook offered an alternative view of regulation as "a modern form of the social contract. They embody a fundamentally democratic idea about the exchange of responsibilities among participants in a society."

She also offered five principles that stress the value of regulatory protections:

1. Corporations, like people, should clean up after themselves and be required to prevent foreseeable harm caused by their actions and choices.
2. Government action should correct social and political wrongs; set out fair rules for participation; distribute resources fairly; and preserve and protect shared resources and the public commons.
3. Government activity both reflects and enacts moral values and collective goals—clarifying who we are and what matters to us.
4. People have a responsibility to actively respect the lives and health of people we do not know, as well as the natural environment and its limitations and gifts.
5. Voluntary risks are morally distinct from risks imposed upon the public without their knowledge or consent.

"The principles encapsulate some of what is systematically disregarded by OMB's cynical view of both government and the people whom government protects under the constitutional prescription that it 'promote the general Welfare,'" Claybrook concluded.

These recurring debates will undoubtedly be repeated in the near future as anti-regulatory policy proposals are introduced.

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

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Estate Tax Could See Senate Floor, Despite No Concrete Compromise

Although Senate Republicans still lack the 60 votes needed for estate tax repeal, they may schedule a procedural vote, in order to assess where each Senator stands on the issue, according to media reports late last week. The vote would come after weeks of Senate negotiations on possible reform specifics that have yielded little in the way of a compromise.

If a vote does occur this week, it would likely serve to increase pressure on Democrats to reach a compromise, and also, according to a July 22 *Wall Street Journal* article, to "smoke out reluctant senators" just before the August recess.

Despite the possibility of an estate tax vote, the thus-far unsuccessful efforts of Senate Finance Committee Chair Jon Kyl (R-AZ) to reach a compromise with Finance Committee Ranking Member Max Baucus (D-MT) seem to have created a rift within the anti-estate tax faction. While many Republicans are fighting for estate tax "reform" to greatly increase the exemption level and reduce its top rate, others are becoming more vocal in criticizing this effort and arguing that Kyl should fight only for full repeal. This fissure was demonstrated in a July 20 letter to Majority Leader Bill Frist (R-TN), from a number of Washington's most powerful business groups and anti-tax leaders. The letter urges Frist to "take the fight for full repeal to the Senate floor. We believe it would be a serious mistake, and exceptionally difficult to again explain to small business, if a compromise is advanced without first giving the small business community the opportunity to actively put their resources to the task of delivering the votes for full repeal."

Also thwarting efforts for repeal were comments made by Federal Reserve Chairman Alan Greenspan in testimony given July 21 before the Senate Committee on Banking, Housing, and Urban Affairs. Greenspan reiterated his opposition to tax-cut proposals that would increase the deficit and, when

questioned by Sen. Charles Schumer (D-NY), agreed that now would not be a good time to move forward with estate tax repeal, if it did not include PAYGO offsets. According to the conservative estimates of the Joint Tax Committee, full repeal of the estate tax would cost $290 billion from 2006 - 2015.

Further undermining anti-estate tax arguments was the release this month of a Congressional Budget Office (CBO) report on the number of farms and small businesses actually affected by the estate tax. The report, put together at Baucus' request, effectively lays to rest the myth that the estate tax poses a significant threat to America's farms and small businesses by levying too large a tax on families who can not afford to pay it. This has been a main claim made by anti-estate tax proponents, including President Bush recently, making the CBO report all the more timely and significant.

The report finds that very few farms are affected by the estate tax with 2005 exemption levels (and thus even fewer would be affected by exemption levels through 2009). In fact, if the current exemption level of $1.5 million were to have been in place in 2000, only 300 farms would have owed any estate tax. Raising the exemption to $3.5 million, the 2009 level, drops the number of farms affected to 65.

Notably, the CBO found that of the few farms that would owe taxes, most of them had sufficient liquid assets, so that heirs could pay the tax without needing to consider selling any portion of the farm. Using farm data for the year 2000, the CBO found that if a $3.5 million exemption had been in place, only 13 farms in the entire nation would lack funds to fully pay the tax, and for these farms, other payment options are available to spread out the estate tax payment over as much as 14 years.

While some lawmakers with the power to vote on repeal (or reform) of the estate tax are still under the impression that a vote to preserve the estate tax is a vote against family farms and small businesses, the CBO report makes clear that this is not the case. It states that exemption levels of "$1.5 million, $2 million, or $3.5 million… along with a 48 percent tax rate and a large Qualified Family-Owned Business Interest (QFOBI) deduction, would substantially reduce the number of small businesses and farmers affected by the estate tax."

As lawmakers ponder the future of the estate tax this week, they should take into consideration the findings of the CBO report, as well as Greenspan's testimony. Eliminating yet another revenue source at a time when deficit spending is out of control will only further throw off the nation's fiscal balance, all while giving more kickbacks to the wealthiest members of society. You can take action on this issue by contacting your Senators and telling them to vote no on repeal or irresponsible reform, and by writing a letter to the editor of your local paper using this US Action web tool.

Updated Status of FY 2006 Appropriations Bills

For more information on appropriations bills:
Click here.

Bill	House	Senate
Agriculture	Roll Call Vote, 6/08/05, passed 408-18	Committee Markup, 6/23/05
Science, State, Justice, Commerce (House only)	Roll Call Vote, 6/16/05, passed 418-7	
Commerce, Justice, Science (Senate only)		Committee Markup, 6/23/05
Defense	Roll Call Vote, 6/20/05, passed 398-19	
District of Columbia	Now part of the House Transportation-Treasury bill	Committee Markup, 7/21/05

Energy & Water	**Roll Call Vote, 5/24/05, passed 416-13**	**Roll Call Vote, 6/30/05, passed 92-3**
Foreign Operations (House only)	**Roll Call Vote, 6/28/05, passed 393-32**	
State, Foreign Operations (Senate only)		**Roll Call Vote, 7/20/05, passed 98-1**
Homeland Security	**Roll Call Vote, 5/17/05, passed 424-1**	**Roll Call Vote, 7/14/05, passed 96-1**
Interior & Environment (House only)	**Roll Call Vote, 5/19/05, passed 329-89**	
Interior (Senate only)		**Roll Call Vote, 6/22/05, passed 94-0**
Labor, HHS, Education	**Roll Call Vote, 6/24/05, passed 250-151**	**Committee Markup, 7/14/05**
Legislative Branch	**Roll Call Vote, 6/22/05, passed 330-82**	**Passed by Unanimous Consent, 6/30/05**
Military Quality of Life, Veterans Affairs (House only)	**Roll Call Vote, 5/26/05, passed 425-1**	
Military Construction, Veterans Affairs (Senate only)		**Committee Markup, 7/21/05**
Transportation, Treasury, HUD, Judiciary, D.C. (House only)	**Roll Call Vote, 6/30/05, passed 405-18**	
Transportation, Treasury, Judiciary, HUD (Senate only)		**Committee Markup, 7/21/05**

Tax Panel Recommends Alternative Minimum Tax Repeal

Although they are not scheduled to submit recommendations to the Treasury for two more months, the nine experts serving on the President's Advisory Panel on Tax Reform publicly announced their first suggestion on reforming the tax code to make it simpler, fairer, and more pro-growth. Following a public meeting last Wednesday, during which reform options were discussed rather than testimony being given by tax experts (as was the case at all previous meetings), the panel announced their recommendation to repeal the alternative minimum tax (AMT). How the federal government will replace the $1.2 trillion the Treasury expects to collect from the tax over the next ten years was not indicated by the panel.

Congress enacted the alternative minimum tax in 1969 to snare affluent tax dodgers; however, in recent years, the tax has affected an increasing number of taxpayers, many of whom are not affluent by today's standards. The AMT currently affects approximately 4 million families; however it is expected that as many as 21 million families will pay the tax next year, and as many 51 million families in the coming decade. A number of lawmakers, such as Sen. Charles Grassley (R-IA), have outspokenly opposed the AMT for this reason; however, many tax experts believe that reform, not repeal, is the fiscally responsible solution.

Repeal of the AMT would be a significant hit to federal revenue sources, especially if combined with possible extension of Bush's 2001 and 2003 tax cuts, and repeal of the estate tax, which could reach the Senate floor as early as next week. Tax Policy Center analysts note that repeal of the AMT would be more costly by the end of the decade than repeal of the regular income tax.

Those in favor of preserving the AMT argue that reform is needed instead of repeal, in order to preserve this valuable source of revenue, keep the tax code progressive, and ensure that wealthy taxpayers are not able to avoid paying taxes completely. Panel member Elizabeth Garrett, a public policy professor at the University of Southern California, voiced her disapproval with the panel's recommendation, calling the decision to recommend repeal "not fair," and noting that taxpayers lose confidence in a system that allows people to escape taxation -- a situation the AMT was created to

prevent.

Options other than repeal include indexing the AMT for inflation, which would reduce the number of taxpayers subject to the AMT in 2010 by 82.5 percent overall and would allow 98 percent of the middle-class to avoid the tax all together. Implementing provisions such as dependent personal exemptions and nonrefundable credits would also help ease the burden on middle-class taxpayers who might otherwise currently pay the AMT.

In recent years, Congress has chosen to address the AMT problem with temporary fixes to prevent the number of taxpayers it affects from growing as fast as experts have anticipated. It is likely that another temporary fix will be passed this year, despite bipartisan efforts in the Senate to do away with the tax altogether. Sen. Max Baucus (D-MT) and 20 cosponsors introduced legislation (S. 1103) on May 23 that would permanently repeal the tax but does not include any provisions to offset the huge cost of the bill.

Gov't Biomonitoring Study Highlights Public Exposure to Harmful Chemicals

The Center for Disease Control and Prevention (CDC) released its *Third National Report on Human Exposure to Environmental Chemicals*, the most extensive assessment ever made of the US population's exposure to chemicals in the environment. The July 21 study found troubling levels of toxics, including metals, carcinogens and organic toxics like insecticides, are being absorbed by people around the country.

The CDC report details 2,500 peoples' exposure levels to 148 chemicals using a technique called biomonitoring. Biomonitoring, the latest and increasingly common tool in environment and health research, enables researchers to detect how much of the chemicals present in the environment and consumer products actually cross over into our bodies.

Nearly six percent of women of childbearing age had mercury levels near what the CDC considers the 'danger level," according to the report. The CDC also discovered widespread exposure among participants to phthalates, a potential reproductive toxin found in everyday items such plastic containers for left-over food and cosmetics.

Biomonitoring studies, such as the CDC report, can help improve public health policy by indicating trends in chemical exposures, identifying disproportionately affected and particularly vulnerable communities, assessing the effectiveness of current regulations and setting priorities for legislative and regulatory action. After years of progress in pollution prevention and reduction of toxic releases, these biomonitoring studies clearly indicate that more needs to be done to protect public health.

The Environmental Working Group (EWG) released its own biomonitoring study, *Body Burden, The Pollution in Newborns*, on a July 14 that analyzed umbilical-cord blood samples. The 10 samples contained 217 toxic chemicals and 180 carcinogens. Mercury, fire retardants, pesticides and the Teflon chemical PFOA were among the chemicals EWG discovered in the samples. From the study results, EWG called on the government to ensure children are protected from chemical exposures, and that exposure to industrial chemicals before birth be eliminated entirely.

Many note that the CDC's biomonitoring study could be more useful if it examined a much larger population or focused on a smaller area, as most toxic exposures occur locally. Such examinations could result in the ability to draw stronger connections between sources of toxics, at-risk populations, and pollution prevention measures industries should take.

California is currently considering such a localized biomonitoring study. A bill before the California state legislature would create the first statewide, community-based biomonitoring program. The bill (SB 600), was introduced in February and passed out of the California Assembly Health Committee June 28, despite heavy pressure from industry. Supporters say that the bill will help scientists, medical professionals, decision-makers and community members better understand the effects of environmental contaminants on human health. They are hopeful the bill will clear its next hurdle in the Assembly Appropriations Committee.

Stakeholders Weight In At First-Ever Congressional Hearings on Data Quality Act

The Government Reform Subcommittee on Regulatory Affairs held Congression's first hearing on the Information Quality Act, also known as the Data Quality Act (DQA) on July 20. The hearing reviewed implementation of the DQA at three federal agencies, the Environmental Protection Agency (EPA), the US Fish & Wildlife Service (FWS), and the Department of Health & Human Services (HHS). The subcommittee also heard from interested stakeholders, including industry associations that have filed data quality challenges and public interest groups seeking the policy's repeal.

The legislation has received a great deal of attention and generated controversy since the Office of Management and Budget (OMB) produced DQA guidelines for agencies in 2002. Supporters of the legislation, primarily industry groups, claim the law simply helps prevent the government from using bad data, while opponents, which include environmental and citizens groups, assert that the law is actually an attempt to expand industrial influence over the regulatory process, cloaking challenges by industry behind a good government veneer. However, neither before its passage, as a last minute rider on an appropriations bill, nor in the years since its passage, has any Congressional committee held a hearing on this contentious program -- until now.

Agencies appeared supportive of the DQA, reporting that they believe in the importance of and principles behind the law, in order to maximize the quality of data used by agencies. However, agencies did acknowledge that DQA efforts have diverted resources and that requests have been more difficult to respond to in a timely manner. None of the agencies had requests or suggestions for changes to the DQA, holding it was too soon to pass judgment on its effectiveness. As of June 2005, HHS had received a total of 22 requests, FWS had received 11, and the EPA had received 33.

The stakeholder panel offered a richer and more diverse set of viewpoints. Opposing the DQA, Sidney Shapiro of the Center for Progressive Reform (CPR) told the subcommittee that analysis of the challenges filed thus far indicate that the DQA is being misused by industry to challenge and delay policy decisions by agencies. Shapiro reported that very little correction of information was taking place under the DQA, primarily because there is no need for such a law, as agencies have long had effective data quality programs in place. CPR detailed eight different methods industry groups have employed to misuse the DQA, in order to oppose or weaken federal regulations.

Jeff Ruch of Public Employees for Environment Responsibility reported that his organization had used the DQA but found that it insufficiently addressed the more fundamental problem of open scientific dialogue, free from political interference. Ruch reported that currently government-employed scientists are not free to express their scientific opinions, if those opinions differ from the administration's political agenda, for fear of being fired.

Industry associations, including the U.S. Chamber of Commerce and the Coalition for Effective Environmental Information, told the subcommittee that there were no problems with the DQA, other than agencies were not enforcing it strictly enough in their opinion. The judicial reviewability of DQA was a major issue raised by the regulated community during the hearing. There have been several court rulings that agency decisions on the DQA challenges are not reviewable by the court. It is clear that industry groups would prefer to have the option of taking the question of data use to the courts and away from agencies. During questioning Rep. Candice Miller (R-MI), chair of the subcommittee, focused on the issue of judicial reviewability, which may indicate her intention to pursue congressional action to add this feature to the law.

Oregon Industries Escape Public Accountability for 'Toxic Use Reduction'

Last month, Oregon lawmakers eliminated a provision in the state's Toxics Use and Hazardous Waste Reduction law that required industries to produce annual reports on 'toxics use reduction.' The annual reporting requirement was replaced with a one-time report on pollution prevention plans, in a move that has shocked and angered state environmental leaders, who pushed to expand, not reduce, reporting on and public access to pollution prevention information.

Since 1989, Oregon state law has required industries to file annual Toxics Use Reduction (TUR) plans, which encouraged companies to cut their use of toxic chemicals by requiring them to examine practices, inventory toxics chemicals, and investigate alternative products and processes. However, the reports were never submitted to the state's Department of Environmental Quality (DEQ), nor did the law grant citizens access to them. The Oregon Toxics Alliance and other environmental groups lobbied the state legislature last month to require industries to submit their TUR reports to the state's DEQ, in order to gain public access to the reports, and thereby increase corporate accountability on toxics reduction.

Unfortunately, the legislature took the opportunity to pass Senate Bill 43, which grants public access to the reports but eliminates the annual reporting. Under the legislation, signed into law by Governor Ted Kulongoski on June 9, companies must submit a one-time summary, which be made available on the Internet, detailing reductions or plans to reduce chemical use. Many question the usefulness of these public reports as a replacement for annual reporting that would have enabled concerned citizens to evaluate companies' progress on toxic reduction plans.

Only Oregon and Massachusetts use TUR to monitor and reduce toxics. However, unlike Oregon, Massachusetts requires TUR reports to be publicly available. This availability enables the public, government regulators, technical experts and scientists to collaborate on determining the best ways to reduce toxics. The more open approach has reduced the amount of hazardous waste generated in Massachusetts by 67 percent over the last 10 years, according to the Massachusetts Toxics Use Reduction Institute UMASS Lowell.

The federal Toxics Release Inventory (TRI) also demonstrates the importance of both public disclosure and regular reporting. Under TRI industries publicly disclose their toxic pollution each year. Public disclosure under the TRI program has helped reduce pollution.

FEC Loses Campaign Finance Appeal Regarding Non-Profit Election Communication

On July 15 the U.S. Court of Appeals for the D.C. Circuit rejected a Federal Election Commission's (FEC) appeal, upholding a lower court decision that invalidated many FEC regulations that were implemented under the Bipartisan Campaign Reform Act of 2002 (BCRA). The FEC must now decide whether to appeal the ruling or write new rules in line with the court's decision. Among the regulations invalidated in the suit are exemptions to the ban on "electioneering communications" for unpaid broadcasts and for 501(c)(3) organizations. The 501(c)(3) exemption is on the FEC's rulemaking calendar for consideration, but no date has been set. In the meantime, the exemptions remain in effect as the result of a stay.

The district court invalidated fifteen FEC regulations implementing BCRA in September 2004, finding some inconsistent with BCRA and others arbitrary and capricious. The FEC appealed the district court decision with regard to five of the rules: standards for "coordinated communication," definitions of the terms "solicit" and "direct," the interpretation of "electioneering communication," allocation rules for state party employee salaries, and a de minimis exemption from allocation rules governing the mix of regulated and unregulated funding for get-out-the-vote, voter identification, and voter registration that does not mention a Federal candidate.

The appeals court found that the electioneering communications exemption for unpaid broadcasts was unwarranted under BCRA, as the legislation does not require electioneering communications to be purchased. In addition, the court found that the exemption falls outside the FEC's power to create exemptions, since an unpaid broadcast could promote, support, attack or oppose a federal candidate. This means that all electioneering communications 30 days before a primary and 60 days before an

election could be restricted, except announcements of candidate debates and forums.

The FEC could request review by the entire Circuit Court panel or appeal directly to the Supreme Court. If it decides not to appeal, it must re-write the rule to conform to the court's opinion.

Extent, But Not Details, of FBI Spying on Nonprofit Groups Revealed

Recent filings in a lawsuit against the Federal Bureau of Investigation (FBI) by the American Civil Liberties Union (ACLU) and other nonprofits expose FBI use of counterterrorism task forces to monitor and investigate the activities of groups that have vocally opposed Bush administration policies. The suit, brought under the Freedom of Information Act (FOIA), seeks expedited processing of the ACLU's request for records on surveillance of nonprofit groups and information about the structure and funding of the FBI's Joint Terrorism Task Force program. The Justice Department, representing the FBI, says it needs up to a year to process the FOIA request.

The ACLU suit seeks FBI files on itself, peace groups Code Pink and United for Peace and Justice (UFPJ), Greenpeace, People for the Ethical Treatment of Animals, the American-Arab Anti-Discrimination Committee and the Muslim Public Affairs Council. The ACLU has also filed FOIA requests for FBI records on over 100 organizations from around the country. A preliminary response from Justice indicates that the FBI has 1,173 pages of documents on the ACLU and 2,303 pages on Greenpeace. The ACLU is asking the court to order the FBI to speed up processing the request. Files released so far show the types of activities the FBI has seen fit to monitor:

- A memo was sent from counterterrorism personnel in the FBI's Los Angeles office to similar offices in New York, Boston and Washington about UFPJ plans for demonstrations during the political conventions in 2004. The memo notes alleged anarchist connections of some individuals in the group, and reveals monitoring of their website, quoting extensively from it.
- Seven pages of documents focus on the American Indian Movement of Colorado's plans for a Columbus Day demonstration in 2002.

The ACLU said the suit was filed after it received complaints from a number of activists, who were questioned by FBI agents in the months before the 2004 political conventions. Executive Director Anthony Romero said, "I'm still somewhat shocked by the size of the file on us. Why would the FBI collect almost 1,200 pages on a civil rights organization engaged in lawful activity? What justification could there be, other than political surveillance of lawful First Amendment activities?"

Greenpeace's U.S. Director John Passacantando went further, saying, "If the F.B.I. has taken the time to gather 2,400 pages of information on an organization that has a prefect record of peaceful activity for 34 years, it suggests they're just attempting to stifle the voices of their critics."

The Justice Department said its activities are aimed at preventing crime, not suppressing dissent. However, there is growing concern among protest groups and others in the nonprofit sector that legitimate civil disobedience is being equated with terrorist violence.

IRS, FEC Dismiss Complaints Against Falwell Groups

Nonprofits associated with the influential fundamentalist preacher, the Rev. Jerry Falwell, accused of violating both Internal Revenue Service (IRS) and Federal Election Commission (FEC) rules have been cleared of wrongdoing. The first complaints, filed by the Campaign Legal Center, claimed an endorsement of President Bush in a newsletter on the Falwell Ministries website during the 2004 campaign violated both tax and election laws. The second, filed by Americans United for Separation for Church and State (AU), alleged a seminary violated an IRS prohibition on partisan activity when Falwell endorsed Bush during a pre-election speech there. AU also filed a complaint with the IRS over the *Falwell Confidential* endorsement. Neither agency has made its findings public, and details of the agencies' decision-making remain sketchy.

News of the FEC and IRS investigations was recently released by Matthew D. Staver, an attorney for Liberty Counsel, who represented Falwell. The first set of complaints involved a July 2004 web posting

of a newsletter, *Falwell Confidential* that contained an endorsement by Falwell of President George W. Bush in his re-election bid. The newsletter was also widely circulated in an email that included a solicitation of donations for and link to a conservative political action committee, the Campaign for Working Families.

Americans United for Separation of Church and State filed a complaint with the IRS requesting an investigation. The Campaign Legal Center also filed a complaint with the IRS alleging violation of the prohibition on intervention in elections by 501(c)(3) organizations, as well as a complaint with the FEC alleging illegal general public endorsement and solicitation of contributions by a corporate entity.

Falwell responded that the communications were paid for by a 501(c)(4) entity, the Liberty Alliance, and that he was speaking as an individual and publisher and was thus legally entitled to express his views. The communications were made using corporate facilities, including the groups' shared website, which does not clearly distinguish between the 501(c)(3) and 501(c)(4) entities. It bears the name of the Jerry Falwell Ministries, the 501(c)(3), but in the About Us section says it is a project of the Liberty Alliance, the 501(c)(4). The FEC's reasons for dismissing the complaint were not given, but it appears the 6-0 vote was based on the media exemption to FEC rules regarding endorsements. Staver asserts Falwell should not lose his editorial free speech rights simply because he is also a preacher.

The second complaint involved a speech by Falwell at the Southwestern Baptist Theological Seminary in Fort Worth, Texas in August 2004. Falwell gave Bush his personal endorsement in the speech, which was reported in the press. In dismissing the complaint, the IRS seems to have given wide latitude for speakers at organizational events to express personal, partisan opinions. Stavers expressed concerned that the complaint was filed based on a newspaper report.

The IRS complaints and the decisions clearing Falwell's organizations reflect growing legal confusion about the difference between statements by individuals and statements attributed to organizations, and what constitutes genuine issue advocacy, as opposed to partisan electioneering. In 2004 the IRS initiated a new process to review cases of potential violations on the ban on partisan activity by 501(c)(3) organizations, the Political Intervention Program. The process came under fire when the National Association for the Advancement of Colored People was audited because its chair criticized President Bush during a July 2004 convention speech. The IRS program examined 80 cases involving alleged prohibited intervention in the 2004 election. IRS privacy rules prohibit it from publishing details about these cases, so little is known about the kinds of activities that are considered violations of the ban.

Feingold Introduces Changes to Lobbying Disclosure Bill, but Passage Unlikely This Year

On July 14, Sen. Russ Feingold (D-WI), introduced the "Lobbying and Ethics Reform Act of 2005" (S. 1398), a bill that amends the Lobbying Disclosure Act (LDA) to require more extensive reporting for lobbying firms and nonprofits. The bill would increase grassroots and coalition lobbying disclosure requirements, curb privately funded travel by members of Congress, and strengthen enforcement and oversight of ethics and lobbying disclosure rules by the Senate Clerk's office.

The bill is substantially similar to the Special Interest Lobbying and Ethics Accountability Act (H.R. 2412), introduced in the House on May 14 by Reps. Marty Meehan (D-MA) and Rahm Emanuel (D-IL). Both bills would require registered lobbyists to disclose amounts spent on grassroots lobbying, although communications with members would not be considered grassroots lobbying. In addition both bills seek to provide transparency of anonymous lobbying coalitions by requiring members to report their involvement. There is a total exception for all 501(c)(3) organizations from the coalition provision. 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 a specific issue for which it engaged the person filing the registration statement." The term "substantial" is undefined. An additional provision added by Feingold would increase the penalty for failure to comply with lobbying disclosure requirements, raised from $50,000 to $100,000. A summary of Meehan's bill can be found here.

Neither bill would change the current provision that allows 501(c)(3)s using the expenditure test to measure their lobbying limit to continue filing Form 990 in lieu of LDA forms. Form 990 already

includes information about grassroots lobbying costs, but has a narrower definition of direct lobbying than the LDA. For example, while the LDA includes reporting on influencing executive branch policies, the Form 990 does not.

The legislation faces tough opposition, both in the House and the Senate. Meehan's bill currently has 72 Democratic cosponsors, but no Republican has signed on in the House. Feingold has already publicly predicted that the Senate will not take up legislation to overhaul lobbying regulation this year, and his bill currently has no cosponsors.

Both the Meehan and Feingold bills respond to recent scandals involving Congressional travel paid for by a nonprofit serving as a conduit for a registered lobbyist. Lobbyists Jack Abramoff and Michael Scanlon pocketed millions of dollars in donations to nonprofit groups they controlled or on whose board they sat, prompting hearings in the Senate. This and other recent reports of professional lobbyists using nonprofits to avoid ethics and disclosure rules have raised calls for greater transparency and oversight of the identity of donors and of financial transactions between groups. However, neither bill may move, as each adds new restrictions on the ability of Congressional members to become paid lobbyists after leaving public office, something many current members are unlikely to support.

Legislative Update: Bills to Watch

The following is an update on bills introduced so far in the 109th Congress that could affect regulatory policy in the public interest.

By Bill Number | By Subject

Bills to Watch

H.R. 185 — Program Assessment and Results Act

This bill would essentially codify the Program Assessment Rating Tool, a highly political assessment scheme the White House uses to justify its decisions to slash agency budgets and to distort agency priorities. More information at www.ombwatch.org/regs/incongress/para. Although it has been reported favorably out of committee, the bill has not proceeded to the floor because, reportedly, it has been held up by the Appropriations Committee.

H.R. 576 — Joint Committee on Agency Rule Review Act

This bill would amend the Congressional Review Act (CRA) by creating a joint congressional committee devoted to agency rule review. Resolutions of disapproval under the CRA would no longer be referred to the committee of jurisdiction in each chamber but would instead be referred to the new joint committee. Agency rules being challenged under the CRA would thus be scrutinized not by the members of Congress with the most expertise in the relevant subject matter but, instead, by a new joint committee that not only would lack expertise but also could more easily be targeted by corporate lobbyists.

H.R. 682 — Regulatory Flexibility Improvements Act

This bill would extend the section 610 reviews of the Regulatory Flexibility Act to all rules on the books which the agency determines have a significant economic impact on a significant number of small entities. By requiring agencies to review all such rules every ten years, this bill would drain agency resources by diverting them away from protecting the public and into navel-gazing analyses. Even proven protections such as the ban on lead in gasoline and safeguards protecting workers against black lung would be subject to these reassessments. These analyses would be even more burdensome than under current law, because the bill would force agencies to calculate reasonably foreseeable *indirect* economic effects, which agency representatives at a recent Senate roundtable suggested would be so speculative as to be useless for policymakers.

Additional sections would do the following:

- Further expand the scope of rules subject to the Regulatory Flexibility Act by including amendments to land management plans, rules affecting Indian tribes, IRS recordkeeping requirements, and regulations governing grants to state and local governments.
- Extend Reg Flex analytical burdens to a whole new universe of public protections — human services rules, such as those protecting abused and neglected children in federally-funded child welfare programs — by including nonprofits in the definition of small entities and expanding the scope of Reg Flex to regulations governing grants to state and local governments.
- Give corporate interests an even greater advantage in the regulatory process by giving the head of the Small Business Administration's Office of Advocacy (a taxpayer-funded office that lobbies for corporate special interests) a preview of proposed rules before they are published in the Federal Register and increased opportunities to intervene in the process.

An additional section would actually give SBA's Office of Advocacy the power to write regulations governing all agencies' compliance with the Regulatory Flexibility Act. Given that Advocacy is a taxpayer-funded voice for business interests, this provision is particularly troubling.

H.R. 725 — Paperwork and Regulatory Improvements Act

Resurrected from the 108th Congress, this bill would authorize a pilot study of "regulatory budgeting." In this kind of bizarre rationing of our public protections, agencies would be given a fictional budget of total costs that can be imposed on corporate special interests through regulations; then, when agencies hit that cap, they would be prohibited from issuing any new protections of the public interest, no matter how urgent the need. Another provision duplicates H.R. 1167.

H.R. 931 — Congressional Responsibility Act

This dangerous bill would essentially revive the Nondelegation Doctrine by statute. The bill would require Congress to act before any final regulation could actually take effect. Upon issuing a new final regulation, an agency would be required to send a report to Congress with the text of the regulation and explanatory material. A member of Congress would then have to introduce a bill specifically allowing that regulation to take effect, and the bill would be subject to a fast-track process with limits on debate and no opportunity for amendment.

A garbled judicial review clause may clarify that the regulation but not the bill itself constitutes final agency action, but it could possibly mean that the congressionally endorsed final rule escapes Administrative Procedure Act review.

H.R. 973 — Program Reform Commission Act

This bill would create a purely legislative commission charged with reviewing agency recommendations for programs to be eliminated and then suggesting, based on those recommendations or on its own initiative, plans to reorganize government programs. The coda to the bill is a sense-of-Congress provision that supports swift review of commission plans without actually imposing a fast-track process.

H.R. 1167 — Amending Truth in Regulating Act

This bill would amend the Truth in Regulating Act by making permanent a pilot project in which the Government Accountability Office is to prepare, upon request of a member of Congress, an independent cost-benefit evaluation of new economically significant regulations. These new analyses could overwhelm GAO and divert it from its investigative and reporting functions.

H.R. 1229 — Federal Consent Decree Fairness Act

This bill is the companion in the House to S. 489.

H.R. 3143 — Major Regulation Cost Review Act

This bill, like H.R. 682 and S. 1388, would make the Regulatory Flexibility Act even more burdensome

by requiring section 610 reviews of most important rules on the books. Whereas the other two bills would require these reviews every 10 years of rules determined to have a significant economic impact on a significant number of small businesses, this bill would require reviews every *five* years of all major rules as defined by the Congressional Review Act. Moreover, this bill would demand that agencies conduct cost-benefit analyses (observing the strictures of OMB Circular A-4) during the section 610 reviews, and OMB would be expected to use those analyses in its annual regulatory accounting report. Expecting agencies to conduct cost-benefit analyses — which are time-intensive and expensive to conduct — of every major rule on the books every five years would be a crushing burden that would leave government agencies little if any time left for actually protecting the public.

H.R. 3148 — Joint Administrative Procedures Committee Act

This bill essentially duplicates H.R. 576 but adds some disturbing additional features: it would charge the new joint congressional committee with reviewing the agencies' semiannual regulatory agendas and examining, at its leisure, any existing regulatory protections.

H.R. 3276 — Government Reorganization and Improvement of Performance Act

This bill officially introduces the White House's proposal for fast-track government reorganization authority and a sunset commission before which agencies would be forced to plead for their lives every 10 years. Click here for analysis, and here for a statement from OMB Watch on the proposal.

H.R. 3277 — Federal Agency Performance Review and Sunset Act

This bill basically introduces a standalone sunset commission proposal without the accompanying fast-track reorganization authority of H.R. 3276 and S. 1399.

S. 489 — Federal Consent Decree Fairness Act

This bill attacks consent decrees (the agreements that resolve cases so that they don't have to go all the way to trial) in federal court cases against state and local governments for violating federal law and ignoring people's rights. It would require these agreements to expire any time there is a change in administration or every four years. It would introduce a new degree of uncertainty in most civil rights litigation against state and local governments, and it would discourage litigants in the strongest civil rights cases from settling in an early stage of the case. The bill could thus discourage public interest groups from bringing some legitimate civil rights grievances to court, while increasing the cost both to individuals and government of those cases that are litigated.

S. 1388 — Regulatory Flexibility Reform Act

This bill basically duplicates the core feature of H.R. 682: applying the Regulatory Flexibility Act retroactively and inducing paralysis by analysis.

S. 1399 — Government Reorganization and Program Performance Improvement Act

Like H.R. 3276, this bill officially introduces the White House's recent proposal for fast-track government reorganization authority and a sunset commission before which agencies would be forced to plead for their lives every 10 years. Click here for analysis, and here for a statement from OMB Watch on the proposal. The Senate version of the bill adds another anti-regulatory twist: while the White House proposal and the House bill would exclude programs that enforce public interest regulations from automatic sunsets, the Senate bill lacks that exclusion.

S. 1411 — National Small Business Regulatory Assistance Act

This bill is the only one on this list that would improve regulatory policy. This bill would be the first step to strengthening Small Business Development Centers (SBDCs) around the country by launching a pilot in which SBDCs would provide compliance assistance to small businesses. This bill would help level the playing field for small businesses by giving them specialized assistance with understanding and complying with federal regulations. This bill is the only one on this list that would not compromise

the public's protections, directly or indirectly; instead, it would actually help some businesses to comply with the regulations that are in place to protect the public.

By Bill Number | By Subject

Bills by Subject

Eliminating Government Accountability

The House already forced out a measure giving the Department of Homeland Security the power to waive all law in the course of securing the borders. Two bills, H.R. 1229 and S. 489, would further eliminate government accountability by limiting the public's ability to hold state and local governments accountable for their violations of federal law.

Paralysis by Analysis

The PAR Act, which would endorse the administration's burdensome PART assessments, is currently held up. Three bills, H.R. 682, H.R. 3143, and S. 1388, would force agencies to review their most significant rules on the books — even proven protections such as the ban on lead in gasoline, and safeguards that protect workers from black lung, brown lung, silicosis, and asbestosis — so frequently that agency resources would be drained and diverted from their missions to protect the public. H.R. 1167 would divert the GAO from its important investigative work by requiring it to conduct yet more cost-benefit analyses of economically significant regulations.

Regulatory Rationing

See H.R. 725 above. Many of the other bills discussed above would accomplish the same goal as regulatory budgeting by imposing so many new requirements on the agencies that they could run out of resources to devote to protecting the public.

Stripping Out Protective Standards

No one disputes that agencies must periodically reassess the level of protection they are providing the public. The problem of H.R. 682, H.R. 3143, and S. 1388 is in part that they would force agencies to reassess their existing regulations with an eye toward deleting them. These bills would distort regulatory policy by pressuring agencies only to eliminate existing protections and ignoring the possibility that existing rules should be strengthened or that unmet needs cry out for new protective standards.

Reorganizing Government into Irrelevance

H.R. 3276 and S. 1399 would give the White House fast-track government reorganization authority. Reorganization is not, in general, intrinsically anti-regulatory, but the prospect of giving fast-track reorganization authority to this administration, given its proven hostility to protections of the public interest, is nightmarish. Restructuring could become the tool for weakening many government programs. Given the importance of decisions about the structure and function of government programs, Congress should be allowed to give any restructuring proposals a full and fair debate — which Congress would not be able to do under these bills.

Government Shut-Downs

H.R. 3276, H.R. 3277, and S. 1399 would establish a standing commission before which agencies would be forced to plead for their lives every 10 years. Even if the commission concluded that a program should be allowed to live another 10 years, it would automatically die unless Congress affirmatively acts to save it. In a time of shrinking budgets, it is inefficient and wasteful to force government programs to re-justify their very existence. Congress has enough resources at its disposal — ranging from the GAO to its own power to hold hearings — that it can ferret out programs in need of elimination without such an extraordinary waste of agency time.

Administration Withholds Rationales Behind Anti-Regulatory Hit List

The Bush administration is refusing to inform the public about the justifications for deciding which regulatory protections were added to its hit list of safeguards to be weakened or eliminated.

The White House invited industry last February to nominate regulatory protections to be added to a hit list, and industry groups responded with 189 discrete calls for regulatory rollbacks. The White House reported those nominations in December and announced that it would submit the industry nominations to the relevant agencies for their review. The White House released the final version of its 2004-05 anti-regulatory hit list on March 9, with a report detailing 76 out of 189 items from the industry-nominated list that received the endorsement of the administration as "regulatory reform priorities."

The White House declined, however, to provide any justification for the administration's choices in narrowing down the 189 items to the 76 that will ultimately receive agency attention. Instead, the White House's report simply summarized industry's reasons for wanting rules on the hit list.

A series of Freedom of Information Act (FOIA) requests by OMB Watch has uncovered evidence that agencies did provide the White House Office of Management and Budget (OMB) with justifications for the rules that appeared on the final hit list -- justifications that OMB is refusing to share with the public.

OMB Watch filed FOIA requests with OMB and every agency that was required to review industry's hit-list nominations. Most agencies are refusing to disclose their correspondence with OMB about the hit list. Two agencies, the National Oceanic and Atmospheric Administration (NOAA) and the Equal Employment Opportunity Commission (EEOC), did respond with partial disclosures. From the documents these agencies provided, it is clear that OMB instructed agencies to assign a priority status to each reform nomination and to provide a justification for that status. Regulations the agency thought were high priorities to reform received a "1," while those the agency did not wish to pursue received a "3."

OMB presumably has the justifications for each reform nomination in a chart. OMB failed to release this document with the announcement of the final hit list and declined to reveal it when OMB Watch filed its FOIA request.

An example of the information that the administration is suppressing appears below:

Manufacturing Reform Nominations

Ref. Number	Rule/Guidance	Priority Status	Priority Status Justification	Timeline and Milestones
4	Coastal Zone Management Act Federal Consistency Regulations	[redacted]	NOAA published a proposed rule to revise the Coastal Zone Management Act (CZMA) federal consistency regulations on June 11, 2003. The comments provided to OMB by the National Association of Manufacturers (NAM) on NOAA's proposed rule are the same as some comments submitted to NOAA on NOAA's proposed rule. NOAA has yet to issue a final rule, thus, there is a limitation on NOAA's current ability to respond to NAM's comments. The measures contained in NOAA's proposed rule contain a strong package of improvements to the CZMA regulations that would continue to balance state-federal-industry interests embodied in the CZMA, while providing for more efficient approval of energy and other projects by providing greater clarity, transparency and predictability in the regulatory process [redacted] NOAA's proposed changes would, however, significantly reduce the time period for the processing of CZMA appeals by the Secretary of Commerce [redacted] NOAA will consider carefully the public comment received in issuing any final rule.	[redacted]

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

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In This Issue

Estate Tax Vote Slated for September -- Take Action Now!

The long run-up to legislative action in the Senate on the estate tax appears to be coming to a close. The day before the chamber recessed in July, Majority Leader Bill Frist (R-TN) filed a motion to proceed to consider H.R. 8, the House passed estate tax repeal bill. This bill will be one of the first items the Senate is expected to take up when it returns in September, and it is quite likely that this repeal bill will ultimately serve as a vehicle for a bad estate tax reform proposal by Sen. Jon Kyl (R-AZ).

If Frist were to bring H.R. 8 to the Senate floor, the Democrats could debate the bill to death. The only procedure by which the Senate can vote to place a time limit on consideration of the bill, and thereby overcome a filibuster is through a cloture vote. Under the cloture rule, the Senate may limit consideration of a pending matter to 30 additional hours, but only if there are 60 votes. Therefore, defeating cloture is a key step to block efforts to repeal the estate tax or prevent enactment of an irresponsible estate tax reform.

A vote on cloture is usually a party-line vote, because it is viewed as a vote on procedure rather than on substance. Therefore, the cloture vote will probably garner the support of all 55 Republican Senators -- even though some of them oppose repeal of the estate tax. Because this cloture vote will ultimately allow proceeding with debate on H.R. 8, in many ways it is equivalent

to a vote for repeal since it will be much more difficult to prevent the enactment of repeal or a bad reform option after the debate has begun. In fact, some conservative organizations have announced they are viewing this cloture vote as equivalent with an up or down vote on full repeal.

It is still unclear whether Frist is sincere in his intention to hold this vote or if he is continuing to use a threat of a vote to motivate Democrats to reach a compromise in on-going negotiations during the August recess. Throughout this year, Frist has repeatedly threatened to bring the estate tax issue on the floor because he and other Republicans were frustrated with the pace of negotiations between Kyl and a handful of Democrats lead by Sen. Max Baucus (D-MT).

Irresponsible Reform

Kyl has a plan to "reform" the estate tax by lowering the maximum estate tax rate to that of the capital gains tax rate, currently 15 percent. Republicans have a long-term agenda to repeal the capital gains tax. Kyl is less concerned about the amount of money exempted from the tax since the main advocates of repeal are generally so wealthy that even a large exemption will not lower their tax bills significantly. Those families and corporations will save tremendous amounts of money, however, by lowering the tax rate.

Current law permits the first $1.5 million of the estate to be inherited tax free. That amount is scheduled to rise to $3.5 million in 2009. (The amounts are doubled if married.) If Kyl proposes a $3.5 million exemption and a 15 percent tax rate, it would mean an 80 percent decrease in revenue, effectively killing the estate tax. This would have adverse impact on charitable giving, on revenue collected at the state level, and provide a major shift in fundamental values that have guided this country since its founding.

Some fear if Frist wins the vote on cloture, it will become clear very quickly there are not 60 votes to pass H.R. 8. But with limited time already permitted on H.R. 8, Frist could shift to a reform option such as Sen. Kyl's. Since these issues are quite complex, it is possible some Senators might vote for "reform," thinking it is the best option.

Action Needed to Preserve the Estate Tax As Vote Approaches

Regardless of Frist's intentions, it is expected forces on both sides of this issue will ramp up efforts to influence Senators by launching media and advertising campaigns and by mobilizing constituents to share their views with their Senators. United for a Fair Economy and the Coalition for America's Priorities will be working to place pro estate tax advertisements in target states leading up to the vote in September.

It will also be even more important for individual supporters of the estate tax to take action. The Americans for a Fair Estate Tax coalition, chaired by OMB Watch, and Fair Taxes for All, a coalition of which OMB Watch is part of, are ramping up efforts to defeat the cloture vote.

Below are ways for concerned citizens to take action to preserve the estate tax:

- Send a letter to your Senators urging them to vote NO on cloture and reject repeal or irresponsible reform options.
- Use the August congressional recess to meet with your Senators while they are at home in the state to express your support for the estate tax.
- Send a Letter to the Editor of your local newspaper using USAction's online submission tool.
- Use these talking points in your organization's media work, in letters and visits with Senate offices, with friends, family, and co-workers, and anyone else who needs the real facts and information about the estate tax debate.

Office of Management and Budget Continues to Manipulate Budget Projections

On July 13, the White House's Office of Management and Budget (OMB) released its annual mid-session budget review that predicted an improvement in the current Fiscal Year 2005 (FY 05) deficit by $94 billion from its February projections. OMB claims the deficit estimate revision proves the president's tax cuts are working. Most independent analysts, however, believe the projected drop in this year's deficit is a result of tax provisions causing a one-time surge in revenue, as well as OMB's continued omission of certain costs in its deficit calculations.

OMB now projects the FY 05 deficit will be $333 billion, down from the $427 billion estimated in February. Even with this decrease, this year's would still be the third largest deficit in U.S. history (after the deficits from FY 03 and FY 04). The primary reason for such huge deficits is a combination of overwhelmingly large, unpaid-for tax cuts that have lowered revenues for the government to their lowest levels (as a percentage of the economy) since the 1950s, coupled with significant increases in overall federal spending. Thus the administration's "good news" regarding the lower deficit should be seen as relative only in its relation to previously biased forecasts than to any measure of economic soundness. When a more long-term view is taken, the argument that these new projections are positive economic indicators seems dubious.

This is the second year in a row that OMB has drastically decreased deficit projections in their mid-session review, causing some analysts and political commentators to suggest the administration artificially inflated their initial estimates, in order to claim progress later on in the year. In fact, this was < a href=" http://www.cbpp.org/2-2-04bud2.htm" target="_blank">originally suspected when initial FY04 deficit estimates were released by OMB at the beginning of 2004.

In February 2004, OMB projected a $521 billion deficit for FY 04 while most other analysts, including the Congressional Budget Office, projected significantly smaller deficits. By the time OMB released its mid-session review in July, 2004, it had lowered its deficit projections to $445 billion. The administration claimed victory for reducing deficits. Yet compared to 2003, deficits were increasing, and at an alarming rate.

Still worse, the $445 billion July, 2004, projection was also criticized as being inflated. *Three days* after OMB released its $445 billion figure, the Treasury department released quarterly deficit data indicating a $418 billion deficit for the fiscal year. Three days after that, the Congressional Budget Office released a report estimating the deficit for FY04 to be $422 billion.

Both these figures were released in the same week that OMB released its mid-session review. When the actual FY 04 deficit was reported to be $420 billion in October, the administration speciously compared it to their overstated estimates from February and July, once again claiming deficits were shrinking and its economic policies were working. Throughout the year leading up to the president's re-election bid, while the public saw reports and headlines stating that deficits were shrinking, the actual deficit increased from $375 billion to $420 billion.

Goldman Sachs summed up the administration's approach to deficit forecasting in August of 2004 by saying, "The Office of Management and Budget has perfected the art of under-promising and outperforming in terms of its near-term budget deficit forecasts... This creates the impression that the deficit is narrowing when, in fact, it will be up sharply from the $375-billion imbalance of a year earlier. This process is likely to continue in October, when the fiscal 2004 deficit turns out to be lower than the current OMB forecast."

The administration's cyclical use of over-inflating deficit projections throughout the year is more than just bad economic and budgetary policy. It is a deception of the Congress, the media, and ultimately the public about the fiscal health of the federal government and the consequences of

the administration's economic policies. This extends beyond over-inflated deficit projections to a fundamental willingness by the administration to manipulate fiscal analysis for political benefit. Such practices undercut a basic principle of democracies, which depend on an informed citizenry to make decisions about which policies (and, in turn, which politicians) are best for the country. The administration's intentional misrepresentation of deficits and other fiscal projections, in order to push people toward a desired conclusion, is manipulation that is both frightening and unacceptable.

Chemical Security Legislation to Address Transport Issues Introduced

Sen. Joseph Biden, Jr. (D-DE) introduced a comprehensive chemical security bill addressing shipments of hazardous materials entitled >"The Hazardous Materials Vulnerability Reduction Act of 2005" (S. 1256) on July 16. The bill, which comes after a flurry of recent legislative activity at the local level on chemical shipment security, promotes greater cooperation between agencies, as well as more input from state and local officials in securing hazardous chemicals.

Congress has devoted a great deal of its time of late to chemical security, as threats posed by chemical storage and transportation have gain national attention. The Senate Homeland Security and Government Affairs Committee has held four separate hearing on the issue in recent months and appears committed to producing chemical security legislation this session. While much of the focus at these hearings and of previous legislation has been on facilities, Biden's bill addresses vulnerabilities related to hazardous chemical shipments passing through heavily populated areas on unprotected railroad tracks.

Biden's legislation proposes a number of provisions focused on identifying and addressing risks associated with shipping hazardous materials. It places an emphasis on improved communication and cooperation with state and local officials including first responders and community groups. Specifically the bill:

- Requires the Department of Homeland Security (DHS) to develop a comprehensive, risk-based strategy -- with input from state and local officials -- to deal with rail shipments of extremely hazardous materials;
- Allows local officials to petition the Department to become a "high threat corridor," around which particularly hazardous material would be rerouted;
- Requires DHS to issue annual reports regarding the transport of hazardous chemicals to Local Emergency Planning Committees established under the Community Right to Know Act of 1986;
- Requires the creation of coordinated first responder plans for chemical transport risks;
- Authorizes $100 million for training and equipment for first responders and rail workers likely to respond to an incident involving hazardous materials; and
- Requires critical studies into leased-track storage arrangements and technologies that can prevent or mitigate the consequences of an attack.

The bill was introduced without any cosponsors and immediately referred to the Senate Committee on Commerce, Science, and Transportation, chaired by Sen. Ted Stevens (R-AK). The committee has yet to schedule hearings on the issue of hazardous materials shipments.

Security experts overwhelmingly agree that chemical plants and shipments are particularly vulnerable to terrorist attacks. Bush administration, however, has been slow to react to such warnings, causing several local municipalities to move forward with their own measures to protect citizens from potential attacks. The District of Columbia passed legislation to ban shipments of hazardous materials from the District unless absolutely necessary, which the Bush administration and the rail industry have successfully blocked in court; the matter is currently being appealed.

Baltimore and Cleveland have introduced similar legislation pending in committees in both cities. Boston and Chicago are considering legislation banning hazardous shipments from coming into their city limits. For more on municipal policies see, this *Watcher* article.

Attorney General Considers Writing New FOIA Memo

Attorney General Alberto Gonzales recently announced he would reconsider the government's position on the Freedom of Information Act (FOIA), previously established in a controversial 2001 memo by then Attorney General John Ashcroft. The Ashcroft memo, which has been criticized by open government advocates, directed federal agency officials to presumptively withhold information requested under FOIA if they were uncertain whether the information should be released.

A Gonzales redefinition of the government position on FOIA would be precedent setting. Since the Carter administration several attorneys general have issued FOIA memoranda, but always after an administration change. No attorney general has ever retracted a FOIA memo during an administration. Several journalist associations, including the Associated Press, Associated Press Managing Editors Association, Cox Newspapers, the Newspaper Association of America, and The Reporters Committee for Freedom of the Press, have sent letters urging the new attorney general to reverse the current FOIA position. The groups claim that the Ashcroft memo's presumption of withholding has had a chilling effect on agencies and led to dramatically less information being released under FOIA.

According to a 2003 Government Accountability Office report, the Ashcroft memo led to increased information withholding among many federal agencies. Of 183 FOIA officers surveyed, 31 percent said they began withholding more information after the Ashcroft memo. Citizen and nonprofit organizations have complained that the reduction of available information limits government accountability and prevents groups form identifying and addressing important problems such as public health and safety threats.

Open government advocates also note flaws in FOIA implementation beyond the Ashcroft memo including long delays, exorbitant fees, and the lack of a request-tracking system. While it remains unclear if Gonzales will take action on FOIA implementation, Congress has already begun to weigh in on the issue with several bills aimed at improving the FOIA process:

- S. 1181 would require that legislation, which exempts government-held information from public access, specifically state the exemption; in addition, it sets the intent that documents should be available under FOIA, unless Congress explicitly creates an exception. It was passed on a voice vote in the Senate.
- S. 589 and H.R. 1620, the Faster FOIA bills, would establish a commission that would report on delays in responding to FOIA requests and recommend solutions. The Senate version, S. 589, passed favorably out of the Judiciary Committee on March 17.
- S. 394 and H.R.867, the OPEN Government Acts contain measures to strengthen FOIA including easier recovery of legal costs, expanded fee waivers, a tracking system for requests, and mediation for FOIA disputes, as well as extension of FOIA to information held by federal contractors.
- H.R. 2331, the Restore Open Government Act would revoke the Ashcroft memo and another memo written by White House Chief of Staff Andrew Card, as well as promote disclosure of information, curtail secret advisory committee meetings, and restore public access to presidential records.

Many individuals and organizations have urged Congress to improve FOIA and expressed their support for the current legislation. If you would like to contact your elected officials on this issue,

click here.

Cities Tackle Chemical Transportation Security

When a freight train accident took eight lives in South Carolina earlier this year because of unsafe and uninspected train cars carrying toxic materials, it heightened concerns about chemical security in our trains and trucks. Cities across the nation have begun addressing serious deficiencies on this homeland security issue because the federal government has done little. Boston, Cleveland, Chicago, and Baltimore are all considering legislation to mitigate the risks of shipping hazardous materials through their heavily populated centers.

In 2004, the District of Columbia became the first U.S. city to pass legislation banning hazardous shipments passing through its city limits destined for other locales. The DC Court of Appeals has since stayed the DC ordinance, following a challenge by the Bush administration and the rail industry that argued the legislation violated constitutional provisions dealing with interstate commerce. The Department of Justice asserted that rail security is the responsibility of the federal government and that local government has no authority in the matter. The DC government is appealing the court ruling.

Despite the court decision, several cities are moving forward with their own chemical security legislation. In Baltimore, City Councilman Kenneth Harris (D-District 4) sponsored legislation very similar to the DC ban. The bill has been referred to the Land Use and Transportation Committee, where Harris is vice-chair, and a Sept. 14 public hearing has been scheduled on the issue.

On May 9 in Cleveland, City Councilman Matthew Zone, introduced ordinance 928-05, which would prohibit rail shipments of hazardous materials through the city unless the fire chief issued a special permit. Several years ago Cleveland adopted restrictions on truck shipments of hazardous chemicals. The legislation is under administrative review by the city's Directors of Public Safety, Finance, Law as well as the Committees on Public Safety, Legislation, Finance.

Chicago Alderman Ed Smith (D-District 28) introduced legislation to reroute hazardous material shipments around the city. However, the measure was defeated in the Transportation and Health Committee due to opposition from rail corporations. After the recent London train bombings, the bill was re-introduced and is back in committee, with city officials optimistic about the legislation's chances for passage.

In Boston, City Councilmembers Stephen Murphy and Jerry McDermott recently cited federal inaction and the availability of alternative routes as key factors for submitting chemical transportation legislation. Their bill would prohibit hazardous material shipments within a 2.5 mile radius of Copley Square, a central urban location in Boston. The ordinance is now being considered by the city's Government Operations Committee, whose members include both Murphy and McDermott.

Almost four years since the terrorist attacks of 9/11, the federal government has taken no action to protect urban centers from threats posed by hazardous material shipments. This inaction continues despite terrorist attacks on European transit centers. Moreover, users of hazardous materials are not required by federal regulation to consider safer alternatives or to fully inform communities about hazardous cargo shipments. Sen. Joseph Biden (D-DE) has recently introduced national legislation that would require the Department of Homeland Security to work with cities and states to identify and address risks associated with chemical shipments. For more information on Biden's bill see our other Watcher article.

Local safety officials have repeatedly expressed safety concerns resulting from hazardous

materials passing through transit systems. These concerns garnered national attention this year when two freight trains carrying hazardous chemicals collided in Graniteville, South Carolina. The resulting spill, which killed nine and injured some 250 others, was the nation's worst from a train crash since 1978.

In the South Carolina incident, a manual track switch was left in the wrong position causing a moving train that was supposed to stay on a main line to collide with a parked train on a sideline. The 11,500 pounds of chlorine released by the collision created a gaseous cloud that hovered over the city through nightfall. Residents used towels and blankets to seal off doors and windows and prevent the greenish-yellow gas from entering their homes. Official clean-up efforts focused on the chlorine release, due to its potentially deadly effects on respiratory and nervous system function; however, the hazardous chemicals cresol and sodium hydroxide were also released during the accident.

Chemical accidents of this nature are more frequently than most realize. Two days after the South Carolina collision, a similar accident in Bieber, California, forced the evacuation of 5,400 local residents, injured two workers. In December 2004, a train carrying hazardous material derailed near St. Cloud, Minnesota, but luckily no hazardous materials were leaked. In a 2004 Rockland County, New York incident, a CSX freight train derailed, spilling nearly 200 tons of silicon metal. Yet, CSX won't release information about the chemicals that pass through jurisdictions to local HAZMAT teams, first responders, and State Emergency Response Committees.

Right to know advocates point out that, while these were accidents, key personnel were not informed about on-board chemicals and were thus stymied in their ability to respond. Community and environmental groups also maintain that the ability of terrorists to take advantage of track switches and other key areas of vulnerability in an attack necessitates added security and access to information on what is passing through communities.

First Public Case of Critical Infrastructure Information

A New Jersey resident, requesting access to a township's electronic map of land parcels, has brought to light the first public example of a law that hides information that meets standards for "critical infrastructure information" (CII). The local municipal utility denied the resident's request for land parcel information, because the data had been protected by the Department of Homeland Security (DHS) under the CII program.

The Brick Township Municipal Utilities Authority, which manages the city's water and sewer systems, took over the township's global information system (GIS) database of land parcels, which is used for property taxes, in the early 1990s. A 2003 request by a local resident for the data apparently prompted the utility to submit the information to DHS for CII protection.

Under a provision of the Homeland Security Act of 2002, companies may voluntarily submit information to DHS concerning the security or vulnerability of critical infrastructure. If accepted into the CII program, the information receives special protection and may no longer be released under federal or state open records laws. However, why the township land ownership information would qualify for the program is unclear.

Once the CII status was approved in a June 5 letter from DHS, the utility denied the request for information. Even though CII status protects the information from release it is unclear if the protection extends to requests made prior to its submittal to the program. It should also be noted that while the municipal utility refuses to grant the resident free access to the database, they publicly offer paper copies of the maps for $5 a piece, leading some to speculate that the utility

submitted the information to DHS specifically to avoid releasing the data *for free*.

Ruling on Material Support of Terrorist Organizations Mixed Blessing

A U.S. court ruled that key provisions of the USA PATRIOT Act targeting material support of terrorist organizations remain unconstitutionally vague despite recent revisions by Congress. The "material support" statutes, particularly troubling to nonprofit organizations, prohibited U.S. citizens or organizations from providing material support or resources to designated "foreign terrorist organizations," regardless of the nature or intent of the support. In the 42-page decision, U.S. District Court Judge Audrey Collins concluded that "the terms 'training' and 'expert advice or assistance' in the form of 'specialized knowledge' and 'service' are impermissibly vague under the Fifth Amendment."

In 2004, Judge Collins became the first judge to declare any part of the USA PATRIOT Act unconstitutional, ruling that the definitions of material support were insufficiently defined and could be construed to encompass First Amendment-protected activities. Yet the procedural history of the issue dates back to the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), which provided the foundation for the USA PATRIOT Act's material support statutes. In its December revision of the AEDPA/USA PATRIOT Act, Congress attempted to address Collins' objections by passing the Intelligence Reform and Terrorism Prevention Act (IRTPA). Judge Collins found that Congress' revisions still fall short of solving the problem of vagueness: "Even as amended, the statute fails to identify the prohibited conduct in a manner that persons of ordinary intelligence can reasonably understand."

Plaintiffs in the case included five organizations and two U.S. citizens seeking to provide support to the lawful, nonviolent activities of the Partiya Karkeran Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), both of which were designated "foreign terrorist organizations" in 1997. Each group undertakes political organizing and advocacy efforts and provisioning of social services and humanitarian aid, apart from their military engagement with government forces.

The PKK is a political organization representing Kurdish people in Turkey. While military activities are part of their campaign for Kurdish self-determination, they also provide vital social services and aid to Kurdish refugees and victims of human rights abuses. The plaintiffs sought to provide the PKK with "support," such as training in the use of humanitarian and international law for the peaceful resolution of disputes and instruction on petitioning for relief before representative bodies such as the United Nations.

The second organization, the LTTE, represents the interests of Tamils in Sri Lanka, who also face discriminatory treatment and human rights abuses, according to human rights organizations. In the wake of the tsunamis of December 2004, the plaintiffs sought to provide emergency relief and "expert training" to the LTTE, in such areas as effectively presenting claims for tsunami-related aid and negotiating peace agreements with the Sri Lankan government to facilitate the distribution of aid.

While the injunction against enforcement of the specified sections applies only to the two organizations named in the suit, it viewed by many advocates as a vital first step toward greater protection of the rights of individual philanthropists and U.S.-based organizations involved in international outreach efforts. "I'm pleased that the court has recognized that people have a right to support lawful, non-violent activities of groups the secretary of state has put on a blacklist," said David Cole, the Georgetown University Law professor who argued the case on behalf of the Humanitarian Law Project.

However, the ruling was a mixed victory. In addition to its limited application to the two named

organizations, the ruling concluded that the term "personnel" was sufficiently clarified in the IRTPA revision. The ruling also concluded that there were no due process violations in current procedure for terrorist financing prosecution, and that the government need not prove intent to perpetuate violence or illegal activities on the part of those suspected of supporting designated terrorist groups.

Study Finds Little Oversight of Religious Content or Client Choice in Gov't-Funded Programs

An Urban Institute study of the Bush administration's Faith Based Initiative, found that, while many faith-based organizations (FBOs) are integral service providers, they often lack established benchmarks and have little oversight at the state, local and federal levels, regarding religious content and the ability of clients to choose an alternative provider.

Examining more than 25 faith-based programs in Birmingham, Boston, and Denver, the study is the first in-depth look at the major grant programs in the Department of Health and Human Services with legislated "charitable choice" provisions, as well as discretionary programs funded under the Compassion Capital Fund. The Compassion Capital Fund was begun by President Bush and has received annual appropriations, but has never been authorized by Congress.

Many faith-based social service organizations contracted with government well before the "charitable choice" provisions and continue to do so. The study found that contracting with faith-based organizations under block grants has changed little since "charitable choice" began, ranging from zero to about 20 percent of total contracts in 2004.. Prayer, Bible study, or "Christ-centered" curricula are central to some programs of groups receiving federal funds, while other FBOs provide services in a manner similar to secular organizations. Findings suggest that these FBOs and secular nonprofits are more similar than is commonly understood. However, expressions of faith by service providers were considerably more prominent in programs supported by the Compassion Capital Fund initiatives than those funded under block grants.

The study found considerable uncertainty regarding implementation of the requirement to notify clients of their right to an alternative provider. FBO contractors in all three cities indicated that there are no formal mechanisms to address clients' right to an alternative provider. They also said they had not received legal guidance from government on responding to such a request. In theory, an intake coordinator identifies the problem requiring services and a contractor or other clinician determines the best provider, which could include an FBO. In practice, intake coordinators often refer clients to providers with whom they are familiar and normally do not refer to new providers, faith-based or otherwise.

However, officials have noted that even when clients are given the option of an alternative provider and informed that religious activities are voluntary, regardless of their personal preference, clients will likely accept a program based on their perception of viable options — mostly, the availability of treatment space. For example, in Alabama, nearly two-thirds of clients in substance abuse treatment are court-referred, so, as one official put it, clients may be unaware that the provider is part of a faith-based organization, but "people are looking for any safety out of the storm."

Although FBOs provide much needed services, capacity and accountability still remains problematic. While many state and local officials welcome participation from faith-based groups, many organizations lack the capacity to meet government contracting requirements. As government agencies are increasingly privatizing social services, monitoring and evaluating the performance of service providers becomes more important. FBOs, along with all contractors, are now attempting to install sufficient administrative and record-keeping mechanisms to monitor

performance, demands that often strain their organizational capacity. Even large, well-established, and experienced FBOs wrestle with the volume, complexity, and cost of new reporting requirements, while new and small providers are under greater pressure to comply with government accountability and performance standards.

The Compassion Capital Fund was established to provide money to intermediaries to build the capacity of small faith- and community-based groups, and better prepare them to receive public funds. The technical assistance is both needed and appreciated, as most FBOs have no previous experience in establishing reporting systems.

As a consequence, religious content and expressions are usually not included in the formal monitoring procedure. Agencies learn about such instances only by happenstance. The study found that prescribed monitoring of faith-based programs receiving federal funds is commonly restricted to financial audits, noting, "...attention to the faith content of programs was likely to be slight or serendipitous."

Additionally, while faith-based providers often try to achieve compliance through separation of and voluntary participation in any religious service component of their programs, the boundaries are permeable. For example, chapel attendance might be required but worship voluntary; a program could ask a client's permission to discuss faith, but then urge him or her to "seek God;" or a program might use faith as a way to motivate clients, but use public funds to pay only for other aspects of service provision. Sometimes there was no boundary, as when Bible study and religious teaching were integral parts of an intervention. In many cases, public agencies remain silent, as long as clients do not complain.

The Bush administration exalts the Faith-Based and Community Initiative as a "bold new approach to government's role in helping those in need," and a remedy to our troubled past when government "ignored or impeded the efforts of faith-based and community organizations." Nearly three-quarters (72 percent) of Americans cite the care and compassion of religious workers as an important reason for supporting government funding of faith-based groups. While Americans recognize the strong connection between religious practice and social service, unless government agencies monitor how faith-based programs use government funding, questions will remain. Of particular concern are how religious content affects the quality of services and how best to strengthen safeguards to protect those that services are intended to serve, such as persons with disabilities and children.

No Charges for Man Who Ejected Three from Town Hall Meeting

Federal prosecutors announced they will not charge the man who ejected three Denver residents from a taxpayer-funded town hall meeting on Social Security, because their car had an anti-war bumper sticker. The announcement was made after the Secret Service referred its investigation to the U.S. Attorney's office to consider charges of impersonating a federal officer. During the March incident, the unidentified man threatened to arrest the three attendees, if they did not leave, even though they had tickets and were not disrupting the event. An attorney of the three ejected from the event said they intend to file a civil suit for assault and violation of free speech rights.

On March 28, following their ejection, the "Denver Three," as they have become known in the press, met with Secret Service officials to find out why they had been forcibly removed by who they thought was an agent. During a subsequent meeting, it was revealed that the three were identified by a Republican staffer who saw a bumper sticker on their car that read, "No Blood for Oil." The Secret Service also said that the Republican Party was in charge of ticket distribution and staffing for the event, despite the White House communications office having set up the

event.

The White House has since identified the mystery man as a "White House volunteer." A spokesman for the U.S. Attorney's office said the man did not display a badge or claim to be a federal agent, although another volunteer had referred to him at the time of the incident as the "Secret Service." U.S. Attorney William Leone said, "Criminal law is not an appropriate tool to resolve this dispute. The normal give and take of the political system is the appropriate venue for a resolution."

The investigation was prompted by a request from several members of Congress from Colorado. Eight of the nine members of Colorado's Congressional delegation have issued statements saying the ejections were wrong. Rep. Marilyn Musgrave (R-CO), a long-time Bush ally, said, "I really do believe in free speech, and if you try to quell people it just makes them more determined."

Study Points to Improvements in Communication With Congress in Digital Age

A recent report by the Congressional Management Foundation (CMF), a nonprofit organization that provides management advice to members of Congress and their staff, described improvements both congressional staff and advocacy groups should implement to improve the quality of communications to and from Congress in the Internet age.

From interviews, focus groups and surveys, CMF found that congressional staff are frustrated by the increasing quantity and decreasing quality of constituent communications. This has led to increased mistrust on Capitol Hill of grassroots communications and the organizations that generate them. The study also found that congressional staff feel that they are doing more work to answer less substantive messages, leaving them less time for other legislative work. This is a trend identified in various studies over at least the last fifteen years, whose roots precede the explosion of email communication.

Congressional staff, according to the study, believe that the Internet and e-mail have provided some clear public benefits that are encouraging for democracy. Seventy-nine percent believe the Internet has made it easier for a citizen to get involved in the public policy process; 55 percent believe it has increased public understanding of what goes on in Washington; while 48 percent believe it has made elected officials more responsive to their constituents. The Internet and e-mail have also provided grassroots organizations and citizens with new and exciting opportunities to organize around issues, to access and share information, and to communicate with elected officials.

Study findings relevant to citizen activists and grassroots organizations include:

1. **Quality is more persuasive than quantity** -- thoughtful, personalized constituent messages generally have more influence than a large number of identical messages generated by a form. Grassroots campaigns should place greater emphasis on generating high-quality messages and less on form communications. This mirrors pre-Internet communications survey findings that showed that personalized letters were more effective than postcard or fax campaigns.
2. **The organization behind a grassroots campaign matters** -- grassroots organizations should identify the source of each campaign, according to congressional staff.
3. **Grassroots organizations should develop a better understanding of Congress** -- the quality and impact of constituent communications would increase, if organizations better understood the legislative process and adapted their efforts to the way congressional offices operate.
4. **There is a difference between getting noticed and having an impact** -- bad

grassroots practices may get noticed on Capitol Hill, but they tend not to be effective in influencing the opinions of members of Congress, and sometimes damage the relationship between congressional offices and grassroots organizations.

Key study findings for congressional offices include:

1. **The communications environment has changed and Congress will need to adapt to it** -- congressional offices are now deluged with email and have not developed a method to deal with the increased volume of correspondences.
2. **Congress must improve online communications** -- members of Congress should improve the timeliness of their responses, reach out to grassroots organizations to help identify better means for communicating, and answer e-mail with e-mail. On this last point, many offices still respond to email through U.S. mail.
3. **Managing the new communications environment requires new capabilities and new thinking** -- congressional offices may need additional staff and resources to manage the rapidly growing volume of constituent communications; they should expand the use of technology and adopt new management policies and/or establish a task force to identify solutions to communications challenges.
4. **The new communications environment is beneficial to the members of Congress** -- members should understand that new technology allows them to connect to thousands more constituents, better connect to politically active citizens, save money, and improve their image.

While elected officials communicate directly with constituents, so do a number of organizations. In fact, some organizations effectively serve as intermediaries, describing interactions between an elected official and his/her constituents. Although Congress is improving in this regard, most members do not have interactive websites that contain timely material. Advocacy organizations help fill that void by monitoring and reporting information to constituencies, and often providing an easy way for the constituent to contact his/her representative or senator. Consequently, how congressional staffers view and deal with mail is important to grassroots organizations.

The study raises important questions for advocacy organizations:

- Do "personalized or individual" messages that are "well-reasoned and articulate" truly carry more weight with an elected official or their staff? Some times raw numbers are just as important as reasoned arguments from constituents. After all, representatives and senators need large numbers for re-elected.
- Congressional staff indicated strong interest in methods of verifying the legitimacy of organizations that facilitate form letters. First, staff stated that they would want to contact the groups when thousands of emails are generated over one issue or piece of legislation. Second, they pointed out that it would be helpful when crafting a reply. One senate chief of staff explained, "I'm going to reply differently to a health care message sent by [a seniors group] then one sent by an insurance company." However, many advocacy organizations maintain that the origins of a letter should have little or no bearing on the outcome of that letter. If citizens are taking the time to send a letter on a particular issue or piece of legislation, regardless of the origin of its language, the citizen is concerned enough to get involved, they argue, and that concern should not be taken lightly. They wonder why the origin of a form letter's language should influence how a response letter is written.
- The study suggested that congressional offices may need more staff to cope with the increased volume of mail. However, given the prevailing belief among staff that answering mail is only a minor part of their job, it is unclear how additional staff would help the situation.

These issues may be addressed in three forthcoming CMF reports in this series. The next report will identify perceptions that citizens and the grassroots community have regarding their communications with Congress. The third in the series will recommend best practices to congressional offices for communicating with their constituents. The fourth and final phase of the project will facilitate discussion and problem-solving among congressional staff, citizens, and the grassroots community by convening a task force with representatives from the various sides of congressional communications.

High Court Nominee Admits Lobbying OMB, FDA

Supreme Court nominee John G. Roberts, Jr. conceded that he omitted records of lobbying the White House Office of Management and Budget (OMB) and U.S. Food and Drug Administration (FDA) from his other public disclosures, after *Newsday* uncovered the lobbying activities.

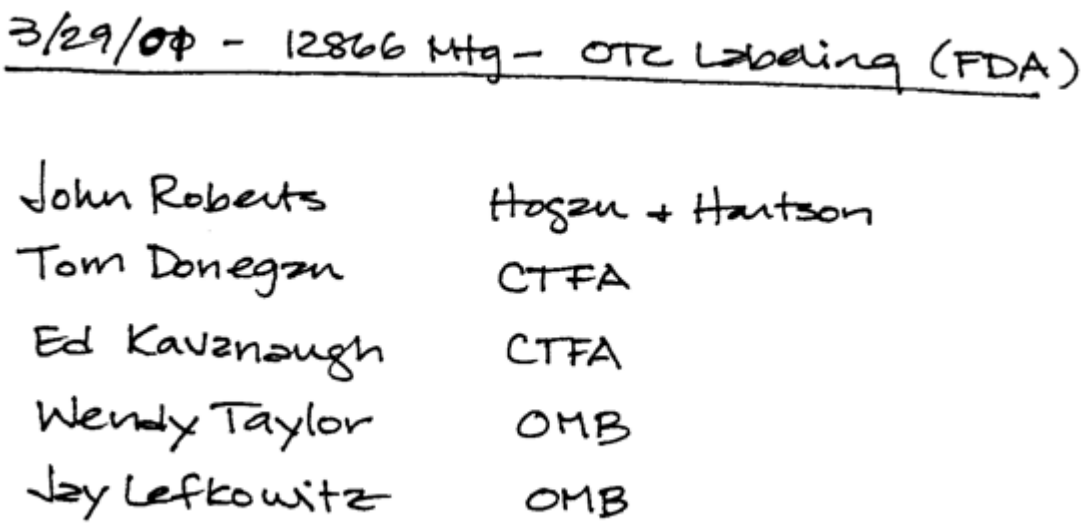
As an attorney for the Cosmetics, Toiletry and Fragrance Association, Roberts lobbied against proposed labeling regulations for sunscreen products by threatening litigation. After *Newsday* broke the story that these contacts were omitted from his previous disclosures to the Senate, Roberts argued that he had not included these contacts because he had considered the discussion of litigation as a legal task rather than a lobbying task.

Newsday notes that Roberts worked for CTFA longer than mentioned in either the previous disclosures or the follow-up letter Roberts submitted in response to the *Newsday* investigation:

The group's executive, Edward Kavanaugh, said he had hired Roberts for two tasks, to draft a lawsuit based on First Amendment and commercial free speech issues, and to work on the labeling of cosmetics like lipstick treated as over-the-counter drugs. But he did not return calls seeking clarification on when he hired Roberts.

An FDA record shows that on Jan. 4, 2000, Roberts and the cosmetic group's general counsel met with FDA officials to discuss a final rule for labeling over-the-counter drug products. The FDA calendar shows that in October 2001 Roberts and cosmetic association officials, including Kavanaugh, met with FDA lawyers about sunscreen labeling.

Hogan & Hartson did not register as a lobbyist for the cosmetics group until March 20, 2001. It filed that registration and a report on the first six months of 2001 in August 2001, and noted Roberts had met with [officials at the White House Office of Management and Budget (OMB)].



Roberts' meeting with OMB's Office of Information and Regulatory Affairs back in 2001 was recorded in a handwritten meeting log. OIRA now posts these meetings online. OMB Watch has an archive of meeting logs that OIRA did not post electronically.

Why Performance Standards May Be Superior to Cap-and-Trade

Cap-and-trade regimes are less effective at stimulating innovative pollution control methods than performance standards, according to a new scholarly article, challenging the industry-backed position that emissions trading and other market-based programs are inherently superior to so-called "command-and-control" regulation.

Industry generally rails against regulations that set performance standards for emissions reductions, and industry-funded think tanks and academics have successfully translated that opposition into widely held support for the use of emissions trading schemes, rather than strict performance standards, to control pollution. Arguments for the industry position are mistaken, argues Center for Progressive Reform member scholar David Driesen in a forthcoming article, as they are based on two fundamental flaws:

- **It selectively ignores an essential part of the emissions trading equation.** In a nutshell, the industry thesis holds that emissions trading schemes encourage companies to find ways to reduce their pollution below the allowed cap so they can sell emissions credits. Although true, the industry argument conveniently ignores the simple fact that there are both sellers and buyers in the emissions market. "While emissions trading encourages sellers to decrease emissions below the levels of a comparable traditional regulation," Driesen points out, "trading encourages buyers to *increase* their emissions..." (emphasis added). He concludes, "It is not clear why a measure that reduces innovation incentives for some facilities and increases them for others will lead to an increase in overall levels of innovation among facilities subject to a regulation."
- **It misattributes innovation incentives to the market-based mechanism, rather than to the stringency of the underlying emissions cap.** The industry-backed arguments treat emissions trading and performance standards as stark opposites even though cap-and-trade regimes are ultimately a form of performance standard. The cap in emissions trading schemes establishes an overall performance standard, while the market

for trading emissions credits essentially establishes a policy of indifference to the site-by-site geographical distribution of compliance levels. An across-the-board performance standard, alternatively, requires all facilities to comply equally. The stringency of the underlying performance goal creates the cost pressures that induce innovation in both emissions trading and performance standards models. "If the market performs perfectly," Driesen writes, "then an emissions trading program produces precisely the same amount of reductions that a traditional regulation with the same emissions limits would produce, no more and no less."

Driesen's comparison of performance standards and emissions trading starts with the supposition that traditional regulation can, just like the highly-touted market-based approach of emissions trading, inspire businesses to develop innovative compliance approaches that not only reduce compliance costs well below pre-regulation estimates but also can result in additional cost savings that offset the initial compliance costs. As famously argued by Harvard University's Michael Porter, all pollution is essentially waste and a sign of an inefficient system of production. Strict regulation can force industries to cut waste by discovering more effective ways to manage their resources, resulting in improved efficiencies of operation that save companies money. Porter asserts that companies do not take advantage of the potential cost savings of environmental innovations, because research into such savings is potentially costly and wrought with uncertainties. Strict regulation gives industries the incentive to invest in such innovations.

Emissions trading discourages this kind of innovation, Driesen argues. Emissions trading fails for several reasons:

- **It limits the scope of probable innovation by restricting the price range of rational innovation investments.** Though emissions trading provides incentives for some businesses to invest in innovation and cut emissions further, other facilities are encouraged to buy emissions credits rather than invest in new technologies. Under an emissions trading program, it may be less costly for a facility to buy emissions credits than to invest in costly innovation that may not pay off. Emissions trading would encourage only limited investments in innovation because, Driesen argues, "rational sellers will only generate credits that cost less to produce than 1) the control costs of prospective buyers, and 2) credits with which the seller must compete."
- **The much-touted lower costs of emissions trading will lower incentives for innovation.** By lowering the cost of compliance, emissions trading programs may actually discourage innovation. More stringent regulatory standards can actually induce innovation by providing industries with incentives to invest in innovation. As Driesen puts it, "stringent regulation (with or without trading) raises the cost of routine compliance and creates an incentive to innovate in order to escape the high costs." Thus, if emissions trading programs are less costly and burdensome for industry, industry will have less incentive to invest in new technologies that may provide greater benefits in the long term but can be expensive and risky in the short term. Driesen concludes, "Trading, by shifting reductions from high-cost to low-cost facilities, may lessen the net incentives for innovation."

Trading allows companies to comply with regulation without making significant changes that may provide greater benefits in the long-run. Driesen illustrates this point using the example of a greenhouse gas emissions trading program in the European Union. "If European states imposed strict requirements upon electric utilities, they might have to switch fuels in order to meet the requirements," Driesen explains. "They might need to switch from coal to natural gas to meet fairly stringent reduction targets and very strict standards might drive them toward innovative technologies, such as almost-zero polluting fuel cells and solar energy. But trading may allow them to avoid significant changes."

Thus, traditional emissions regulation -- either performance standards or technology-based standards -- may result in some cost pressures on industry in the short-term but can spur innovation that will provide greater cost savings for industry, as well as greater reductions in harmful pollutants, than cap-and-trade methods.

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

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In This Issue

Economy and Jobs Watch: Continuing Bad News for Americans

Last month's economic news has been far from encouraging for most Americans, with a continuation of an uneven and unpredictable job market, rising consumer prices, and declining earnings. Yet, despite the grim realities faced by most working families in the U.S. the recovery period has been very good to business, with corporate profits up over 15 percent since it began. A survey of indicators shows the Bush administration's economic policies, specifically how they value profits for corporations over the bottom line for average Americans, have further eroded the country's economic health.

The reality that the economic recovery is not helping most American households to recover is beginning to be acknowledged by the Bush administration. Earlier in August, Secretary of the Treasury John Snow conceded the slowly progressing economic recovery has not benefited all Americans equally. Snow said, "[Now] the idea...is to explore the things that produce broad-based prosperity and one of the things we know is that less educated people have seen their incomes and wages grow more slowly."

But the unbalance in the recovery has been caused by more than just a poorly educated workforce. Snow's comments came amid the release of two reports that put this recovery period in historical context. In early August, the Center on Budget and Policy Priorities released a report that compares our current economic recovery with previous recovery periods dating back to World War II and finds that, not only is this one less robust, it is much more unevenly distributed, with corporate profits reaping nearly all the benefits at the exclusion of the labor market. In fact, corporate profits are the only major economic indicator that has outpaced the post-World War II average during this recovery, and they have grown twice as fast as during the recovery in the early 1990s.

The second report, a Congressional Budget Office (CBO) background paper, examines employment during and after the economic recession of 2001. CBO found similar trends in the labor market with wages and employment suffering during the recovery, while corporate profits soared. Among its many interesting findings, the CBO writes, "both the magnitude and persistence of the decline in the labor force [participation rate] during the past several years are unprecedented."

CBO has reported elsewhere on the unbalanced distribution of economic gains during the recovery period, speculating that one explanation for the unforeseen increases in federal revenues this year is increasing personal income concentrated

among high-income taxpayers. High-income taxpayers generally pay tax at higher rates, thus bringing in more revenue to the Treasury.

As Americans continue to be apprehensive about the economy, more negative indications have come with the release of economic data from the Labor Department's Bureau of Labor Statistics (BLS). The data indicate a significant rise of consumer prices in July (by 0.5 percent), driven largely by rising energy and food costs, in particular record high oil prices. In a separate release, BLS also reported workers' earnings, adjusted for inflation, declined by 0.2 percent in July.

This is a distressing combination as many Americans continue to struggle with mounting personal debt, living paycheck-to-paycheck with very little personal savings. These households will experience a more severe financial squeeze, as they are forced to pay more to put food on their tables, fill their gas tanks, and heat and cool their homes with less money.

Most troubling of the bad news is the economy continues to fall short in creating a sufficient number of jobs to keep pace with population growth. Although July saw a healthy rise in hiring from previous months, adding 207,000 jobs, the average number of jobs added each month for 2005 is only 191,000. This is well below the jobs necessary to keep up with new workers entering the labor market. Therefore Americans are currently facing higher prices for essential goods, while holding lower paying jobs and having an ever shrinking number of options with an increasingly flooded labor market. As evidence mounts of the failure of Bush administration economic policies to our economy growing strong for all Americans, the need for an about-face on these policies becomes increasingly clear.

Congressional Budget Office Projections: No Change in Bleak Long-Term Fiscal Outlook

Just over a month after the White House released its misleading and overly optimistic budget projections, the Congressional Budget Office (CBO) released an update to their *Budget and Economic Outlook* last week. The CBO report is far more realistic in its long-term assumptions and therefore shows little change in our country's dismal long-term fiscal outlook.

Similar to the July Office of Management and Budget (OMB) projections, the CBO report foresees a $331 billion deficit for fiscal year 2005 (FY05), a $33 billion reduction since CBO released an initial estimate in March. CBO also has increased their estimate of the total deficits over the next ten years by more than $1.1 trillion to $2.1 trillion. These estimates are much more worrisome (and accurate) than OMB numbers, with CBO projecting ten-year deficits from 2006 - 2015 to be $600 billion more than OMB.

Unlike the OMB numbers, CBO finds very little reason to be optimistic about the future health of the federal government. They write, "Although the deficit for 2005 is lower than previously expected, the fiscal outlook for the coming decade remains about the same as what CBO described in March." In March, CBO described a very dark future if current policies are continued.

This CBO report casts further doubt on Bush administration claims that its economic policies are working to spur strong economic growth and will continue to shrink deficits. CBO has confirmed what many private analysts have reported: the recent jump in federal revenue is due to short-term, temporary factors that are unsustainable, and over the long-term the country still faces large and difficult fiscal challenges. CBO concludes, "Over the long-term, then, growing resource demands...will exert pressure on the budget that economic growth alone will not eliminate."

Yet even the CBO's long-term projections do not reveal just how troubling our budgetary outlook is. The CBO is required by law to assume the continuation of current policies, the most important for its current estimates being the expiration over the next five years of most of the tax cuts legislated in 2001 and 2003. Since it is unlikely the Republican-controlled Congress will not act to extend those tax cuts (with some of them already slated to be extended this fall in a congressional reconciliation bill), deficits will likely be much higher than CBO projections. In fact, extending all of President Bush's tax cuts will add an additional $1.6 trillion to the deficit over the next ten years, according to the CBO report.

The Senate Budget Committee's most senior Democrat, Kent Conrad (D-ND), believes the nation needs a "serious fiscal wake-up call" if Congress is to correct the long-term budget shortfalls that "threaten our economic security." The increased payments on the debt due to the long and sustained deficits alone will begin to put enormous pressure on the entire federal budget just as the baby-boomer generation begins to retire en mass. This pressure, along with the possible continuation of reckless budget and tax policies, could mean a recipe for disaster for our nation's financial health.

The current administration should be more straight-forward in addressing serious concerns regarding national economic security and begin an honest dialog with Congress about adopting alternative policies that will return the country to a

sound and sustainable fiscal path.

Industry Misuses Data Quality Act to Challenge EPA Choices

Two industry groups recently filed challenges, under the Data Quality Act, against the U.S. Environmental Protection Agency's (EPA) methodological choices. Both challenges focus on evaluations of human health risks from specific chemicals. The petitions specifically question documents that address emissions of Metam Sodium, a pesticide, and Dioxin/Furan, used to produce cement. The petitions challenge EPA procedures, however, which are policy decisions made within the agency -- and not data -- and as such lie outside the scope of the Data Quality Act (DQA).

The stated purpose of the Data Quality Act is to "ensure and maximize the quality, objectivity, utility, and integrity of information disseminated." Yet, both of these challenges violate the spirit of that goal, and instead attempt to transform DQA into an avenue for industry to challenge methodology, agency judgment or choices.

Metam Sodium Challenge

The industry group Metam Sodium Alliance (MSA), comprised of three chemical companies that produce Metam Sodium, the third most widely used pesticide in the country, challenged EPA preliminary human health and ecological risk findings for the chemical. The risk assessment process allows the agency to establish guidelines and restrictions to protect workers, the general public and the environment from exposure to dangerous levels of toxic chemicals. The draft risk assessment, which the industry group has challenged, projects the need for a buffer zone during the use of this pesticide to protect communities from airborne exposure.

On June 24, MSA challenged EPA's use of the Probabilistic Exposure and Risk Model for Fumigants (PERFUM) in the agency's official Risk Assessment of Metam Sodium. The MSA asserts that the EPA should have used Fumigan Exposure Modeling System (FEMS) in the assessment. Under the PERFUM model EPA projects that a buffer zone of more than one mile is necessary to protect against human health risks due to exposure.

MSA suggest the use of the PERFUM model compromises the utility, integrity and objectivity standards of the agency's data quality guidelines with the use of the PERFUM model. Moreover, the petitioner argues that the PERFUM methodology is inadequate and limited, yet, they offer no scientific data or expert testimony to support the claim that PERFUM is inferior to FEMS. In the draft risk assessment, EPA explains its selection stating "EPA selected the PERFUM model over the other distributional models because PERFUM provides the most resolution for the acute duration of exposure, which is the key concern for these soil fumigants."

The petitioner asserts, the PERFUM-driven analysis in the current draft Risk Assessment threatens to unjustifiably, undermine the commercial viability of Metam Sodium. In response EPA has noted "that a well established process for pesticide re-registration exist." This suggests that MSA claims the FEMS model's superiority is merely an attempt to use DQA in a veiled effort to protect their commercial interest from an EPA policy with which they disapprove.

Since the Risk Assessment is in draft form and currently open for public comment, EPA forwarded the challenge to the EPA Office of Pesticide Programs (OPP) for incorporation into the docket for the metam sodium re-registration process. OPP uses a six-phase process to conduct re-registrations. As part of the six-phase review, the EPA is currently evaluating the risk assessment under the Federal Insecticide, Fungicide and Rodenticide Act. This allows the pesticide registrants and the U.S.D.A. an opportunity to review and correct errors before the risk assessment is available.

Dioxin Challenge

The second challenge, submitted by a coalition of cement kiln operators, seeks changes to an EPA report presenting a comprehensive inventory of sources and releases of dioxin-like compounds in the United States. It is generally accepted that dioxin-like compounds are among the most toxic substances released into the environment by human activities. Cement kilns, which are used to burn hazardous waste, are among the many sources of dioxin emissions.

On June, the Cement Kiln Recycling Coalition (CKRC) requested correction of information contained in the EPA's Inventory of sources and Environmental Releases of Dioxin-Like Compounds. Specifically, CKRC believes the External Review Draft incorrectly estimates the amount of dioxins that Hazardous Waste Combuster (HWC) cement kilns emit each year. The report estimates that HWCs emit 68.40 grams of dioxins per year and are responsible for 4.47% of annual dioxin emissions in the United States. In contrast, another EPA report finalized in 1999 calculates dioxin/furan emissions from HWC cement kilns at approximately 13.1 grams per year. CKRC challenges the External Review Draft's use of

estimated emissions factors instead of the actual emissions data collected in the 1999 report. The group had requested that EPA replace the "estimated" emissions data replaced by actual data collected by the EPA's Office of Solid Waste.

More importantly, CKRC is asking the EPA to circumvent its own policies and make corrections to the External Review Draft immediately. The agency is currently accepting feedback on the draft during a public comment period. However, the industry association claims the current data makes them vulnerable to special interest groups. CKRC states: "that correction of this fundamental error through the regular comment process will not be sufficiently timely to protect the interests of CKRC's members." Their petition goes on to say, "Interest groups, particularly those inclined to oppose energy recovery in cement kilns, often promote their goals by trumpeting negative allegations about cement kilns." To date, the EPA has not issued a response to CKRC's challenge.

Both challenges question the methodology and policy choices made by EPA rather than data. The CKRC does contain some data specific arguments but they are used to launch a broader attack on the policy decision by EPA to emphasize dioxin/furan emissions. Both challenges also demonstrate the duplicative nature of the data quality act as they both address documents that currently have comments processes open to receive any data complaints or feedback.

Open-Government Activist Seeks to Recover Legal Fees from FOIA battle

After winning a four-year legal battle for access to county documents concerning the Seahawks Stadium, a Seattle resident has returned to court seeking greater financial compensation for his efforts. King County Superior Court Judge Michael Hayden heard arguments on August 19, during which Armen Yousoufian sought an award of more than $1 million in compensation for his legal fees and as a deterrent to prevent other agencies from stonewalling citizen requests of public information.

The battle began in 1997, when Yousoufian requested documents from the King County government on the then-proposed Seahawks Stadium. After King County officials denied the request, Yousoufian sued under Washington's Public Disclosure Act (PDA). In 2001, the King County Superior Court ruled in his favor and ordered the county to pay $100,000 in fines. Unfortunately, this amount did not come close to covering the $330,000 in legal fees Yousoufian had incurred.

Washington's PDA allows assessment of penalties ranging from $5 to $100 per day for every day documents are withheld. The original ruling had used the minimum of $5 per day. At last week's hearing, Yousoufian's attorneys argued the penalty should be raised to $90 per day, for a total of more than $742,000, in addition to lawyer fees. In its counterargument, the county acknowledged that the minimum penalty was too low but sought to raise it to only $10 a day and less than half the attorneys' fees. Judge Hayden is expected to issue a written ruling by the end of the month.

Fee recovery is a critical component of any effective public disclosure law. Without it citizens unfairly denied requested documents would often be unable or unwilling to take on the uncompensated financial burden of battling the government in court. Recognizing this, Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) included in their Openness Promotes Effectiveness in our National (OPEN) Government Act (S. 394), a provision that would allow the public to more easily recoup legal costs from the federal government for improperly withheld documents. The bill currently has five cosponsors, while the House version of the bill (HR 867) has 20 cosponsors.

Minnesota Considers 'Biomonitoring' to Protect Public Health

Minnesota lawmakers are considering biomonitoring legislation that would test Minnesota citizens to determine their exposure levels to a variety of toxic chemicals. The proposed law seeks to better gauge health risks currently posed by such chemicals, as the first step toward controlling and reducing those risks.

The proposed legislation requires the state's commissioner of health to provide community-based biomonitoring for toxic chemicals in economically, racially and geographically diverse communities. Upon detection of dangerous levels of a toxic chemical, the bill calls for various state agencies to identify the source or sources of the chemical exposure, and develop recommendations to minimize the exposure.

Versions of the "Healthy Minnesotans Biomonitoring Program" bill have been introduced in both the Minnesota House (H.F. 1850) and Senate (S.F. 979), on February 14 and March 16, respectively.

Biomonitoring is a cutting-edge tool that yields clearer information about chemicals that are still being absorbing into peoples' bodies, and therefore continue to pose health risks, despite environmental progress made over the past three

decades. These studies help improve public health policy, by indicating trends in chemical exposures, identifying disproportionately affected and particularly vulnerable communities, assessing the effectiveness of current regulations, and setting priorities for legislative and regulatory action. In July, the Center for Disease Control and Prevention (CDC) released its Third National Report on Human Exposure to Environmental Chemicals, a nation-wide biomonitoring study released every two years. The study found troubling levels of toxics, including metals, carcinogens and organic toxics like insecticides, in individuals across the country.

Many scientists have pointed out that more focused state-level biomonitoring studies would yield more revealing data than the national CDC study. Such examinations could allow researchers to draw stronger connections between sources of toxics, at-risk populations, and pollution-prevention measures that should be taken by industry.

According to the federal Toxics Release Inventory in 2003 Minnesota industries released or disposed of over 31 million pounds of toxic chemicals. A Minnesota biomonitoring program could determine which of these chemicals are trespassing into resident's bodies.

California is the only other state currently considering a state-wide biomonitoring program. The bill (SB 600) was introduced in February and passed out of the California Assembly Health Committee June 28, despite strong opposition from industry. Supporters say that the bill will help scientists, medical professionals, decision-makers and community members better understand the effects of environmental contaminants on human health. They are hopeful the bill will clear its next hurdle in the Assembly Appropriations Committee.

Town Seeks to Keep Secret Maps, Images

Officials in the town of Greenwich, Connecticut are compiling a list of vulnerable public buildings and utilities and plan to withhold aerial images and maps of these sites from the public, despite having been ordered by the Connecticut Supreme Court to disclose them. Mapping information has been a continual target for proponents of increased government secrecy, even though little evidence supports their claims that such information is too dangerous to remain public.

A Greenwich computer consultant, Stephen Whitaker, requested access to the town's recently compiled geographic information system (GIS), which contained digital maps and aerial photos of the community. The town denied the request claiming that the information could be misused by terrorists and criminals. Whitaker fought the town's decision all the way to the state's highest court. On June 15, the Connecticut Supreme Court ruled that the town had no evidence supporting its claim that disclosure of the images represented an immediate danger to the community. Greenwich officials were ordered to grant Whitaker full access to the computer files.

However, a month after the court decision town officials requested the state intervene and limit public access to the town's GIS files. A Connecticut law passed after the 9/11 terrorist attacks granted the Public Works Commissioner the power to restrict public access to information that risks harm to any person. The agency is currently investigating the situation; however, whether the new law is even applicable in the case is unclear, as Whitaker's request predates it.

Mapping and GIS data is among the first information held up by proponents of greater government secrecy as examples of the types of information that must be withheld from the public in order prevent terrorists from using it. For instance, a previous *OMB Watcher* article revealed that the Department of Homeland Security had accepted a New Jersey municipal utilities' GIS database of property parcels into a program designed to restrict information. However, municipal property parcels data collected for property tax assessments seem a far cry from the critical infrastructure information the program was established to protect. It appears that the utility simply did not want to supply the information without charging for the service.

While little research has been done in this area, at least one study supports the court ruling to allow access to the GIS files. According to a 2004 RAND Corporation report, efforts to remove information from government websites after the 9/11 attacks, especially maps and imagery information, were unnecessary and unproductive in protecting against terrorism. The report, "Mapping the Risks: Assessing the Homeland Security Implications of Publicly Available Geospatial Information," found that the data was simply not detailed or current enough to be significantly useful to terrorist purposes. The report also determined that terrorists could acquire better information from direct observation or other public sources including textbooks, trade journals, street maps and non-governmental websites. Therefore the removal of the information from government websites was pointless.

Federal Election Commission Seeks Comments on Rule that Could Gag Charities around Elections

The Federal Elections Commission (FEC) is considering changes that could affect the advocacy voice of charities across the country. Currently charities are strictly prohibited from electioneering, and are thus not covered by campaign finance law. However, the FEC is reviewing current rules regarding communications made 30 days prior to primary elections and 60 days before general elections, and weighing whether charities should be limited in mentioning a candidate for federal office during those periods.

On August 12, the FEC General Counsel released a proposal on "electioneering communications" -- broadcast, cable or satellite communications that, because they refer to a federal candidate, cannot be aired within 30 days of a primary and 60 days of a general election. The proposal examines the unqualified exemption for 501(c)(3) tax-exempt organizations, seeking information on the level of deterrence current tax laws have to prevent an organization from "promoting, attacking, supporting or opposing" (PASO) a federal candidate. Other information sought in the proposal includes to what extent do grassroots communications result in charities PASO-ing a candidate, as well as input on a proposed rule that would allow the FEC to make its own determinations on whether an ad PASOs a candidate.

The proposal is significant, because it involves a wholesale review of the exemption that 501(c)(3)s receive under current rules. 501(c)(3)s are currently entirely exempt from the electioneering communications prohibition. The Bipartisan Campaign Reform Act of 2002 (BCRA) exempts certain communications from the definition of electioneering communications. It also authorizes the FEC to issue regulations exempting other communications as long as the communications do not "promote, support, attack or oppose" a federal candidate. In 2002, the FEC exempted 501(c)(3)s because it did not want to discourage organizations from issue advocacy based on a threat that had not manifested.

The FEC also assumed that the Internal Revenue Code (IRC), which prohibits charities from intervening in political campaigns, could be used to regulate 501(c)(3)s for the purposes of election law. *Shays v. FEC* challenged the exemption for 501(c)(3) organizations, with the plaintiff complaining that the rule was neither inadequately considered or explained and questioning whether the FEC should leave enforcement to the Internal Revenue Service (IRS). A U.S. District Court found the record unclear as to whether the regulation's reliance on the IRC prohibitions would result in exempt advertisements that "promotes, supports, attacks and opposes" a federal candidate. The Court held that the exemption for 501(c)(3) organizations violated the Administrative Procedure Act (APA) because the explanation and justification for the rule led the Court to believe that the FEC had failed to conduct a reasoned analysis. Specifically, the Court found that the explanation was deficient because it did not address the "compatibility" of the IRS' enforcement with Federal Election Campaign Act's (FECA) requirements, and identified three specific omissions:

- whether public communications that PASO a federal candidate would be viewed by IRS as political activity in which 501(c)(3) organizations may not engage;
- the risks, if any, that limited lobbying activity permitted for 501(c)(3) organizations could give rise to advertisements that PASO a federal candidate; and
- the implications of allowing the IRS to "take the lead in campaign finance law enforcement."

The District Court remanded the regulation to the FEC for further action consistent with the order. Rather than appealing this aspect of the Court's decision, the FEC is initiating rulemaking to address the three concerns. A well-developed administrative record will help inform their decision, as well as allay the Court's concerns.

If the FEC makes changes in the rules affecting charities, it could result in stifling nonprofit speech, as nonprofits would struggle to determine how to conduct issue advocacy without referencing an elected federal official in a manner that is neither too flattering or too disparaging to the satisfaction of the government. Comments on the proposal are due on or before Sept. 30 and should be sent to ECdef@fec.gov, or through the Federal eRegulations Portal at www.regulations.gov. The FEC will hold a hearing on Oct. 19.

The FEC is considering a range of options including:

- retaining the section 501(c)(3) exemption;
- narrowing the section 501(c)(3) exemption;
- repealing the two current exemptions for 501(c)(3) organizations; and
- replacing all of the current exemptions with a broad new exemption covering all communications that do not *promote, support, attack, or oppose* a federal candidate.

Action Expected on Charitable Giving Legislation in September

The Senate Finance Committee intends to introduce a package of nonprofit accountability reforms and charitable giving tax incentives soon, according to sources on the Hill.

Sources say the committee hopes to mark up the Charity Aid and Recovery Act (CARE) in September. The CARE Act, contained in Title III of S. 6, the Marriage, Opportunity, Relief, and Empowerment Act of 2005 (MORE Act), includes several charitable-giving incentives, including a charitable deduction for itemizers, and tax-free distributions to charities from individual retirement accounts. The bill also contains provisions to improve the oversight of exempt organizations, including providing more money for IRS-oversight operations and making public more IRS determination letters.

The committee is also working on several charitable reform proposals and will likely introduce these proposals in September. Legislation may also address donor-advised fund reform, supporting organization reform and self-dealing, however, it is unclear to much of the sector the exact content of the legislation.

It is uncertain whether Santorum will support the nonprofit accountability legislation that Sen. Charles Grassley, chairman of the Senate Finance Committee, intends to introduce, even if it contains Santorum's CARE Act provisions. On May 31, Santorum and 20 senators, both Republican and Democrat, raised their concerns in a letter to Grassley and Ranking Member Max Baucus (D-MT). Santorum is concerned that the legislation will not focus on giving resources to the IRS to enforce the current laws, and that new laws might have an adverse effect on small nonprofits. If Santorum opposes the legislation, it will be more difficult for Grassley to move his bill through the Senate — and this will have a large impact on whether the CARE Act will pass.

In the House, Leadership is waiting to see what the fallout from the Senate will be. Rep. Roy Blount (R-MO) has indicated his intention to re-introduce the House version of the CARE Act and companion nonprofit accountability legislation after the Senate has acted.

Legislative Update: Federalism Bills

Legislative developments brewing in the 109th Congress could alter the relationships between the federal and state governments, thus potentially distorting important regulatory protections.

Unfunded Mandates Reform Act Revisions

There has been a flurry of activity marking the tenth anniversary of the Unfunded Mandates Reform Act: a series of hearings, a Government Accountability Office symposium, and hints from various congressional offices that UMRA could be reshaped in ways that might present serious obstacles to public protections. More information and analysis is available here. There appears to be a two-pronged strategy:

- **Creating a supermajority roadblock:** This part of the strategy was already realized in the Senate budget resolution. Before the budget resolution changed things, UMRA included a point-of-order mechanism that was relatively harmless: it allowed any member of Congress to raise a point of order against a bill imposing new requirements on state and local governments that, according to the Congressional Budget Office, would impose new costs of $50 million (indexed for inflation to $62 million) or more, but that point of order could be overcome by a simple majority vote. A undebated provision in the budget resolution, introduced by Sen. Lamar Alexander (R-TN), changes that simple majority vote into a 60-vote supermajority requirement, albeit only in the Senate.

  Bills subject to the point of order are not necessarily the paradigm case of an "unfunded mandate," or a requirement imposed specifically on the states without accompanying funding. Take, for example, a hypothetical bill to raise the minimum wage. State and local governments are employers, just like any private corporation that would be subject to minimum wage laws; even a small raise in the minimum wage would easily trigger the $62 million threshold for state and local governments. In such a case, senators wishing to block a minimum wage increase could raise an UMRA point of order, and the hypothetical minimum wage would then have to be supported by at least 60 votes. This heightened point of order becomes a backdoor filibuster that a senator can use to block legislation without ever having to criticize it.

- **Expanding UMRA's reach:** State and local government groups have been actively advocating for expanding the scope of laws subject to UMRA and amending UMRA to close what they call "loopholes." The changes they are calling for include the following:

- Eliminating UMRA's current exemptions, which include grant conditions (such as requirements attendant to foster care funding) and laws that impose requirements on the states in order to improve national security;
- Extending UMRA's coverage to laws that alter existing mandates when the total cost of the revised mandate exceeds $62 million, even if the *incremental* cost of the new requirements does not alone reach the UMRA cost threshold; and
- Imposing a form of regulatory budgeting by holding costs associated with implementing regulations within the bounds of the Congressional Budget Office cost estimates for the original legislation.

In an April 2005 hearing, it was apparent that no legislative proposal had been developed at that time. Given the major developments still to be tackled when the Senate returns from August recess, it now seems unlikely that there will be major developments on this prong of the UMRA strategy in that chamber until late fall at the earliest. Timing aside, this threat still seems significant.

Attack on Consent Decrees

Two currently pending bills, H.R. 1229 and S. 489, would erode government accountability by limiting the public's ability to hold state and local governments accountable for their violations of federal law. Consent decrees are court-enforceable settlement agreements that resolve litigation against state and local governments; the requirements built into such agreements, which are negotiated by the governments themselves, become the terms of a court order to remedy the existing violations and, in many such cases, to fix the systemic problems that caused those violations. These bills would put an artificial expiration date on consent decrees to remedy violations of federal law.

The stakes are high with these bills. They pose an immediately obvious threat to civil rights, with the exception of school desegregation cases, which are exempted under the bills. Also at stake would be many cases in which state agencies are responsible for implementing federal protective policies, such as air quality standards and workplace safety requirements. Many states have a weak record of environmental enforcement and workplace health and safety enforcement. When states fail to follow the law, the litigation option empowers workers and communities suffering environmental harms to act as private attorneys general, compelling the states to do their jobs. These bills would take power away from the people to hold their own government accountable.

Public interest groups, led by the civil rights community, are monitoring these threats closely.

On the Fringe

At least two other bills would have federalism implications, although with little likelihood of passage they do not appear to pose any real threat.

H.R. 3499, the "Local Control of Education Act," purports to "restore state sovereignty over public elementary and secondary education." It works by, first, declaring the obvious--that requirements built into federal education spending laws are not requirements on the states unless the states affirmatively act to take the money--and then, second, by requiring states every five years to re-affirm their decision to be subject to federal education requirements.

The final bill, H.R. 3621, is farthest out on the fringe. It would give governors and state legislators standing to litigate against any federal statute, regulation, or program that "invades or otherwise violates or intrudes upon the residual core sovereign authority" protected by the Tenth Amendment or that "damages or otherwise diminishes the republican form of government" in the state. Both ideas are nonstarters, and the second one is null and void from word one, given that the Supreme Court long ago ruled that the clause of the Constitution ensuring a "republican form of government" is nonjusticiable.

Political Context

These last two bills appear to be largely rhetorical efforts that allow some in Congress to espouse states' rights while doing little or nothing for the states themselves. The consent decree bills and potential UMRA reforms, however, pose serious threats in part because they are fueled by states' rights rhetoric. Recent budgets have been devastating to the states (even in those states that are showing revenue upticks, because those upticks are likely to be temporary and those states may well be forced to replace the missing federal funding with state revenues), 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 GOP sponsors in corporate America.

States Present Opportunities and Pitfalls for Progressive Regulation

Although many progressives have begun to focus resources on winning battles in the states, the regulatory record at the state level is characterized by both opportunities and potential pitfalls.

Successes at the State Level

Under the Bush administration, many important federal regulations have been stalled, weakened or even rolled back. In such cases, states have often been forced to take matters into their own hands, developing their own regulations that are more stringent than the national standards.

Most recently, Pennsylvania has decided to raise the bar on EPA's weakened mercury regulation. The Pennsylvania Environmental Quality Board voted 16 to three to go beyond the federal mercury regulation and require coal-fired power plants in the state to reduce mercury emissions by up to 90 percent. The federal standards promulgated by EPA earlier this year require only a 70 percent reduction by the mid-2020s.

Earlier this year, New Jersey also adopted more stringent standards for mercury emissions. Pennsylvania, however, has 39 coal-fired power plants in the state and has the second highest levels of toxic mercury pollution in the nation, making the task of lowering emissions across the state far more complicated than in New Jersey, which has only five such plants. Pennsylvania has also joined a host of other states to sue EPA over the standard, arguing that the Clean Air Mercury Rule does not offer adequate protection of health and the environment. Litigation serves as another mechanism for states to demand greater levels of protection from the federal government.

California offers another example of states enforcing stringent standards in the absence of federal protections. EPA promulgated regulations in January 2001 to mandate dramatic decreases in harmful emissions, most notably particulate matter and nitrogen oxide. These standards, known as the "Federal 2007 Rule," are scheduled to take effect in 2007. However, according to state and local pollution control officials, EPA has been pressured by the trucking industry to weaken the rule. In order to ensure truck drivers in California will be forced to comply with the original federal standard, California passed its own diesel fuel standards in October 2001 that are identical to the federal standard and scheduled to take effect at the same time.

Unwilling to rely on EPA to fully implement the rule, other state and local leaders worked with the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO) to create a Model Rule, based on the California standard, that states could adopt to ensure diesel emissions would still be regulated in the event that the federal standard is not implemented or is weakened. STAPPA and ALAPCO are comprised of air pollution control officials from the states, territories, and major metropolitan areas. On Sept. 29, 2004 11 states and the District of Columbia announced plans to implement California's standards for diesel fuel emissions as a backup to the federal regulation promulgated by EPA.

Like the federal regulation, the model rule, if implemented, will reduce emission levels by 90 percent for particulate matter and 95 percent for nitrogen oxide. According to a STAPPA/ALAPCO press release, the adoption of these regulations by these 12 jurisdictions will require more stringent emissions standards from about one-third of truck sales. To date, the states that have implemented or plan to implement the California standard are Connecticut, Delaware, the District of Columbia, Georgia, Maine, Maryland, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania and Rhode Island. (Read more about this example here).

Local governments have also stepped in to create more robust public protections than the federal government has mandated. Seattle led the way for a US Mayors Climate Protection Agreement, which committed US mayors to enforcing the provisions of the Kyoto Protocol on climate change in lieu of a federal policy.

Why Federal Mandates Matter

Action by state and local governments has increased the level of public protection in these cases, but state legislatures can also lower the bar on public protections. Though 175 cities joined the effort to combat climate change through reducing emissions, some states have passed policies that weaken efforts to control greenhouse gasses. A new law in Maine, for instance, requires the Maine Department of Environmental Protection to conduct analysis into the cost effectiveness of

regulations aimed to reduce greenhouse gas emissions, which will ultimately impede the state's ability to regulate greenhouse gases.

In other cases legislative action has caused more immediate harm to state citizens. In Florida, for instance, the repeal of a motorcycle helmet law has lead to a significant increase in death and serious injury. With the repeal of the law on July 1, 2000, only motorcyclists under the age of 21 or with less than $10,000 worth of medical insurance coverage are required to wear to protective helmets. A recent report by National Highway Traffic Safety Administration (NHTSA) has found that the repeal of the law has led to a 75 percent increase in motorcycle fatalities, from 181 motorcyclists killed in the 30 months before the law was repealed to 280 killed in the 30 months following repeal. The costs to treat head injuries for motorcyclists more than doubled to $44 million in 2002, and fewer than 25 percent of the hospitalized cases for head, brain or skull injuries cost less than $10,000, the required level of insurance to ride without a motorcycle.

States Fail at Worker Safety

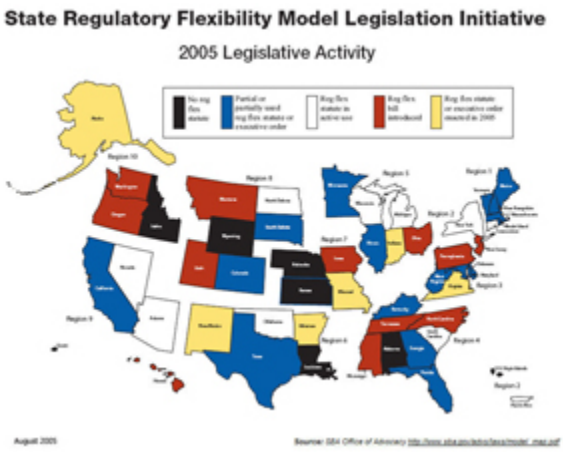
When states are responsible for enforcing or implementing regulations, standards may be applied unevenly or poorly. For instance, both states and the federal government are responsible for enforcing workplace health and safety protections. States are solely responsible for regulating work place health and safety in twenty-one states and U.S. territories, while the Occupational Safety and Health Administration (OSHA) oversees regulation in the rest. This unique situation provides an opportunity to examine how enforcement and compliance are impacted when regulation is left to the states. A recent paper examining enforcement data in the construction industry found that state inspectors tend to be more lax than OSHA officials in enforcing regulations. State inspectors tend to impose lower fines per violation and have "less measurable impact on inspected firms' regulatory compliance." Moreover, the frequency of construction injuries increases by approximately ten percent when states are responsible for enforcement.

Unlike state standards, safeguards enacted at the federal level provide the same protections for all Americans, regardless of where they happen to live. Thus, developing basic federal standards is necessary for ensuring equal protection for all. Nationwide problems call out for national solutions rather than a patchwork of efforts by states that could be prompted by economic dislocation into racing to the bottom rather than striving for the top. Moreover, as business learned with worker right-to-know regulations, it is less costly to comply with one federal standard than with potentially 50 different standards at the state level.

Easy Targets for Bad "Reforms"

In Congress, bad regulatory legislation is often too political to move forward, or other legislative priorities simply take precedence. Conservative groups, however, have made regulatory "reform" a priority at the state level and have found much success there. Several states have already enacted legislation similar to regulatory reform bills introduced in Congress. In fact, the Small Business Administration's Office of Advocacy has drafted model legislation for states to implement their own version of the Regulatory Flexibility Act ("Reg flex") that mirrors the federal statute. The Regulatory Flexibility Act requires agencies to analyze the impacts of regulations on small businesses before an agency can promulgate a new rule. At the state level, such analytical burdens will ultimately only serve to further bog down already taxed agencies while putting the interests of business above needed protections.

Still, through SBA's model legislation initiative 44 states have either implemented or introduced regulatory flexibility legislation. Just this year, Arkansas, Missouri, Alaska, Virginia, Indiana and New Mexico passed regulatory flexibility statutes or executive orders.



"Reg flex" is not the only initiative making its way through the states. Sunset and results commissions are another regulatory "reform" initiative that has caught on at the state level. In fact, legislation in Congress to establish federal sunset and results commissions is modeled off of the Texas Sunset Advisory Commission. Other regulation overhauls that originated at the state level were eventually adopted in Congress, such as the Unfunded Mandates Reform Act.

A PLAN for Better Safeguards?

Much of the regulatory "reform" successes at the state level have been made possible by the American Legislative Exchange Council (ALEC) which provides policy support for conservative state legislators. Progressive leaders recently launched the Progressive Legislative Action Network (PLAN), which seeks to be an alternative to ALEC "by providing coordinated research support for a network of State legislators, their staff's and constituencies, in order to equip them with coherent logistical and strategic advocacy tools necessary for advancing key progressive economic and social policies." Yet as myriad examples show, the states can provide just as many foils as they do opportunities for health, safety and environmental safeguards, and ultimately state protections can not replace the need for strong federal protections.

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

****Special Supreme Court Addition****

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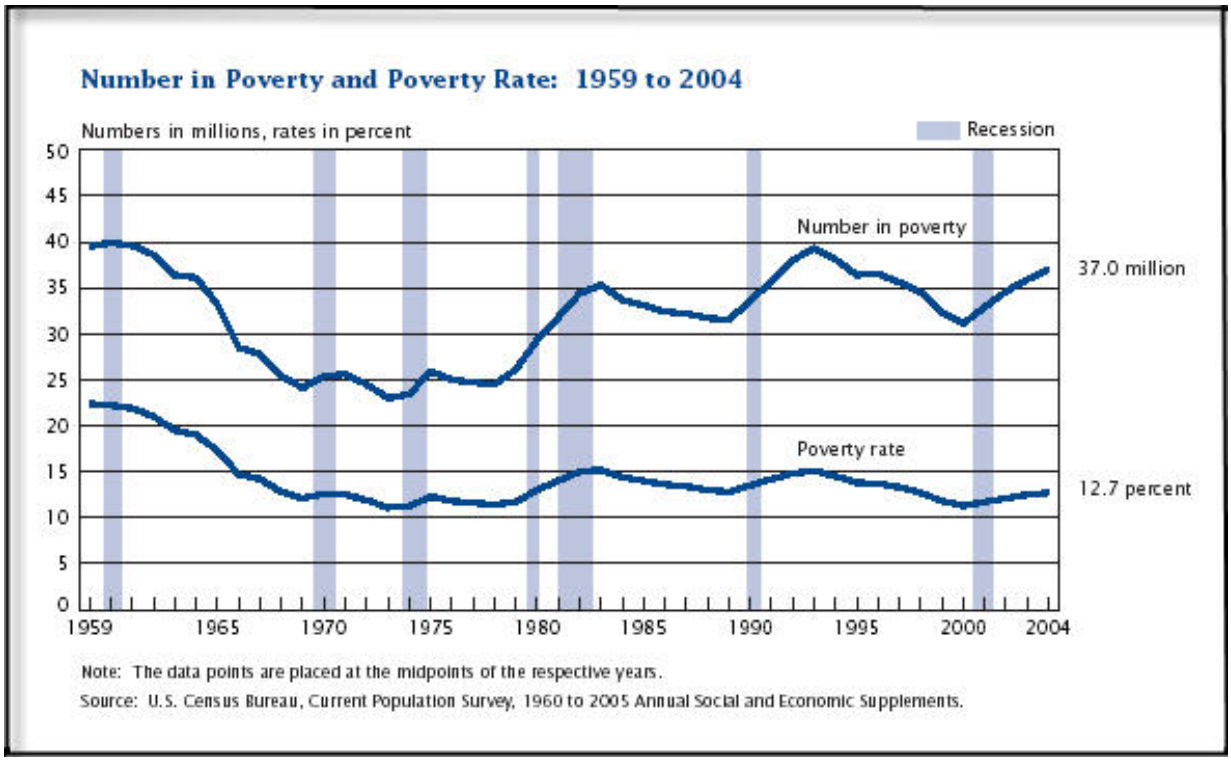
In This Issue

Despite Recovering Economy, Poverty On the Rise for Fourth Straight Year

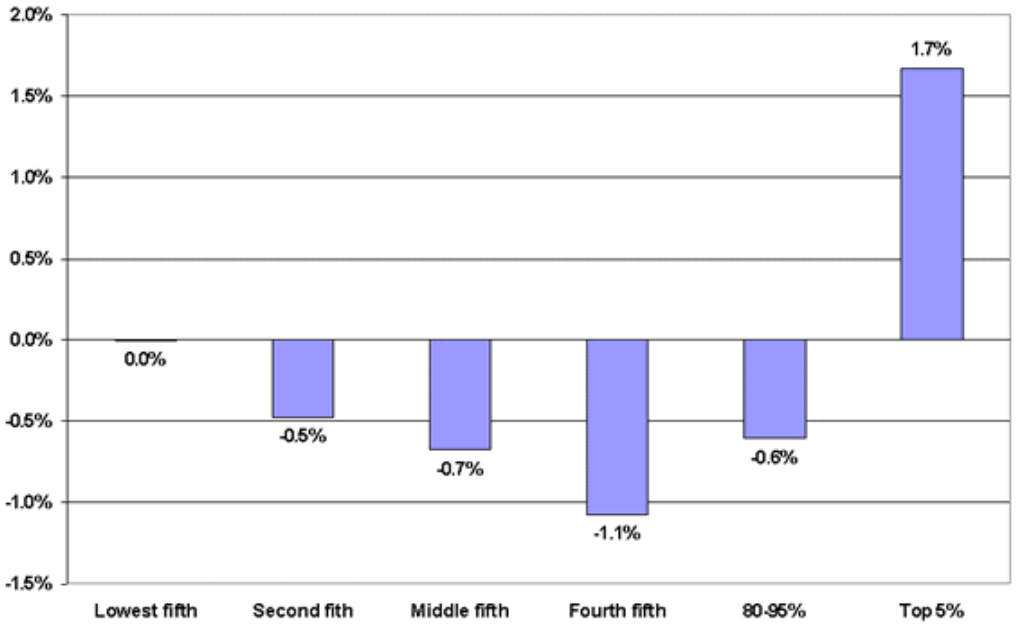
This year's Census Bureau report on nation-wide levels of poverty, income, and health insurance made clear that, although the U.S. economy expanded in 2004, the expansion did not extend to all Americans, in particular missing households most in need of a boast. The real income of a typical household has fallen for the past five years, despite steady economic expansion over the last three years. At the same time, the number of Americans living in poverty and lacking health insurance has increased steadily.

The number of Americans living in poverty rose to 37 million in 2004, up 1.1 million from 2003, according to the report. The income of the median household, adjusted for inflation, remained 3.8 percent - or a whopping $1,700 - below its most recent peak in 1999. This ongoing decline in income is in part due to the faltering level of real annual earnings, which fell 2.3 percent for men and 1.0 percent for women. Health care coverage for Americans grew spottier as well, with one million more Americans going without health insurance in 2004. In 2003, 45 million Americans lacked health insurance; that number has since grown to 45.8 million.



Besides revealing growth in the ranks of America's poor and uninsured, the latest Census release highlights the unbalanced nature of the economic recovery from 2002-2004. From the Census numbers, the Economic Policy Institute noted that "while the share of total national income flowing to the bottom 60% of households was essentially unchanged, the share going to the top 5 percent was up 0.4 percentage points."

Figure 2: Change in real average income by quintile, 2003-04



Source: Economic Policy Institute: Income Picture: August 31, 2005

While the economic recovery is not benefiting Americans equally, our economic outlook will likely worsen with the anticipated fallout from Hurricane Katrina, leading to a jump in unemployment and lower economic growth across the board. Payrolls may very well shrink and the unemployment rate could rise significantly in the months ahead. Many

economists believe the hurricane's fallout will slow overall economic growth, as higher energy prices provide a disincentive for consumers and businesses to spend. The *Washington Post* reports, some predict the aftershocks of the hurricane could drag down economic growth across the country, with the final quarter of this year slowing to an anemic 2 percent.

The latest Census report underscores the failure of current economic policies to improve conditions for most Americans. There has been some economic growth and expansion over the last few years, but the benefits have flowed primarily to corporations and those individuals who already have achieved economic stability, leaving the rest of the country to continue to struggle. As the Center on Budget and Policy Priorities found, at no other time in the past 45 years has U.S. poverty increase between the second and third years of an economic recovery.

The impact of stagnating incomes, increasing poverty, and the growing roster of uninsured Americans is felt most acutely by the most vulnerable. Almost one in five American children lives in poverty according to the new data, yet Congress is planning to make deep cuts to Medicaid and the federal food stamp program as part of the budget reconciliation process this month. Such cuts will only worsen the situation for poor families, who are already struggling to provide for their children's most basic needs.

Given the rise in poverty, slashing the safety net will only add to the pain of millions of Americans. CBPP Executive Director Robert Greenstein encapsulating progressive arguments against such cuts maintains that "Congress should not be pursuing policies that take these adverse trends in poverty income, and health insurance and make them worse." Our elected officials would better serve the American people by focusing on policies that realistically address the growing problems of poverty and inequity in our nation and that satisfy the need for long-term investment in our country, rather than by cutting our budget at the expense of those in need, to finance tax cuts for the wealthy.

Frist Has Change of Heart, Postpones Estate Tax Repeal Vote

Senate Majority Leader Bill Frist (R-TN) experienced a change of heart over the Labor Day weekend and decided late Monday evening to postpone a vote on repeal of the estate tax, which he had scheduled to be the first item of business when Congress returned to Washington today. That it took Frist so long to postpone the vote typifies the misguided priorities of the entire movement for repeal of the estate tax -- an effort to reward the privileged few at the expense of millions of Americans who struggle to get by from day-to-day.

The repeal vote had been scheduled for Tuesday, September 6 before the Senate left town at the end of July for its month-long recess. Frist's announcement of his intention to proceed with the vote as planned despite the extent of the devastation caused by Hurricane Katrina becoming more apparent by the day, however, was met last week with surprise and even outrage. Many found Frist's myopic pursuit of estate tax repeal in light of the crisis insensitive, including Minority Leader Harry Reid (D-NV), who in a statement expressed surprise "at the Republican leadership's insensitivity toward the events of the last week. With thousands presumed dead after Hurricane Katrina and families uprooted all along the Gulf Coast, giving tax breaks to millionaires should be the last thing on the Senate's agenda." Reid's sentiments were echoed by a number Senate Democrats.

Early reports put the price tag of clean-up and reconstruction in hurricane-affected areas at more than $100 billion, quickly placing Katrina among the most costly and destructive natural disaster in U.S. history. Clearly, urgent priorities exist that need a large and continuing financial commitment from the federal government, in order to begin the long-term task of rebuilding devastated Gulf Coast communities. Repealing the estate tax would fundamentally undermine the government's ability to provide those resources over the long-term.

It is unclear when, or if, the vote to repeal the estate tax will be rescheduled. It is possible the Senate will simply not have enough time this year to reschedule the vote, in light of its already jam-packed schedule.

Finishing Appropriations Bills Will Be Juggling Act for Congress

Thanks to the House and Senate appropriations committee reorganization that took place earlier this year, the appropriations wrap up this fall promises to be particularly dreadful, causing headaches for politicians, congressional staff, and analysts alike. In a startling display of ignorance and lack of foresight, the House and Senate chose to reorganize their appropriations committees in an inconsistent and uncoordinated way. The result is a different number of appropriations bills in the House and Senate (11 in the House and 12 in the Senate) and committee structures that are not

easily reconciled across the two chambers -- there are only six appropriations bills this year with identical jurisdictions.

This situation is bound to cause confusion and grief on the Hill in forming and staffing conference committees for the remaining six bills without identical counterparts and also for outside analysts and observers in attempting to track appropriations for different programs across committee jurisdictions. It will almost surely lead to delays and drag out the conference committee process when Congress can least afford to waste its time.

The Senate, in particular, now has more than a full plate with confirmation hearings and a vote on the Supreme Court nomination of John Roberts (now for the post of chief justice), two difficult reconciliation bills, additional relief legislation for the victims of Hurricane Katrina, hearings into the federal response to the disaster, the reauthorization of the Higher Education Act, and more than half (seven, to be exact) of the appropriations bills to finish. Majority Leader Bill Frist (R-TN) already announced during the August recess that the Senate would be working well into the fall, past its target adjournment date - but it is unclear if even that extension will give them enough time to wrap up the work. Congress could very well be working through Thanksgiving or later again this year.

Yet the delays will have a broader (and more significant) impact than simply changing holiday travel plans for members of Congress and their staff. Because of the incongruence between the organization of the House and Senate appropriations bills and because the Senate is woefully behind in its appropriations work with little hope of catching up, Congress appears headed for another round of unending, short-term continuing resolutions, and most likely another extremely large omnibus appropriations bill.

Continuing resolutions are measures Congress passes that continue funding the federal government past the start of the new fiscal year when new legislation for funding has not been passed. Commonly called "CRs," the resolutions are passed by both chambers and signed by the president. Yet they fund government programs at the previous year's level, not taking into account inflation, population growth, or demographic changes such as greater rates of poverty or numbers of uninsured. Funding the federal government through CRs for long periods, as Congress did last year when it was unable to finish the appropriations bills on time, inevitably has an negative impact on the services and programs Americans depend on.

Further, the CRs ultimately lead to a last-stitch omnibus appropriations bill -- where all unfinished bills are throw together into one tremendous piece of legislation. Congress usually spends too little time debating and analyzing the contents of the omnibus bill, allowing unnecessary special interest projects and congressional pork to slip into the bill unnoticed.

As we have previously observed, omnibus appropriations bills are bad policy:

> *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, 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, especially for other members of Congress, is troubling.*
>
> -- *OMB Watcher*
> June 27, 2005

Roberts Errs on Side of Secrecy as White House Counsel

Documents recently released from the Ronald Reagan library reveal that, while acting as White House associate counsel during the Reagan administration, John Roberts supported government secrecy and strenuously avoided any implication that the White House had an obligation to provide information to anyone, including Congress. On occasion, Roberts made small efforts to assist those seeking information. These, however, tended to be minor issues; and, even in these efforts, Roberts typically included disclaimers to prevent any assumption that the administration was required to respond.

Freedom of Information

In one memo, Roberts expressed aversion to government openness, recommending the removal of a reference to the Freedom of Information Act (FOIA) from President Reagan's radio address to avoid endorsing the law. In the original text of the radio address, which condemned the Soviet Union's handling of a 1983 incident, in which its military shot down a

Korean Airline passenger plane, the president would have acknowledged that "freedom of information" is necessary to democracy. Roberts noted that the statement clashed with the administration's efforts to limit FOIA and advised replacing "freedom of information" with "free speech."

"'Freedom of information' is of course a legal term of art, and we have, quite correctly, taken several steps to limit the scope and certain abuses of the Freedom of Information Act."

That Roberts endorsed Reagan administration efforts to limit FOIA as undertaken "quite correctly" here offers a rare glimpse into Robert's personal opinions on freedom of information.

In another memo, Roberts appears willing to bend FOIA to avoid disclosure. Generally, when the White House received requests for information under FOIA, Roberts used standard response language, informing the requester that FOIA did not apply to the White House. Responses always noted that some offices of the executive branch were covered by FOIA and advised the requesters to resubmit their requests to specific offices. The White House exemption from FOIA is a fairly well established legal precedent, thus these responses reveal little of Roberts' position on FOIA.

However, on at least one occasion Roberts advised claiming the White House exemption when he did not believe it was legally justified. On March 30, 1984, Diane Powers of the White House Photo Office inquired if she could deny requests from photo collectors. Apparently, the Photo Office sought to avoid satisfying the deluge of requests under FOIA for copies of photos of the president with other world leaders and on other occasions of state. In a memo, dated April 27, 1984, to White House Counsel Fred Fielding, Roberts advised that "as an initial matter" the White House "take the position that the Photo Office is not subject to FOIA." Roberts also noted that "While I have no doubt that this is the position we should take, I must point out that it is not clear that it will withstand legal challenge."

Roberts explained in the memo that the legal precedent that exempts the White House from FOIA applies to the president's personal staff or those whose sole job it is to advise and assist the president. Clearly, the Photo Office would not fit into either of these categories. However, Roberts wrote that it is "unclear" whether the Photo Office would satisfy one of these criteria and acknowledges that a court asked to rule on the issue "could view the Photo Office as a discrete entity with functions that go beyond advising the President."

In this instance, Roberts went to questionable lengths to stretch the White House's FOIA exemption simply to shield a White House office from inconvenient requests. Robert's strong stance is likely the result of efforts to prevent any part of the executive branch from committing to any public disclosure requirements.

Presidential Records Act

Shortly before Reagan took office, Congress passed the Presidential Records Act of 1978 (PRA) to impose limited requirements for public disclosure upon the White House. Under the PRA, presidential documents would be archived and made public 12 years after a president leaves office. A memo, dated September 9, 1985, drafted by Roberts for Fielding, expressed great concern over the requirements of the new law. Specifically Roberts worried that the 12-year limit on restricting access was too short and that the "prospect of disclosure after such a brief period might inhibit the free flow of candid advice and recommendations within the White House."

Roberts recommended "steps should be taken before the end of the Administration to cure the infirmities of the Act." He advised either a legislative amendment to the law or archive regulations that would allow "executive privilege claims to block disclosure after the expiration of the statutory 12-year period." While Robert's lack of enthusiasm for disclosure is disheartening, it is especially troubling that he would advise attempting to thwart the intent of Congress with a regulatory rulemaking.

Roberts noted in the memo that claims of executive privilege would hinge on the president in power in 2001. As it turned out, President Bush, still less supportive of government openness, forcefully exerted executive privilege to prevent the automatic release of Reagan documents as mandated by PRA. In fact, President Bush issued an executive order empowering past presidents and their representatives to invoke executive privilege and restrict presidential papers from the public indefinitely. This effort to block the PRA, which is currently being challenged, may eventually reach the Supreme Court, creating a potentially interesting predicament for the former-White House counsel, were Roberts to be confirmed.

Congressional Access

One might think Congress would more easily gain access to government information held by the White House, and that the administration would more readily disclose information to Congress on issues being decided by the legislature. Roberts, however, advised the Reagan White House against such cooperation and transparent dealings with toward Congress.

An April 23, 1985 memo drafted by Roberts for Fielding objected to the disclosure to Congress of information supporting the president's decision not to seek voluntary agreements for production restraint from copper-producing countries. Roberts asserted that "such documents could be protected from even compelled disclosure by a claim of executive privilege." Roberts appeared concerned that Congress would view the release of information as a precedent and expect disclosure of similar documentation in the future.

"We should not gratuitously release such materials, even on a 'confidential basis,' to Congress. Doing so creates a precedent that will cause problems when we wish not to disclose similar material in the future, and also whets the appetite of Congress for additional protected documents."

Roberts envisioned a future issue for which Congress would want additional information on the administration's process and deliberations to help it in its own efforts on the issue. Interestingly, he assumes that the White House would want to withhold this information from Congress. Similar to the Presidential Records Act, Roberts' comments from twenty years ago have remarkable resonance with recent events. Congress sought additional information from the Bush administration on Vice President Cheney's Energy Task Force after allegations were raised that the energy proposal was almost entirely based upon the wish lists of major energy companies. The administration refused to disclose the information, resulting in an unprecedented suit brought by Congress against the executive branch. The U.S. District Court for DC upheld the administration's use of executive privilege and Congress dropped the case. Private lawsuits from public interest groups did, however, result in the disclosure of thousands of pages from the Energy Task Force.

Conclusion

Roberts' own documents from his time as a White House assistant counsel show the Supreme Court chief justice nominee was neither a supporter of government openness or of executive branch transparency. He advocated against FOIA, the Presidential Records Act, and disclosure to Congress. Indeed, the near-constant struggle to obtain information from our federal government is why the Supreme Court regularly hears cases on granting public access to government information. Given the numerous restrictions put into place in recent years, including questionable homeland security restrictions, expanded use of executive privilege, denials of routine FOIA requests, and repeated stonewalling of the public and Congress on issues ranging from torture to energy policy, if his nomination is confirmed Roberts will undoubtedly hear new cases involving access to government information. What is in doubt is to what extent Roberts holds the same views now that he held as White House counsel. If he has retained the views he expressed during his White House years, surely we can expect his opinions to favor government secrecy over transparency.

Public Being Shut Out of Environmental Right-to-Know Hearings

House Resources Committee Chairman Richard Pombo (R-CA) has established a congressional task force to review and make recommendations on how to 'improve' the National Environmental Policy Act (NEPA). As the task force holds hearings around the country, however, environmentalists and ordinary citizens are finding it difficult to participate.

The task force has held four 'public' hearings this summer, soliciting input primarily from industry interests that view NEPA's environmental and health requirements as burdensome. In several cases, citizens concerned about loosing their voice in environmental decision-making have been prohibited from testifying. The task force intends to hold two more meetings, but has not announced the details on dates and locations of those hearings.

Critics contend that Pombo created the task force to undermine NEPA -- considered by many to be the cornerstone of American environmental law -- and that meeting announcements have been intentionally withheld until the last minute to silence NEPA supporters. Nearly 200 NEPA supporters demonstrated at the first task force hearing held on April 23 in Spokane, Washington. Since then details on hearing locations and times have been difficult to get in advance.

Signed into law in 1969 by President Nixon, NEPA requires the government to determine and disclose the environmental impact of taxpayer-funded projects, consider alternatives, and respond to public comments. NEPA is often cited by environmentalists as having improved American quality of life by requiring, for example, builders to construct highways

away from drinking water sources and nuclear waste shippers to route their toxic cargo away from homes.

Unfortunately, the Bush administration has been chipping away at NEPA on a variety of fronts:

- Attached to a 2005 supplemental appropriations bill (H.R. 1268) was a measure exempting the Department of Homeland Security from obeying any laws (including NEPA) when securing U.S. borders. See: Homeland Security Wins Power to Waive All Law, *OMB Watcher*, February 22, 2005.
- President Bush issued an executive order on May 18, 2001 directing federal agencies to "expedite" energy-related permits, thereby shortchanging environmental reviews required under NEPA.
- The Healthy Forests Initiative (H.R. 1904), approved Dec. 3, 2003, included several waivers of NEPA requirements, on the suspect grounds of wildfire prevention efforts.
- The U.S. Forest Service announced on Dec. 22, 2004, new rules that reduce public participation, and eliminate NEPA requirements for many plans to include environmental impact statements. See: December 22, 2004 Wilderness Society letter.
- President Bush signed Executive Order 13274 in September 2002, exempting transportation projects from certain NEPA requirements. See: Paving Without Public Input, eUpdate on Community Right to Know, Sept. 1, 2004.

The NEPA task force is accepting public comments sent to the following email address: nepataskforce@mail.house.gov.

New Jersey Attorney General's Office Scraps Proposed Secrecy Rule

New Jersey's Office of the Attorney General has announced the state will abandon plans to establish controversial restrictions to its Open Public Records Act (OPRA). The restrictions, proposed in a state rule change, would have required requesters to prove a "need-to-know" before the state would release information about chemical hazards. The added burden on the public could have severely limited access to toxic-chemical inventories and other records widely used to monitor public health and safety, workplace conditions, and environmental quality.

The decision is welcome news to open government advocates who voiced strong opposition to the proposed restrictions since they were announced eight months ago. Earlier this summer, workers and environmentalists protested against the proposal, picketing the office of New Jersey Attorney General Peter Harvey. Protestors maintain that the proposed rules would have amounted to an "information lockout" and assert that safety, not secrecy should be the focus of state efforts.

According to New Jersey's Acting Governor Richard J. Codey, input from public interest groups and media attention around the issue played a major role in the attorney general's decision to reconsider the secrecy rules. Specifically, an August 18 letter from Codey to the New Jersey Work Environment Council (WEC) read, "It is my understanding that based on substantive input received at the July 22 hearing and in written form during the two open public comment periods, the Department of Law and Public Safety has decided not to adopt the rule as proposed."

Rick Engler, executive director of WEC, comments that, "New Jersey open government advocates have convinced the attorney general's office that their proposed rule was far too sweeping and would have endangered worker and community health, as well as jeopardized federal funding for state safety enforcement." WEC is coalition of 70 labor, environmental, and community organizations that advocates for safe, secure jobs and a healthy, sustainable environment.

Roberts Documents Show Troubling Disregard for Nonprofit Rights, Desire Not to 'Alienate' Industry

Recently released documents related to the nomination of John Roberts for chief justice of the Supreme Court reveal concerns he had over a 1983 proposal that would have prohibited recipients of federal grants or contracts from using their own money for lobbying and other forms of advocacy. The nonprofit community congratulated itself for beating back this "defund the left" proposal. The documents, however, suggest that what was heralded as a victory for nonprofits may have had more to do with the potential negative impact of the proposal on defense contactors such as TRW and Boeing.

On January 24, 1983, the Office of Management and Budget (OMB) published a proposal to modify Circular A-122, which presents cost principles for nonprofit federal grantees. The proposed modification would have barred all advocacy by nonprofit organizations that receive federal funds, including advocacy paid for with non-federal funds. This proposal was advocated by the Heritage Foundation's *Mandate for Leadership*, a blueprint for Reagan administration policy that called

for defunding the left by limiting the advocacy voice of nonprofit grantees.

OMB began work on this issue early in Reagan's first term. In April, 1982, OMB's Financial Management Branch privately circulated proposed language to a group of federal officials assembled by OMB. The unpublished proposal tracked the federal tax code; for example, confining "lobbying" to legislative activities. The proposal was one sentence long: "The cost of influencing the introduction, amendment, enactment, defeat, or repeal of any act, bill or resolution by a legislative body is unallowable." The proposal would have applied to state and local governments, and institutions of higher education.

A slightly less extreme version of the proposal was eventually published on January 24, 1983 much to the dismay of the nonprofit community. The proposal would have prohibited federal reimbursement for all costs of "political advocacy," which was sweepingly defined as "attempting to influence a government decision" of any type -- legislative, administrative, or judicial -- at any level of government. It would have applied to any staff, equipment, or facility involved in the slightest amount of political advocacy, even if the advocacy costs were paid with non-federal funds.

Upon release of the OMB proposal, the White House indicated that contractor rules operated by the Department of Defense, the General Services Administration, and NASA would ultimately change to be compatible with the Circular A-122 changes. A 1949 law already restricted federal contractors and grantees from charging the government for costs they incur (either directly or indirectly) to influence legislative action on any matter pending before Congress or a state legislature.

Roberts, then White House associate counsel, wrote a February 3, 1983 memo to White House Counsel Fred Fielding, describing the Circular A-122 proposal. Roberts notes that he has been advised that "the logic of the proposed rules would affect traditional lobbying activities of government contractors." Roberts then gets to the heart of the matter:

"The proposals paint with a much broader brush than is necessary to address the activities of government grantees that have been perceived as most objectionable. It is possible to 'defund the left' without alienating TRW and Boeing, but the proposals, if enacted, could do both."

Roberts also questions the "relevance" of the legal citations used in the OMB proposal.

Meanwhile a firestorm of protest was building over the OMB proposal. Lyn Nofziger, a political advisor to Reagan, wrote a February 17, 1983, memo to Fielding, along with Attorney General Ed Meese, White House Chief of Staff Jim Baker, and Assistant to the President for Political Affairs Ed Rollins, warning of the far-reaching effects of the proposed revision.

Nofziger detailed concerns over the vagueness and burdensome nature of the proposals. "What this is going to do is force companies to keep detailed records on the political activities of their employees. If this is Constitutional, and I doubt very much that it is, instead of getting government off people's backs as we promised to do for lo these many years, you are adding an intolerable burden onto the backs of many, many people." In a handwritten postscript, Nofziger notes that "the opposition is growing not only among the lobbyists but also among the Republicans on the Hill." Nofziger notes rumors that House Minority Leader "Bob Michel is upset" and that "Jack Brooks [the Democratic chair of an oversight committee] is thinking about hearings."

Roberts penned a letter to Nofziger addressing these concerns for Fielding. The letter indicates that OMB will publish a revised proposal.

The revised OMB proposal, released on November 3, 1983, hardly represented an improvement for nonprofits. The result was that the National A-122 Coalition, led by Independent Sector, OMB Watch, and the Alliance for Justice, who joined forces with defense and other government contractors to call for a fix to the proposal. With the strength of the contracting community and support within the White House for companies like TRW and Boeing, a more reasonable rule was published April 27, 1984.

OMB's final rule addresses "lobbying," not "political advocacy." The final rule also employed standard cost allocation principles, so that non-federal funds could be used to pay for lobbying activities. Lobbying is defined as attempts to influence legislation at the state or federal level, attempts to influence the outcomes of elections, or contributing to a political party.

Roberts' work on the Circular A-122 rule revision demonstrates troubling values. For Roberts and others in the White House at the time, only the concerns raised by corporate interests prevented their efforts to silence the nonprofit community in an effort to "defund the left." That the defeat of OMB's reckless proposal to modify Circular A-122 was

brought about by the power and influence of the contracting community, and not recognition of the issue-advocacy rights of the nonprofit sector, should be of concern to all Americans.

Debate Over Grants Rules Heats Up as Groups Lose Funds, Challenge Policy

DKT International, a Washington-based charitable organization, has filed suit against the U.S. government over a grant condition that dictates organizations adopt a specific policy statement, while a second organization has lost federal funding as a result of a suit brought for noncompliance with grants rules for faith-based organizations. Both developments point to important issues in federal grants rules, the first challenging the degree to which government may dictate privately funded speech, the other demonstrating the practical problem of separating privately funded religious content from publicly funded programming.

DKT International has sued the U.S. Agency for International Development (USAID) to block its requirement that grantees adopt an organizational policy opposing prostitution and sex trafficking. DKT has refused to adopt the USAID policy, it explains, because such a policy would hinder its work to reach those most at risk of contracting HIV/AIDS, as well as being an unconstitutional coercion of speech by private individuals. As a result of this refusal, DKT lost a $60,000 grant to market condoms in Vietnam.

DKT manages contraceptive and family planning programs in 11 countries in Africa, Asia and South America. Its annual budget of $50 million serves 10 million couples, and its programs target those most at risk of contracting HIV/AIDS. A statement by DKT President Phillip Harvey lays out DKT's objects to the USAID policy requirement as "further stigmatiz(ing) the very people we are trying to help...thus undermining the relationship of trust and mutual respect required to effectively conduct AIDS-prevention work." Harvey also explains the policy violates the First Amendment rights and integrity of affected organizations.

While the DKT case raises objections to government intrusion into private speech, another case involving a faith-based grantee raises the issue of intrusion of private, religious content into government-funded services. The U.S. Dept. of Health and Human Services (HHS) notified the abstinence-only program Silver Ring Thing (SRT) that it cannot draw down a $75,000 grant until it submits a plan to implement safeguards that ensure its publicly funded programs are free of religious content. Three months ago the American Civil Liberties Union (ACLU) filed a lawsuit against HHS alleging the Boston-based program used federal funds "to promote religious content, instruction and indoctrination." HHS conducted site visits to the program before suspending funding.

Federal regulations require that faith-based organizations provide religious programs at a separate time and /or location from publicly funded programs. It is unclear how or whether SRT will correct the problem, but a plan for doing so is due to HHS on Sept. 6. Joel Oster, a spokesman for the Alliance Defense Fund that represents the group, was quoted as saying, "Basically, they want us to change our accounting system." It would appear, however, that changes in bookkeeping methods would not address the broader issue of religious content in SRT programs.

FBI Documents Reveal Further Spying on Peace, Civil Rights Groups

Joint Terrorism Task Forces conducted surveillance of peace, civil rights and animal rights groups in Michigan and Colorado, according to documents released as part of a suit brought by the American Civil Liberties Union (ACLU) accusing the Federal Bureau of Investigation (FBI) of misuse of anti-terrorism funds. The ACLU is seeking documents for 16 organizations and ten individuals nationwide relating to the case, in which the ACLU alleges the FBI used state task forces to spy on domestic advocacy groups that oppose Bush administration policies.

The ACLU obtained documents through the Freedom of Information Act (FOIA) showing the FBI investigated the Rocky Mountain Peace, Justice Center and the Colorado American Indian Movement, and four groups in Michigan. The investigations were carried out by the state Joint Terrorism Task Force (JTTF), which are meant to combine federal, state and local law enforcement resources to combat terrorism.

The Colorado groups were both investigated after announcing plans for anti-war demonstrations. In a statement issued by the Colorado ACLU, Legal Director Mark Silverstein said, "These documents underscore the ACLU's concern that the JTTF inappropriately regards public protest as potential 'domestic terrorism'... By casting its net so unjustifiably wide, the FBI wastes taxpayers' money and threatens to chill legitimate dissent." The ACLU has asked the city of Denver to

withdraw from the Colorado JTTF.

In Michigan four advocacy groups were listed as targets of investigations described at a January 2002 "Domestic Terrorism Symposium" attended by representatives of the FBI, Michigan State Police Force, including its Criminal Intelligence Unit, the Secret Service, Michigan State University, and Michigan's National Guard and Department of Corrections. Documents obtained from the meeting state its purpose was to keep law enforcement "apprised of the activities of the various groups and individuals within the state of Michigan who are thought to be involved in terrorist activities." In addition to covering white militias and prison gangs, the meeting reported on the following:

- *By Any Means Necessary*, a national organization that defends affirmative action. The documents indicate that the FBI reported that all their activities have been peaceful.
- *East Lansing Animal Rights Movement* and *the Animal Liberation Front* (ALF) and *Earth Liberation Front* (ELF). The report states a student group of 12-15 members had planned a meeting and potluck dinner on the Michigan State University campus.
- *Direct Action*, a peace group that organized a march to protest a 2002 FBI program to interview 37 Lansing-area immigrants from the Middle East as racial profiling.

In a statement announcing release of the documents, ACLU Staff Attorney Ben Wizner said, "This document confirms our fears..." Michigan ACLU Director Kary Moss said, "Labeling political advocacy as 'terrorist activity' is a threat to legitimate dissent which has never been considered a crime in this country. Spying on those who simply disagree with our government's policies is a tremendous waste of police resources."

American League of Lobbyists Proposes Principles to Guide Congressional Reform

Responding to Democratic-sponsored lobbying and ethics reform bills recently introduced in the House and Senate, the American League of Lobbyists (ALL) recently adopted a set of principles to guide lobbying reform. Among its recommendations is an expansion of the definition of lobbying to cover all types of legislative advocacy efforts, include advertising, media campaigns and grassroots efforts that are currently exempt from filing and disclosure requirements forms.

ALL, a membership organization representing more than 700 lobbyists, concluded at its August board meeting that the Lobbying Disclosure Act (LDA) should apply to all legislative activities, including those of "church groups, state and local governments and public relations professionals."

The league began crafting its reform principles in May when Reps. Marty Meehan (D-MA) and Rahm Emanuel (D-IL) introduced legislation to reform the LDA. The Special Interest Lobbying and Ethics Accountability Act of 2005 (H.R. 2412) would increase lobbying disclosure requirements for grassroots groups and coalitions, curb privately funded travel by U.S. Congresspersons, and strengthen enforcement and oversight of current ethics and lobbying disclosure rules by the Senate clerk's office. Sen. Russ Feingold (D-WI) introduced a similar bill in the Senate.

The Lobbying Disclosure Act of 1995 (LDA) governs federal lobbying by professional lobbyists, lobbying firms, and tax-exempt organizations. The LDA requires an organization to register with and file semi-annual reports to the clerk of the House of Representatives detailing its federal lobbying activities if it 1) has at least one employee who qualifies as a lobbyist as defined by the act, and 2) expects to spend $24,500 or more in a six-month period on lobbying. Houses of worship are currently exempt from the LDA.

Nonprofit 501(c)(3) organizations are already required annually to submit extensive filings (in the Form 990) to the Internal Revenue Service (IRS), including disclosing lobbying activities at the federal, state and local level. Currently the LDA permits a nonprofit organization that has chosen to fall under an expenditure test -- a test that identifies how much money an organization may spend on lobbying -- to submit lobbying information through the Form 990, instead of completing the LDA forms. Accordingly, these nonprofits have already been reporting their lobbying activities under a definition of lobbying that differs from that of the LDA.

If the LDA is modified, it is unclear how such modifications will affect nonprofits. Currently the provision to submit the Form 990 continues, but that could change. Nonprofits are being urged to follow developments related to and to better understand reporting rules that may change, with nonprofit advocates fearing new rules may create burdensome reporting requirements and fuzzy definitions. Education and enforcement of rules, which ALL also supports, are critical for

nonprofit accountability, as well as an expansion of the range of voices in the advocacy arena.

Many nonprofits, particularly small groups, do not put substantial resources into federal lobbying. Although nonprofits value public policy participation, most are not involved in advocacy on a consistent basis. For example, of the nonprofits that report carrying out any lobbying activity, roughly three out of five say they lobby infrequently. In general, many nonprofits have a hazy understanding of federal advocacy and lobby laws. A 2002 study, conducted by OMB Watch, The Center for Lobbying in the Public Interest and Tufts University, found that even among those who claim to know the rules, most groups lacked an understanding of the basic limits on lobbying and were unaware even of what constitutes lobbying under IRS rules.

Roberts Showed Prudence in Reg Reform Initiative

Although Supreme Court chief justice nominee John Roberts worked for an administration generally hostile to regulation, documents released by the Reagan Library from his time as White House counsel reveal that he raised considerable objections to at least one of the period's far-reaching regulatory "reform" proposals.

In 1983, while working as Associate Counsel to President Ronald Reagan, Roberts was asked to review a radical regulatory reform bill proposed by then-Rep. Trent Lott (R-MS). The bill, known as the Regulatory Oversight and Control Act of 1983 (H.R. 3939), would have imposed significant burdens on regulatory agencies, mandating the following:

- All regulatory agencies would perform cost-benefit analysis for all new major rules (i.e., those that would impose costs greater than $100 million).
- Agencies would also have to review all existing major rules over a ten year cycle.
- All newly proposed and existing major rules would include sunset provisions, which would force the rule to expire no later than 10 years after it was promulgated.
- Further, major rules would only pass with congressional approval, and Congress would be given an opportunity to disapprove all non-major rules.

Along with these provisions, the legislation would have also codified parts of Reagan's Executive Order 12911, such as the requirement that agencies produce a regulatory agenda. Other provisions would have changed the way rules were judicially reviewed and given Congress greater oversight authority over the rulemaking process. Many of these provisions would have in effect stifled all agency rulemaking. Moreover, many of these ideas are now being proposed once again by conservatives in the House.

Roberts wrote two memos to White House Counsel Fred Fielding responding to the proposed legislation. In the memos, Roberts opposed several specific provisions of the bill and criticized the bill overall for overburdening agencies. Though Roberts did condone the use of cost-benefit analysis in agency rulemaking, he believed that the review of existing rules would overly burden agencies. Roberts also strongly disagreed with the mandate for congressional review of agency rules.

Very little about Roberts' opinions on regulatory reform can be discerned from the first of these documents, an Oct. 7, 1983 memo with recommendations for a White House letter to Lott regarding the bill. Roberts took a prudent, legalistic approach to the legislation, recommending the White House respond with only "broad generalities" until the White House Counsel office had time to evaluate the bill carefully and consult the affected agencies. He did elaborate on one part of the bill, but only because he concluded it was unconstitutional.

Roberts' second memo, from Oct. 17, was more revealing. In response to an OMB request for comments on the bill, Roberts was stronger in his criticism of H.R. 3939 as a handicap to agency rulemaking, objecting to "the burden of mandating agency review of existing regulations." Roberts also criticized the bill for "hobbling agency rulemaking by requiring affirmative Congressional assent to all major rules." Though Roberts did agree with the use of cost-benefit analysis in evaluating new regulations, he believed applying cost-benefit analysis *ex post* would drain agency resources and stymie White House efforts to put forth new regulatory initiatives. In a document drafted by Roberts and signed by Fielding, Roberts acknowledged that "several of the provisions, such as those mandating regulatory analyses of agency rules and requiring agencies to adopt the most cost-effective alternative, appear to be consistent with the Administration's approach to regulatory reform." Roberts added, however, that "other provisions of the bill would seem to impose excessive burdens on the regulatory agencies in a manner that could well impede the achievement of Administration objectives."

Although the Roberts files reveal little about his approach to regulatory policy itself, there is ample additional evidence that Roberts is hostile to the exercise of federal power to fashion solutions to national problems, whether by questioning

the Commerce Clause as a basis for environmental protection or by actively litigating against standards established through Spending Clause programs.

Press Room | Site Map | Give Feedback on the Website

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

September 19, 2005 Vol. 6, No. 19

IN THIS ISSUE

LETTER FROM GARY BASS ON POST-KATRINA PROGRESSIVE INITIATIVE

September 19, 2005

RE: Your Thoughts on Launching a Domestic Security Initiative

Dear Friend of OMB Watch:

Like you, the board and staff of OMB Watch has been dismayed, even outraged, by what has transpired in the aftermath of Hurricane Katrina. The limited and poorly coordinated government response is a direct consequence of the "starve the beast" mindset that has dominated our nation's capitol in recent years. The era of less government and unquestioned reliance on the private sector must end. In its place must be a renewed commitment to creating responsive government institutions and policies that address not only the immediate problems in the Gulf Coast, but also the underlying inequities that existed in the region before Hurricane Katrina and that still exist today in far too many areas of our country.

We made this argument in a September 8 statement, your responses to which have been illuminating, gratifying -- and largely supportive. We were taken by not only the number of responses but also the energy, emotion and vitality of them. All these comments were shared with OMB Watch board members and staff, and some, which in particular

added to the understanding of the crisis and what our response has and should be, have been published here for all to see.

Last Thursday evening President Bush said that "the work of rescue is largely finished; the work of recovery is moving forward." He highlighted the important work of the voluntary sector and then offered a new federal plan to address the rebuilding of the Gulf Coast that some have estimated will cost roughly $200 billion. The president should be commended for calling on government to respond to the challenge even as "starve the beast" ideologues begin to criticize the spending.

At the same time, the magnitude of proposed spending dictates careful consideration by lawmakers to ensure it is directed toward the right priorities. The public should be concerned with accountability and should demand that taxpayer dollars go toward their intended purpose. It is troubling that the first weekly financial updates required of the administration as part of the money already appropriated by Congress have been called by Rep. David Obey (D-WI) "so vague as to be useless." Others are already warning about contractor profiteering, with Rev. Jesse Jackson, for example, noting that "it's a hurricane for the poor, and a windfall for the rich." One of Congress' key responsibilities in the clean-up and reconstruction to come will be ensuring transparency and accountability, in order to provide assurances to the public that money is being spent wisely and justly.

The president's plan looks like a hasty repackaging of conservative proposals that have been rejected in the past. His proposal for Worker Recovery Accounts of up to $5,000, the latest incarnation of the White House's routinely rejected proposal for re-employment accounts for dislocated workers, is simply another voucher proposal, embodying the conservative philosophy that favors private corporations over public services, and diminishing accountability. Moreover, the White House's Gulf Opportunity Zone proposal is unlikely to boost new economic activity in the region, as it is merely a rehash of existing empowerment zone policies, which rely heavily on corporate tax breaks to entice businesses into taking on economic activity they would likely do anyway. Finally, the Urban Homesteading Act, which would give land through a lottery to people in exchange for an agreement to build on it, falls far short of being visionary in its approach, does nothing to assuage the enormous anxieties the underprivileged of the region face, and raises moral questions about re-establishing geographic concentrations of the poor. It is even so short-sighted as to provide no means for helping "winners" build housing, only for obtaining property.

The president appears to be taking a page out of the Heritage Foundation post-Katrina response playbook. For example, the Heritage Foundation called on Congress to offset the cost of responding to Hurricane Katrina with cuts to other programs. Bush ruled out tax increases to pay for the new initiatives the day after presenting his plan, and instead called for cuts to offset the new spending. Even House Majority Leader Tom DeLay (R-TX), a staunch conservative, said earlier in the week that discretionary spending has already been cut to the bone and that offsets would be nearly impossible to find.

Not surprisingly, conservative groups such as the Heritage Foundation are trying to capitalize on Katrina to pursue ideological objectives. For example, they have proposed suspending or watering-down a broad swath of environmental, safety, and wage regulations, some of which the president has already temporarily waived. (See related story.)

Possibly the most outrageous proposal of all, however, is the call to repeal the estate tax and "immediately exempt Katrina victims from paying death taxes." Such a statement, which is cruel in its willful ignorance of the reality of Katrina's victims, illustrates just how out of touch this movement is. Had the poor, elderly, and frail who were the vast majority of those who lost their lives in Hurricane Katrina and her aftermath been wealthy enough to face even the slightest prospect of paying the estate tax, they would have likely had the resources to evacuate in time. Those left the most adrift in Katrina's wake are certainly not estate tax payers: they are the single mother struggling to start over from scratch, the senior who lost his home, and working families housed in temporary shelters across our country. In the weeks, month, and even years to come, it is with these people and their hopes for a better future that our priorities should lie. Instead, Time.com reported last week that Sen. Jeff Sessions (R-AL), a leader for estate tax repeal, left a voice mail for a colleague: "[Arizona Sen.] Jon Kyl and I were talking about the estate tax. If we knew anybody that owned a business that lost life in the storm, that would be something we could push back with."

We hope the president's plan will receive the careful scrutiny it deserves. Democratic leaders have also presented a plan that deserves consideration. That plan includes helping victims: (1) find housing; (2) find jobs with decent wages, along with increasing and extending unemployment insurance; (3) obtain access to the health care they

need, including mental and public health services; (4) get children back to school and provide student borrowers with relief; and (5) get back on their feet.

The president said last Thursday, "We've also witnessed the kind of desperation no citizen of this great and generous nation should ever have to know -- fellow Americans calling out for food..." We wholeheartedly agree. But we wish to point out that this desperation, which the White House finds so unacceptable, was experienced by many along our Gulf Coast before Hurricane Katrina and is experienced today in underprivileged communities across America. Over the past four years, poverty rates have steadily climbed, with 4.1 million more Americans slipping below the poverty line. We believe something must be done about this; addressing this challenge is both a moral imperative and a practical necessity.

Not only must this nation help heal and rebuild its Gulf Coast communities, it must also work to tackle a still deeper blight. We must invest in communities across the country to prevent avoidable tragedies, mitigate the unavoidable ones, and work to improve the opportunities available to and the quality of life for all Americans. This requires also that our government address existing glaring inequalities in our society. For example, poor and homeless people in the Washington, DC area are already on waiting lists for shelter. They now must wait even longer, because Hurricane Katrina evacuees have been placed above them on those waiting lists. The problem is less the decision to prioritize evacuees than the inadequacy of resources in the capital city of the wealthiest country in the world.

In that vein, OMB Watch and several other like-minded national organizations have begun discussing what a new investment agenda -- tentatively titled the Domestic Security Initiative -- might look like. Here are our initial thoughts. We would like to involve you in this discussion and would appreciate any feedback you may have in helping to shape it.

Five Elements of a Domestic Security Initiative

1. **Addressing our Infrastructure Needs.** This would include repairing and improving our roads, bridges, levees, and public transit systems.
2. **Protecting our Environment.** This would include enacting mandatory limits on pollution to fight global warming and other environmental problems, reducing our dependence on oil, cleaning up existing environmental hazards, and strengthening enforcement.
3. **Investing in our People.** This would include strengthening public education, health care for all, providing child care support, expanding food and nutrition support, providing affordable housing, and protecting the institutions that provide these services.
4. **Strengthening our Economy.** This would include supporting public works projects where needed to put people to work, establishing decent, livable wages, instituting workplace improvements, increasing job training and placement activities, and other employment issues.
5. **Protecting our Communities.** This would include support for community-based policing, enforcement of anti-discrimination, environmental, health and safety, and civil liberty laws intended to protect the public, and federal oversight, testing and coordination of emergency response plans, which include ensuring our chemical plants, nuclear facilities, and borders are safe and secure.

To make it easier to obtain your thoughts, we have created a short survey. Please take a moment to complete the survey.

Thank you in advance for your thoughts. Also please encourage others to complete the survey. We'll leave it open until the end of the month, when we'll report to you on the results.

Yours truly,

Gary D. Bass
Executive Director, OMB Watch

Click here to give us your thoughts.

KATRINA COULD CAUSE A NEEDED REEVALUATION OF PRIORITIES IN CONGRESS

Hurricane Katrina has shaken up Congress' fall schedule immensely, as its focus has shifted to respond to the immediate needs of the Gulf region utterly devastated by the storm. Congress has passed more than $62 billion in aid, as well as tax and Medicaid packages in order to help victims get back on their feet. This work has caused the postponement of a vote to repeal the estate tax in the Senate and completion of congressional reconciliation tax and spending bills. It is still unclear if this is merely a set-back or the beginning of a more long-term shift in congressional priorities after the hurricane.

Of the reconciliation measures laid out by Congress in April's budget resolution, some could prove to be extremely harmful. Reconciliation was expected to result in lawmakers:

- cutting $35 billion from expected mandatory spending over five years ($10 billion was expected to be taken from Medicaid);
- enacting $70 billion in tax cuts over five years (Senate Finance Committee Chairman Charles Grassley (R-IA) was expected to use reconciliation to, among other things, extend the 2003 dividend and capital gains cuts and provide one year of alternative minimum tax relief); and
- raising the federal government's debt ceiling to $781 billion (for the fourth time since President Bush took office in 2000).

The original deadlines for the three actions above were September 16, 23, and 30, respectively. However, in light of the current attention to hurricane-related legislation, Senate Majority Leader Bill Frist (R-TN) has extended the deadlines for the budget cuts approximately six weeks to October 26 and for tax cut legislation to November 2.

The Republican leadership in Congress has signaled its intention to proceed with the reconciliation bills this year, they claim partly to "ensure the vitality" of the national economy. Grassley has repeated his intention to move forward with tax reconciliation and Rep. Jim Nussle (R-IA) and Sen. Judd Gregg (R-NH), Budget Committee Chairmen for the House and Senate, respectively, intend to move forward with reconciliation-protected budget cuts sometime this fall. Nussle stated, "We should not be distracted by this or anything else to continue our efforts to reform government. That's what reconciliation is about, it's about reforming government." Gregg echoed these sentiments calling the idea of an indefinite suspension of reconciliation "blatant politics" and noting, "The view is we're still going to execute this reconciliation package in a timely manner."

Congressional Democrats, meanwhile, have been steadfast in their calling for a fundamental shift in priorities, starting with reversing the decision to complete the reconciliation bills. Democratic lawmakers are calling on the GOP leadership to reconsider drastic tax cuts for the wealthy and cuts to essential human services at a time when so many people are in need. Many believe a post-disaster shift in our national consciousness and priorities will make it much more difficult for the GOP to ram through $70 billion in tax cuts and hope to cancel reconciliation altogether.

In addition, some Democrats in the Senate are hoping the delayed vote to repeal the estate tax will fall off the agenda for good. It remains unclear whether Frist will be able to hold a vote on the estate tax this year. While Frist and other GOP leaders are still hoping to hold a vote, they have come under increasing fire -- both from Democrats and some in their own party -- for their efforts to push forward with repealing taxes for the wealthiest people in the U.S., while so many people are in obvious need following Hurricane Katrina.

Sen. Jon Kyl (R-AZ), who has served as the Republican's key estate tax negotiator, told reporters last week he hopes to hold a vote in October "to determine whether or not the votes are there for permanent repeal... That hasn't changed." Meanwhile, Chairman Grassley has vocalized his skepticism on holding a vote, commenting recently that repeal of the estate tax would be "unseemly" at a time when "people are suffering."

Congressional Republicans not only face criticism of their continued efforts to repeal taxes for the most wealthy, but are also being hammered for a string of budget decisions that will negatively impact the nation's charitable infrastructure for many years to come -- the same infrastructure so many Americans are now turning to for help. Federal budget experts at the Aspen Institute have found in a recent report that Congress' Fiscal Year 2006 (FY 06) federal budget proposals reflect a broader trend of shifting responsibility for a number of social programs from the federal government towards the already strained charitable sector. In *The Nonprofit Sector and the Federal Budget: Fiscal Year 2006 and Beyond*, they report that the budget proposed by Congress would cut funding to important programs for nonprofit groups by $40 billion between FY 05 and FY 10. The president's original budget proposal from earlier in the year would have been even more harmful, cutting these same programs by $71.5 billion over the same time period.

Congressional GOP leaders and the administration have, following Hurricane Katrina, made a point of lauding charitable organizations and nonprofits for the important role they play in helping people in need. President Bush, in his Sept. 15 address to the nation, said, "I ask the American people to continue donating to the Salvation Army, the Red Cross, other good charities and religious congregations in the region." Yet, Bush and GOP Congressional leaders are undermining the abilities of the charitable sector to effectively provide help in times of crisis, by continuing to push forward with budget cuts, as well as continuing their push for repeal of the estate tax, a key incentive for charitable giving.

If Congress and the White House are serious about providing help to disaster victims *now*, and serious about improving the plight of all Americans in need across the country, it is imperative they reconsider:

a) Dangerous budget and tax cuts in reconciliation,
b) Efforts to repeal the estate tax, and
c) Priorities that would force the nonprofit sector to carry more of the load.

An about-face on these dangerous proposals would illustrate a true commitment to investing over the long-term in the well-being of this country and its people, a commitment that is obviously needed right now.

SENATE, HOUSE PASS FIRST KATRINA TAX CUT PACKAGE

Last Thursday, the House and Senate quickly passed separate but similar versions of legislation designed to provide targeted and temporary tax cuts to all those directly impacted by Hurricane Katrina. The two bills, which also provide tax incentives to individuals housing evacuees and for businesses who continue to pay employees or hire displaced workers, each passed unanimously. All signs indicate this bill is not the last tax cut Congress will attempt to pass in order to help Katrina victims as GOP leaders have already eluded to additional "economic stimulus" proposals in the pipeline. Many fear these proposals will amount to little more than a continuation of the traditional conservative tax cut agenda and will not target tax cuts to those affected by the hurricane genuinely in need.

Most provisions of the two bills passed by Congress last week were targeted at specific populations or groups of people affected by the hurricane and were designed to act as a temporary boost to those left dislocated by the storm. Among the items included in both bills include cancelation of early withdrawal penalties from retirement plans, extension of the Work Opportunity Tax Credit and other provisions that would encourage hiring those displaced by the hurricane around the country and aid in the retention of employees within the disaster zone, a relaxation of restrictions on financing for first-time homebuyers in the areas impacted for three years, and a tax deduction for individuals who provide housing assistance to dislocated people.

The Senate and House versions also seek to encourage charitable giving through the private sector, but the Senate included more wide-ranging incentives. The Senate version encourages both cash and non-cash donations such as food and books, while the House version focuses on increasing individual and business cash contributions only. Both versions increase reimbursements for the charitable use of a personal vehicle and loosen restrictions on direct contributions to charities from IRA and other tax-advantaged retirement accounts.

Before adopting a final version, the Senate bill was modified to more closely match the House version by including additional provisions and modifications related to the Earned Income Tax Credit (EITC), other low-income credits,

and sunsets for different provisions. The EITC provision would grant displaced individuals the option of using their 2004 income to calculate the child credit and the earned income credit on their 2005 tax returns and grant the Treasury Department authority to ensure that taxpayers do not lose dependency exemptions or child credits for 2005 due to being temporarily dislocated. These changes were made in an attempt to have the two versions more closely aligned and avoid the need for a conference committee to resolve differences. Unfortunately, this attempt did not expedite the process enough to send a final version to the President before congress recessed for the weekend.

The Joint Committee on Taxation estimated the House version would cost $5.28 billion over the next ten years while the Senate version will cost slightly over $8 billion over the same time period.

Because these tax cut bills contains mostly small, non-controversial items that are targeted and temporary, its two versions will likely quickly be reconciled and a final bill sent to the president this week. It is, however, nearly certain to be only the first of several tax cut packages that will be compiled to respond to the aftermath of the hurricane. It seems likely an intermediate "economic stimulus" package will be proposed that will be more a vehicle for conservative ideological tax policies than a measure to help those in need on the Gulf Coast. Corporate tax cuts, particularly to specific industries like the insurance, logging, airline, and agricultural industries, reconstruction giveaways for huge multi-national corporations like Halliburton, and unrelated items like extension or elimination of capital gains and dividend taxes could sneak their way into legislation that is seen in Congress as must-pass.

What is worse, the devastation and ruin along the Gulf Coast seem to have done little to change the priorities and perspectives of the Republican leadership in Congress. Despite pushing back reconciliation deadlines until the end of October, GOP leaders continue to insist passing the tax cut reconciliation bill outlined earlier this year is of vital importance. Yet it is this very philosophy of tax cuts as a panacea applicable to any situation that has lead to the current state of egregious underinvestment in American infrastructure and communities, problems Congress now scrambles to fix in the wake of Katrina. Specific provisions long-rumored to be included in the reconciliation bill would primarily benefit the wealthiest Americans, while doing little to offer quick or targeted relief to those who face the formidable work of putting their lives back together in the months to come.

TAKE ACTION NOW: TELL EPA TO COME CLEAN ON HURRICANE KATRINA AFTERMATH

As we survey the events following the storm, our government's early response can only be viewed as woefully inadequate. The government has employed incomplete testing of the dangers, withheld information from the public about chemicals in the flood waters, and provided misleading information about public safety. The public deserves better from the government it relies on as its first line of protection in a crisis.

The fact is that thousands of sites in the storms path use or store hazardous chemicals. From the day Hurricane Katrina passed over the Gulf Coast, report after report from residents and media on the ground told of oil spills, obvious leaks from plants, storage tankers turned on end, and massive fires. Yet our information about what threats to the public actually exist, what measures are being taken to protect the public, and what measures people in the area should be taking to protect themselves remains vague and piecemeal.

Evidencing the confusing information available are statements made by Chris M. Piehler of the Louisiana Department of Environmental Quality, who told reporters earlier this week, "early results do not indicate specific toxic pollutants at any levels of concern," and, in stark contrast, a New Orleans City news release, which stated that "a disease-laden sludge could remain on streets and buildings, which may further compromise public health."

Environmental Protection Agency (EPA) Administrator Stephen Johnson has acknowledged there is great uncertainty over toxic hazards that remain in the flooded parts of New Orleans. Yet, EPA's Response to Katrina webpage offers far too little information to assuage this uncertainty. The agency indicates that only a few chemicals had been found to be over their acceptable limit, which would only pose a threat to children and pregnant women who they drank significant qualities of flood water.

An EPA press release acknowledged the presence of 'fuel oils' in soil deposits left behind from the flood waters, but EPA has not released detailed data about which chemicals have been found in soil. Many 'fuel oils' and other

petroleum byproducts are known carcinogens and can breach certain protective gear, yet the EPA release gives no warning of potential cancer risks of exposure.

In even more flip-flopping by government agencies, over the weekend city officials announced plans to allow some businesses and residents to return to the city as early as next week, while Vice Admiral Thad Allen, head of FEMA's relief effort, called these plans "problematic" and voiced doubts about the safety of return to the city. No one seems to know what potential dangers were left behind from the polluted flood waters. These concerns will require addressing for some time to come, as decisions are made about the safety of institutions, such as schools, day care facilities, or hospitals, where children and other vulnerable populations could face exposure.

Along with many local and national environmental right-to-know organizations, OMB Watch is calling on federal agencies to level with the American people, so that individuals and communities in affected areas can make the best possible choices to protect their own health and safety. You can take action now and tell EPA to fully investigate the environmental hazards released in New Orleans by Hurricane Katrina and to disclose all its findings to the public.

GAG ORDERS LIFTED; FBI CAN NO LONGER SILENCE DISCUSSION OF PATRIOT ACT, JUDGE SAYS

In a victory for First Amendment advocates, a federal judge lifted a gag order on a Connecticut library from whom the FBI demanded patrons' records, allowing them to discuss openly their experience and participate in the broader debate about the PATRIOT Act. The judge issued a preliminary injunction against the government, barring it from enforcing gag orders on recipients of certain orders called National Security Letters (NSL), created under the PATRIOT Act.

The American Civil Liberties Union (ACLU), who is also a plaintiff in the case, represent "John Doe," an unidentified member of the American Library Association. The ACLU filed the lawsuit on August 9 against the U.S. Department of Justice, and the case was originally under seal in U.S. District Court in Bridgeport, Connecticut.

The lawsuit specifically challenges the NSL provision of the PATRIOT Act that allows the FBI to demand a range of records without any judicial oversight. The NSL gag order prevents the recipient from speaking out about personal experiences with the PATRIOT Act. The ACLU sought an emergency court order to lift the gag so the client could participate in meaningful discussions of the PATRIOT Act with Congress, the press, and the public. The government argued that the gag ordered blocked the release of the client's identity, not his ability to speak about the PATRIOT Act, and that revealing the client's identity could jeopardize a federal investigation into terrorism and spying.

In her September 9 ruling siding with the ACLU, U.S. District Court Judge Janet Hall ruled that the organization has a First Amendment right to fully participate in the discussion surrounding the PATRIOT Act. In order to do so, the recipient must be able to talk about the NSL. Hall wrote, "The [National Security Letter] statute has the practical effect of silencing those who have the most intimate knowledge of the statute's effect and a strong interest in advocating against the federal government's broad investigative powers." Ann Beeson, ACLU Associate Legal Director and the lead attorney in the case, said the ruling “makes clear that the government cannot silence innocent Americans simply by invoking national security." The decision has been stayed, and the gag order will remain, until September 20, to allow the government an opportunity to file an appeal.

The case is likely to be watched closely by critics and supporters of the PATRIOT Act alike. The preliminary injunction, which the government is likely to appeal, is a significant landmark, because it would, if upheld, allow the public for the first time to hear the experiences of someone who has received a National Security Letter. First Amendment and civil liberties activists argue that recipients of PATRIOT Act orders must be allowed to speak out and government should disclose the frequency and circumstances surrounding its use of PATRIOT Act powers, if the country is to have an informed discussion of the usefulness and constitutionality of the PATRIOT Act.

Sign the ACLU petition to urge Attorney General Alberto Gonzales to stop preventing librarians from participating in the PATRIOT Act debate.

RIGHT-WING GROUPS CHALLENGE LINK BETWEEN CARCINOGENS, CANCER

Two right-wing, industry-backed groups filed a data quality petition with the U.S. Environmental Protection Agency (EPA) challenging the agency's labeling of certain chemicals as "likely human carcinogens." Specifically, the Washington Legal Foundation (WLF) and the American Council on Health and Science (ACHS) want EPA to eliminate statements in its Guidelines for Carcinogen Risk Assessment that indicate that a substance may properly be labeled as "likely to be carcinogenic to humans" based solely or primarily on the results of animal studies.

Background

EPA publishes and periodically revises a series of documents to assist risk assessors in evaluating the risks of environmental hazards; the Guidelines for Carcinogen Risk Assessment is one such document. The principle focus of the guidelines is hazard identification: can a chemical agent present a carcinogenic hazard to humans, and, if so, under what circumstances? The guidelines direct investigators to weigh all available evidence, briefly summarize the results of the risk analysis, and provide a conclusion with regard to carcinogenic risk to humans. The guidelines include lengthy discussions regarding the use of animal studies in making risk assessments and state that an agent may be labeled "likely to be carcinogenic to humans" based on a variety of evidence derived from animal studies.

The Challengers

The ACSH is a self-described "consumer education consortium concerned with issues related to food, nutrition, chemicals, pharmaceuticals, lifestyle, the environment and health." However, the group has been heavily funded by industry for years; among the past corporate contributors are numerous food, drug and chemical companies. According to the Center for Media & Democracy, the group has taken an "apologetic stance regarding virtually every... health and environmental hazard produced by modern industry."

The WLF was founded in 1977 to "fight activist lawyers, regulators, and intrusive government agencies at the federal and state levels." The group has received sizable donations from the tobacco industry for its work opposing so called "junk science," which it claims has been used to establish the dangers of cigarettes.

Request for Correction

The August 23 data quality challenge objects to EPA's policy of erring on the side of caution in making its determinations. The Data Quality Act, passed by Congress in 2000, required that agencies establish guidelines to maximize the quality of their data and allow outside stakeholders to request a correction of any information they believe does not meet the guidelines. The WLF and ACSH claim that EPA is distorting scientific evidence with this policy, and they are requesting that a litany of specific corrections be made to the text of the guidelines. Among the "corrections" recommended is a request to replace an assertion that agency policy should be health protective with a statement that "no risk assessment procedures should be as decision-making tools." The petitioners also called for the deletion of an entire paragraph that explains that studies indicating a chemical to be an animal carcinogen may be used to assess a carcinogenic effect in humans, because the agency does not test carcinogens on humans.

The sole evidence used in the data quality petition to challenge EPA's guidelines is a book written by the ACSH, entitled America's War on Carcinogens: Reassessing the Use of Animals Tests to Predict Human Cancer Risk. The book claims that the use of high-dose animal studies to determine human cancer risks is not scientifically sound. It further asserts that animal studies are often misinterpreted in a manner that distorts the risk to humans associated with exposure to such chemicals and that such studies confuse the public regarding cancer risks and actually undermine public health.

The WLF and ACSH petition represents a new low in the misuse of the data quality challenge process, seizing upon the existence of scientific uncertainty and attempting to use the data quality guidelines to call data unreliable or poor. No scientific study or finding is ever certain, and EPA has established policies that it believes are ethical and scientifically sound. Because it does not test carcinogens on human subjects, the agency must make policy decisions based on the best available information -- animal studies.

The challenge does not question the veracity of findings from any specific animal study, merely the use of these studies to assess the risk of cancer in humans. However, the manner in which the agency uses sound scientific information is a policy issue, not a data quality issue. The objections raised by WLF and ACSH in their data quality petition are clearly beyond the scope of the guidelines. This data quality challenge more than any other, is sound reason for re-evaluating its usefulness to agencies but more importantly, its usefulness to the public.

NONPROFITS AND KATRINA

The nonprofit sector has really stepped up to the plate in responding to the crises left in the wake of Hurricane Katrina. Now the federal government is responding with laws and regulations that will assist nonprofits providing relief in the Gulf Coast.

The House and Senate have each passed legislation providing Katrina tax relief that will directly affect nonprofits. The bills, an overall description of which is available here, offer short-term tax relief to evacuees and residents of the devastated areas along with a series of charitable giving tax incentives to promote charitable aid for hurricane victims. The differences between the House and Senate versions, which are very similar, will likely be hashed out early this week, and the bill will immediately be sent to the president for his signature.

Key provisions relating to charitable giving are:

- IRA Charitable Rollover: The Senate bill excludes Individual Retirement Account (IRA) withdrawals from a traditional or a Roth IRA for qualified charitable distributions from otherwise-taxable gross income. Taxpayers who are 70 or older would be allowed to rollover amounts from their IRA accounts directly to a qualified charitable organization on a tax-free basis. In addition, the provision allows taxpayers aged 59 or older to transfer IRA funds to a charitable remainder trust and give a remainder interest in the trust to charity without tax consequences. This provision is effective through December 31, 2005. The House bill does not have a similar provision.

  Charities may have difficulty maximizing the utility of this tax break, given the short time frame. Groups who can benefit will need to educate the public to make donors aware of it. That means using resources on fundraising rather than relief, given the short timetable for the tax break.

  This provision was a key item in the CARE Act, which has had difficulty moving in Congress. Passage through this Katrina Relief package may be the means for extending it next year.

- Increases Individual Charitable Deductions: The Senate bill raises the permitted cash contribution level for individuals seeking a charitable deduction from fifty percent to sixty percent of adjusted gross income for tax years ending on or before December 31, 2005. The House bill would exempt cash donations related to Hurricane Katrina relief made before January 1, 2006 from the 50 percent of adjusted gross income limit as well as a phase-out of itemized deductions.
- Food and Book Donations: The Senate bill adds a provision from the CARE Act to encourage food and book donations from surplus inventories, by increasing the deductions donors will receive. The tax break would be in effect until December 31, 2005. The House version does not address food and book donations.
- Corporate Charitable Contributions: Currently, the charitable deduction for a corporation in any taxable year may not exceed 10 percent of the corporation's taxable income. Both the Senate and House bills temporarily increase the percentage limitation to 15 percent of the corporation's taxable income for one taxable year ending on or before December 31, 2006. Of course, the history of corporation charitable contributions shows that corporations, on average, have never come close to the 10 percent limit on contributions.
- Encourage IRS Information-sharing with State Charity Officials: The Senate allows the IRS to disclose information regarding organizations for which the IRS has denied or revoked tax-exempt status or certain other disciplinary actions the IRS may have taken to appropriate state officials. The objective is to address potential scams in the wake of Katrina, although there is no specific expiration date for this provision. The House does not have a similar provision.
- Increased Mileage Rate for Calculating Charitable Contribution Mileage Deduction: Both the Senate and House versions increase the mileage rate individuals may use to compute a tax deduction for personal vehicle expenses. The Senate increases it to 60 percent of the standard business mileage rate; the House to 70 percent [until Dec 31].

In related legislation, the House passed by voice vote H.R. 3736, the Katrina Volunteer Protection Act, authored by Rep. James Sensenbrenner (R-WI). The bill provides liability protection for the actions of unaffiliated volunteers or

those working through a nonprofit assisting in Hurricane Katrina relief. Currently, there are few legal protections for volunteers or nonprofit organizations. Only an extremely small percentage of the some 1.4 million nonprofit organizations in the United States actually purchase liability insurance, due to excessive costs.

As the *Los Angeles Times* recently reported, "The lack of liability protection was one of several concerns delaying some 900 churches from joining the evacuation network." According to recent press accounts, the Red Cross feels constrained in giving out the names of refugees to those who want to offer their homes for shelter because of liability concerns.

The IRS has also temporarily changed some of its regulations concerning nonprofits. For example, it is expediting reviews of applications from new disaster relief organizations seeking tax-exempt status. The IRS has also recently announced special relief intended to support leave-based donation programs. Under these programs, employees donate their vacation, sick or personal leave in exchange for employer cash payments made to nonprofits providing relief for victims of Hurricane Katrina. This provision expires on Dec. 31, 2005.

Other agencies are also taking action. The Department of Justice (DOJ) has established the Hurricane Katrina Fraud Task Force, designed to deter, investigate and prosecute disaster-related federal crimes, such as charity fraud and insurance fraud. DOJ has also set up a page on its website to inform citizens of ways to protect themselves from fraud.

Donations to nonprofits have poured in as Americans respond to the devastation in the Gulf Coast. As of September 17, charities have raised over $1.06 billion in aid. Consequently, many nonprofits that are not participating in the relief efforts are worried whether donations for the remainder of the year will decline. According to the *Chronicle of Philanthropy*, such dips occurred after the 2001 terrorist attacks and December tsunamis.

Charities and foundations are currently scrambling to figure out how to aid the victims of Hurricane Katrina, helping them get new homes, jobs, transportation, health care, education for their children, post-trauma counseling, and other services. Charities will also be focused on the long-term, how the work their organization does can help prevent massive devastation like that caused by Hurricane Katrina. The charitable giving legislation is Congress' first step in aiding charities in getting the resources they need when Congress and the nation is asking so much of them. However, Congress must do more than rely on the nonprofit sector. Disaster preparedness and relief programs are a federal responsibility that must be supported with adequate resources.

OMB WATCH URGES CHARITIES TO COMMENT ON PROPOSED FEC RULE

The ability of nonprofits to use broadcast media for advocacy and to encourage citizen participation in public policy debates could be severely limited by proposed rules meant to regulate federal campaign finance. The Federal Election Commission (FEC) is reviewing rules that exempt unpaid broadcasts and 501(c)(3) organizations from a provision meant to limit campaign attack ads funded with soft money. The review is the result of a court case challenging a host of regulations implementing the Bipartisan Campaign Act of 2002 (BCRA). Charities and religious organizations are encouraged to file comments explaining why grassroots lobbying and genuine issue advocacy should not be regulated as federal election activity.

BCRA imposed absolute bans on corporate funding, including nonprofit corporations, for broadcast messages that refer to federal candidates with 60 days of an election or 30 days of a primary. Congress gave the FEC power to create exemptions for broadcasts that are wholly unrelated to federal elections. In 2002 the FEC exempted charitable and religious organizations from the rule because, unlike other nonprofits such as 527s, these organizations are already prohibited from partisan election activity by the U.S. tax code.

A federal court sent the rule back to the FEC for reconsideration to address whether it should leave enforcement to the Internal Revenue Service (IRS), and asking if this would result in exempt advertisements that "promote, support, attack and oppose" a federal candidate. On August 12 the FEC published a notice seeking public comment on its re-examination of the rule. The FEC is considering a range of options including retaining, narrowing or repealing the exemption for 501(c)(3) organizations or replacing it with a broad new exemption covering all communications that do not "promote, support, attack, or oppose" a federal candidate.

The FEC, however, fails to define what it means by the "promote, support, attack, or oppose" standard. An undefined "promote, support, attack, or oppose" standard would be the wrong approach to determine when charities and religious organizations can broadcast grassroots lobbying and other messages about the issues of the day. It does not distinguish between a candidate in his or her capacity as a candidate and references to public officials acting in their official capacity. It could mean grassroots lobbying messages that ask people to call a Senator and urge him or her to change a past position on a bill are considered partisan attacks on that Senator.

This approach would have a chilling effect on constitutionally protected speech, with charities wishing to avoid FEC investigations, even if they are ultimately cleared. The public would be the ultimate loser if this happens.

While drawing the line between electioneering and issue advocacy may be difficult, it is not impossible. Lobbying is not campaigning. The IRS has established indicators that distinguish between electioneering and issue advocacy. For example, nonpartisan communications are those that:

- identify specific legislation or a specific event outside the control of the organization;
- are timed to coincide with the specific event; and
- identify the candidate solely as a government official in a position to act on the policy or specific event.

The FEC should use IRS standards in its own enforcement program, so that there will be one set of standards for charities and religious organizations to define what is partisan and what is not. The FEC should recognize that nonpartisan nonprofits have the right to speak out on the issues of the day, any day. The right to criticize federal officeholders in television, radio, satellite and cable media should not depend on arbitrary application of the undefined "promote, attack, support or oppose" standard, or on the desire of federal officials to avoid public criticism. If the FEC is unable or unwilling to define the "promote, attack, support or oppose" standard, it should retain the exemption for 501(c)(3) organizations. It can always initiate its own enforcement proceedings, and use the IRS rules as a guide.

Although it lost its appeal of the court's ruling before a three-judge panel, the FEC has asked the U. S. Court of Appeals for the District of Columbia to allow review by the entire eleven-judge panel. A majority of the judges must approve the request. On Sept. 2 the court ordered attorneys for Reps. Chris Shays (R-CT) and Martin Meehan (D-MA), plaintiffs in the suit, to file a response to the FEC's request by September 17.

GAG ORDERS LIFTED; JUDGE TELLS FBI IT CAN NO LONGER SILENCE DISCUSSION OF PATRIOT ACT

In a victory for First Amendment advocates, a federal judge lifted a gag order on a Connecticut library from whom the FBI demanded patrons' records, allowing them to discuss openly their experience and participate in the broader debate about the PATRIOT Act. The judge issued a preliminary injunction against the government, barring it from enforcing gag orders on recipients of certain orders called National Security Letters (NSL), created under the PATRIOT Act.

The American Civil Liberties Union (ACLU), who is also a plaintiff in the case, represent "John Doe," an unidentified member of the American Library Association. The ACLU filed the lawsuit on August 9 against the U.S. Department of Justice, and the case was originally under seal in U.S. District Court in Bridgeport, Connecticut.

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JUSTICE DEPARTMENT DOCUMENTS ILLUSTRATE NEED FOR MORE LOBBYING DISCLOSURE ENFORCEMENT

The U.S. Department of Justice (DOJ) recently released compliance information for the first time in the 10-year history of the Lobbying Disclosure Act (LDA). The information reveals that it has pursued only 13 violations out of approximately 200 referrals in the past two years. Recent legislation introduced by Reps. Marty Meehan (D-MA) and Rahm Emanuel (D-IL) in the House and Sen. Russ Feingold (D-WI) in the Senate calls for lobbyists to file quarterly lobbying statements and would require disclosure and regulation of grass-roots activity. There is some question whether reform is needed, especially in light of the lack of disclosure and enforcement from the DOJ.

Of the 13 cases pursued by the Justice Department, seven are "still open" reported Channing Phillips, a U.S. Attorney for the District of Columbia spokesperson. The six completed cases include three, in which the office declined to act and three others that resulted in civil settlements and fines. Until this new report, the DOJ had refused to release information, citing Privacy Act restrictions.

Two of the three settlements involved small firms, Natsource LLC and CHG & Associates. The third involved an unnamed lobbyist, whose name was withheld in compliance with the Privacy Act. The settlements with the firms were reached earlier this year. Natsource was fined $25,000 for failing to file reports in 2003, while CHG was fined $12,000 for failing to file in 2000.

The LDA requires federal lobbyists that meet a set threshold to report their activities to the Clerk of the House and Senate's Offices in the form of semi-annual reports. Neither the Senate nor House Clerk's Office has formal enforcement authority. The office of the U.S. Attorney for the District of Columbia receives referrals from the Secretary of the Senate and Clerk of the House of Representative's Office. The U.S. Attorney's Office then makes a determination to pursue the "most egregious" cases. Penalties are imposed on a person who "knowingly fails to (1) remedy a defective filing within 60 days after notice of such a defect by the [Senate Secretary or House Clerk's Office] or (2) comply with any other provision of the Act".

It is not clear from the information released by the DOJ why the firms involved in the settlements were penalized and how they made the determination. According to Phillips, the U.S. Attorney's Office has "culled through" about 200 referrals of possible LDA violators over the past two years and decided to pursue 13 cases. He did not provide information on what factors led to the 13 being chosen.

The recently released documents provide a window into the world of LDA enforcement. In a Roll Call article, Pam Gavin, superintendent of the Senate Office of Public Records, which oversees the LDA in the Secretary's Office, stated, "From my perspective, I think it's working pretty well. Anybody in the world can go to our Web site and look at lobbying reports and see what's being done." So far this year, the Senate has received 25,500 lobbying disclosure documents.

However, details about enforcement activities can be difficult to come by. The LDA is mute on the issue of disclosure of violations to the public. Gavin's office has never made public the number of LDA-related referrals it

has made to the U.S. attorney's office, much less any details about individual cases. Consequently, it is difficult to find out how well the current law is working, and if there is adequate enforcement.

According to Kenneth Gross, an attorney with Skadden, Arps, Slate, Meagher and Flom, and author of *The Ethics Handbook on Entertaining and Lobbying Public Officials*, while "people do not play fast and loose with the rules, after 10 years, there is some lack of understanding of what gets included in a report." Additionally, he explained that "[w]hen errors surface, they tend to be inadvertent. As soon as a company corrects an error, it has absolved itself from a violation. You really have to work at getting referred under this law."

WHITE HOUSE FINDS IN KATRINA RECOVERY 'OPPORTUNITY' TO WAIVE NEEDED PROTECTIONS

Though most government agencies have worked diligently to alleviate the untold burdens on Hurricane Katrina's victims and to expedite recovery in a safe and effective manner, several agencies have taken the opportunity to waive needed protections, thus possibly putting recovery workers and others at greater risk.

From the Department of Education to the Federal Aviation Administration, federal agencies are developing strategic responses to the catastrophic aftermath of Hurricane Katrina. Agencies are providing housing, food and medical services to the victims of the hurricane. And some agencies, such as the Department of Transportation, are also waiving rules to make it easier for needed supplies to be carried to the area or to address other problems.

In a few select cases, however, important public protections have been waived in response to the catastrophe. These waivers may undermine relief efforts by putting recovery workers and others at risk.

Questionable Waivers

Federal Motor Carrier Safety Administration (FMCSA) Regulations

In the weeks after Hurricane Katrina ravaged the Gulf Coast, two declarations of emergency and one other White House emergency-related proclamation have weakened rules for truckers and motor carriers, effectively waiving most FMCSA safety regulations in order to respond to the "emergency" situations, however loosely defined. The result in all three cases is the waiver of qualifications for drivers, safety requirements for carrier parts and accessories, hours of service requirements for drivers, inspection, repair and maintenance standards for vehicles, requirements for the transportation of hazardous materials, as well as employee safety and health standards.

- The regional declaration of emergency issued by FMCSA, which went into effect Aug. 31, waives safety regulations for the "emergency transportation of gasoline, diesel, jet fuel, natural gas/CNG, propane and ethanol." The original declaration of regional emergency expired on Sept. 15; however, FMCSA has extended the waiver of safety regulations through Oct. 5 for transportation to, from, and within the states in the eastern (CT, DC, DE, MD, MA, NH, ME, NJ, NY, RI, VT, PA, VA, WV) and southern (AL, AR, FL, GA, KY, LA, MS, NM, NC, OK, SC, TN, TX) regions of the country.
- The White House's declaration of emergency for the states of Alabama, Arkansas, Florida, Louisiana, Mississippi, and Texas resulted in a waiver of safety regulations for truckers delivering "direct emergency relief *to, from, or within*" those states, "*regardless of commodity carried*." This waiver went into effect Aug. 29.
- The White House's authorization of emergency relief in support of evacuees in Arizona, Colorado, Georgia, North Carolina, Oregon, Tennessee, Utah, Virginia, and West Virginia automatically triggered the waiver of safety regulations for the "emergency movement *to, from, or within* those States of items needed to house, feed, or clothe evacuees."

The waivers are quite broad, despite not affecting the requirements for commercial drivers licenses or state regulations of vehicle weight. For example, FMCSA will allow drivers to assist the Gulf Coast efforts who are not otherwise qualified to drive, and trucks delivering fuel in most parts of the country will not have to meet standard levels of maintenance and service. Further, the declaration waives the hours of service regulations, which limit the number of consecutive hours a truck driver can work without taking a break. Under FMCSA regulations that operate during declarations of emergency, a driver must receive ten hours of off-duty rest if he or she requests it,

but companies do not otherwise have to comply with hours-of-service regulations. Though a temporary waiver may have been necessary to help evacuate the area or to provide immediate assistance, now that the areas hit by the storm have been fully evacuated, waiving these important regulations puts truck drivers as well as others on the road needlessly at risk.

Minimum Wage for Government Contractors

Just as Katrina's aftermath shone the national spotlight on the vast poverty and inequity in the Gulf region, the White House responded, ironically, by repealing a 70-year-old minimum wage standard. Claiming a need to lower the cost of reconstruction, the White House announced Sept. 8 that it is suspending its obligations under the Davis-Bacon Act to require a fair minimum wage for contractors working on the reconstruction and recovery efforts in the aftermath of Hurricane Katrina in Alabama, Florida, Louisiana and Mississippi.

The Davis-Bacon Act prohibits the federal government from undercutting prevailing wages in the construction industry in areas where the federal government is contracting for work. The administration is required to ensure that its contracts establish minimum wages for workers that comport with the prevailing wage of the area. The White House invoked the act's exemption for national emergencies.

Secrecy News, a publication of the Federation of American Scientists, noted that a Congressional Research Service report indicates Bush's waiver of Davis-Bacon may be illegal. The National Emergencies Act of 1976 renders several statutory authorities dormant, unless specific procedural formalities are enacted by the president. Since the president did not formally declare a national emergency in accordance with that act, the Davis-Bacon waiver may be illegal.

The president's action came one day after 35 Republican members of Congress led by Reps. Jeff Flake (R-AZ), Tom Feeney (R-FL) and Marilyn Musgrave (R-CO) requested Bush to temporarily suspend the Davis-Bacon Act for the Hurricane Katrina recovery effort.

Companies such as Halliburton's Kellogg Brown & Root that are given federal contracts to rebuild in the Gulf region are under no obligation to pass the savings from reduced labor costs onto taxpayers. There is nothing to prevent these contractors from cutting workers' wages and boosting their own profits, while passing no savings onto taxpayers. The Center for American Progress noted that prevailing wages in the Gulf Coast are not likely to make people rich. "A laborer in New Orleans would receive $10.40 per hour in wages and fringe benefits," according to the Center.

Representatives in Congress who oppose Bush's waiver have already moved to undo it legislatively. Rep. George Miller has introduced a bill, H.R. 3763, that will require the re-application of Davis-Bacon wage requirements to the areas affect by Hurricane Katrina. The Campaign for America's Future has launched a letter-writing campaign to support the Miller legislation.

Environmental Standards: Fuel and Hazardous Materials

With the waters in and around New Orleans teeming with hazards such as lead and hexavalent chromium and the airs carrying the remnants of dangerous leaks of natural gas and carbon monoxide, the Environmental Protection Agency has chosen to waive fuel refinement and emissions standards, thus adding to the health hazards already present. Whatever merit there may have been in temporary waivers to mitigate the overtaxed fuel supply, both the duration of these waivers and EPA's apparent willingness to extend them point to a potentially hazardous trend.

In the name of ensuring "that the Hurricane Katrina natural disaster does not result in serious fuel supply interruptions around the country," the agency announced waivers of various fuel standards in a number of markets. The agency's website lists a rash of recent waivers for fuel requirements, including waivers for low sulfur highway diesel fuel requirements, for the use of reformulated gasoline in Richmond, VA, and for the use of low volatility "summertime" gasoline, as well as relaxed requirements for "refiners, importers, distributors, carriers and retail outlets to supply gasoline and diesel fuels that do not meet standards for emissions."

Though most of the waivers of fuel standards were originally set to expire Sept. 15, EPA extended them in several cases. The waiver of requirements for low sulfur gasoline, for instance, was extended until Oct. 5 in Tennessee and

Petroleum Administration for Defense Districts (PADD) I and III, which includes eastern states from Maine to Florida and the Gulf states. Extensions were granted to the waiver of standards for low Reid Vapor Pressure (RVP), which sets the volatility for gasoline, in Texas, California, and Phoenix, AZ.

The Natural Resources Defense Council argues that waivers are not an appropriate long-term response to fuel shortages. As NRDC vehicles policy director Roland Hwang stated in a press release, NRDC does not oppose interim waivers but adds that it is "important to recognize that [waivers] will cause harmful health effects from increased air pollution. It cannot be a permanent rollback."

At the same time, the Pipeline and Hazardous Materials Safety Administration issued temporary emergency exemptions for Florida, Alabama, Louisiana, and Mississippi, authorizing them to waive all safety regulations for the transportation of hazardous materials to, from and within the disaster areas when necessary to support the recovery and relief efforts. The exemption does not include transport of radioactive materials.

A Sign of Things to Come?

These cases may be less important as individual policy decisions than as portents of a broader agenda of regulatory rollbacks. The Heritage Foundation, a conservative think tank, has unveiled a vast plan for using the reconstruction of the Gulf Coast as an excuse for broad rollbacks of federal protections, including environmental, worker health and safety, and minimum wage standards.

The president's recent speech announcing the White House's plan for reconstruction of the region included reference to a "Gulf Coast Opportunity Zone." Though Bush gave little detail of what such an opportunity zone would entail, the Heritage Foundation report using the same language details a vast give-away to corporate special interests and a full-scale repeal of health and safety protections. Ideas put forward in the report include drilling in the Arctic National Wildlife Refuge, suspending environmental regulations such as the Clean Air Act and Clean Water Act, and waiving the prevailing wage standards in Davis-Bacon. The Heritage Foundation recommended a limited government response to rebuilding the Gulf Coast while cutting the so-called "red tape" of health and safety regulations. Senate environment committee chair James Inhofe (R-OK) has already taken some of the report's message to heart, dropping a bill Sept. 15 that would allow EPA to waive all environmental protections in the name of expediting the Gulf Coast recovery.

Heritage Foundation scholars and other conservative thinkers see the devastated Gulf Coast as an "Opportunity Zone" for entrepreneurs "in which capital gains tax on investments is eliminated and regulations eliminated or simplified." The report calls for the suspension of any regulations that may "impede" recovery. Judging by Bush's ready acceptance of the report's "Opportunity Zone" language, it seems likely that other threats to public health and safety, civil rights, and environmental protections are soon to come.

HOMELAND SECURITY WAIVES LAW FOR BORDER FENCE CONSTRUCTION

Apparently taking advantage of media focus on Hurricane Katrina and its aftermath, the Department of Homeland Security (DHS) announced that it is exercising its newly acquired power to waive apparently all law in order to expedite construction of border fencing near San Diego.

The DHS statement announcing the decision to exercise the waiver authority does not specify what laws are being waived. The statement, issued Sep. 14, emphasizes the elimination of environmental law protections, among them the National Environmental Policy Act and the Coastal Zone Management Act, but it does not otherwise catalog the specific laws waived. Moreover, DHS does not eliminate the possibility that non-environmental protections -- such as Davis-Bacon Act requirements for federal contractors to hire construction workers at the area's prevailing wage, or Occupational Safety and Health Act requirements for job safety -- have also been waived.

An attachment to the statement emphasizes the environmental protections that DHS has decided to implement in the absence of all the protections Congress has carefully developed over the last 30 years.

The statement does limit the scope of the waiver decision to expedite construction of border fencing along a 14-mile stretch near San Diego. It is unclear, however, if DHS is waiving any protections outside that geographical zone for activities related to the fence construction, such as waiving requirements for maximum hours of service for truck drivers delivering equipment or supplies to the border zone.

The Secretary of Homeland Security was given this unprecedented power to waive all law by the REAL ID Act, the Sensenbrenner immigration bill that was forced through Congress as a rider on the Iraq war supplemental.

Any legal challenge to DHS's decision will be complicated by a related section of the law, which purports to strip courts of any jurisdiction over "any cause or claim arising from any action taken, or any decision made, by the Secretary of Homeland Security pursuant to" the power to waive all law.

TAKE ACTION: Tell Congress to demand DHS to come clean about what laws are being ignored!

ANALYSTS SPLIT ON MEANING OF MERCURY VOTE

Commentators disagree whether a recent vote on a Senate measure to reject part of the Bush administration's mercury rule should be viewed as a sign of strength or weakness for progressives in environmental fights to come.

The vote in question was on S. J. Res. 20, a joint resolution under the Congressional Review Act to reject part of the Environmental Protection Agency's mercury rule.

Even if the resolution had passed the Senate, it would almost surely have been rejected by the House, and it would have surely been vetoed had both chambers passed it. In fact, the only time the Congressional Review Act was successfully used was to reject the Clinton administration's ergonomic rules, which both a GOP-dominated Congress and the incoming Bush administration wanted to stop.

Facing both stiff opposition in the House and the threat of a White House veto, the resolution of disapproval was rejected by the Senate on a 47-51 vote.

National Journal's *CongressDaily* reported that supporters of the resolution viewed the vote as a signal of their ability to marshal the 41 votes needed to sustain a filibuster against the administration's proposed Clear Skies legislation. From this perspective, the 47 votes in favor of the resolution amount to a success.

Others consider the vote a failure, both as a thwarted strategy against the mercury rule and as a weakening in the environmental ranks. According to BushGreenWatch, the vote was a "severe setback" to environmental health particularly notable because six Democrats voted against the resolution. Nine Republicans, however, did vote for the resolution -- including Susan Collins (R-ME), co-sponsor of the measure.

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IN THIS ISSUE

SCRAMBLING TO OFFSET KATRINA COSTS, REPUBLICANS CONTINUE DANGEROUS FISCAL POLICY

After five years of ill-conceived and reckless tax and budget policies that have led the federal government to be deeply in debt, weak, and vulnerable, Republican congressional leaders and the White House are now talking about fiscal responsibility in the aftermath of Hurricanes Katrina and Rita. While nearly all the current proposals emerging from Congress and the administration are cloaked in the rhetoric of balancing the budget, this serves simply to hide their one-sided emphasis on shrinking the role of government through cutting spending rather than increasing revenue. This strategy will only exacerbate long-term problems and worsen the bleak fiscal outlook and economic concerns facing the country.

The calls for offsets to Katrina-related spending began on Sept. 19, when Rep. Mike Pence (R-IN), Chairman of the far-right House Republican Study Committee (RSC), sent a letter cosigned by 21 House Republicans to President Bush urging him to further cut non-defense discretionary spending. This was quickly followed by a letter from Reps. Jeb Hensarling (R-TX) and Jeff Flake (R-AZ), both members of the RSC, to House Speaker Dennis Hastert (R-IL) and former Majority Leader Tom Delay (R-TX), in which they suggest that the 2006 implementation of the Medicare prescription drug benefit be delayed by one year, in order to contain costs related to Hurricane Katrina. Many other members of Congress advocated for the re-opening of the recently passed highway transportation bill that contained over 6,000 lawmaker "pet projects" to find offsets.

Unfortunately, these proposals were just the tip of the iceberg and at a Sept. 21 press conference, the Republican

Study Committee unveiled in a 24-page scheme -- "Operation Offset" -- a historical laundry list of nearly every budget cut Republicans have proposed, imagined or yearned for over the years. The document outlined over $500 billion in cuts to a vast swath of government programs over the next five years, including significant cuts to NASA, Amtrak subsidies, the Corporation for Public Broadcasting, the Peace Corps, foreign aid, the Earned Income Tax Credit, the national park system, community health centers, agricultural subsidies, and many, many more areas. An analysis of the proposed cuts by the Center for Budget and Policy Priorities found that nearly half would come from programs serving low-income and vulnerable populations.

Operation Offset has done more to fracture the Republican Party than to rally members behind a coherent set of proposals. GOP leaders and the White House rejected the major pieces of the proposal (delaying the Medicare prescription benefit and reopening the highway bill) and called the overall proposal unrealistic. Congressional leadership and moderate Republicans saw it as a harsh criticism of government spending enacted and trumpeted by Republicans. Others feared it would divide the caucus, postponing or eliminating consensus among Republicans and showing increased disarray in the party amid a flurry of criticism of the federal government's response to Hurricane Katrina.

Yet, while seen as politically unrealistic as a package and not supported (and even reviled) by the Republican leadership, the RSC proposal has succeeded in fundamentally transforming the conversation in Congress about Katrina-related relief and reconstruction efforts. The discussion is now firmly centered around where and by how much Congress can shrink government by cutting other parts of the budget. The Bush administration took notice as well, scheduling a meeting between OMB Director Josh Bolten and Pence, Hersarling, and Flake, just one day after the proposal was released. Many believe the meeting was a blatant and somewhat desperate attempt to ease concerns about eroding support for the president among conservative Republicans in Congress and map out a course for realistic cuts to other parts of the budget.

So while the GOP has been divided about what programs to cut and by how much, they are in agreement that budget cuts, and not a rollback of the tax cuts (or even tax increases), is the first priority in attempts to offset the cost of Katrina-related spending. Over the last two weeks, Republicans have worked to bridge the gap between opposing sides of the conference and are now considering a number of different methods to cut the budget.

Some have suggested Congress should cut back on spending in the Fiscal year 2006 (FY06) appropriations bills yet to be finished. Still others sought to restrict spending for a number of months only with the enactment last week of a very unusual continuing resolution that continues funding the federal government past the end of the fiscal year.

But many members are skeptical of Congress' ability to scale back FY06 appropriations bills and the savings from the continuing resolution will be minimal compared to the reconstruction costs. To create more substantial savings, House Budget Committee Chairman Jim Nussle drew up a plan to trim non-defense discretionary spending across the board in FY06 by 2 percent and to wring additional savings out of entitlement programs through the reconciliation process.

This proposal was well received by most House Republicans, and the GOP is now counting on the fast-tracked reconciliation spending bill to provide even more cuts than were originally planned. In seeking to push the reconciliation cuts above the $35 billion outlined in the budget resolution, acting House Majority Leader Roy Blunt (R-MO) has pressured committee chairs to view their respective targets for spending cuts in reconciliation as minimums, not maximums.

Yet another roadblock may exist, as increases in reconciliation budget cuts may not be as well received in the Senate, where the budget resolution passed by only two votes in May and where many senators, Republicans and Democrats alike, have been wary of the planned $35 billion in cuts, which comes mostly from Medicaid, food stamps, and other low-income support programs. While Senate Majority Leader Bill Frist (R-TN) and Budget Committee Chairman Judd Gregg (R-NH) are working with other senators and committee chairs to consider all

options, the focus thus far in the Senate has also been solely on budget cuts.

The policies currently being promulgated by the GOP are not only reckless and shortsighted, but also run contrary to the will of the American people. In a number of recent polls, Americans have overwhelmingly rejected cuts to other parts of the budget as a way to pay for additional Katrina-related spending. Instead, most Americans strongly support canceling the planned tax cuts for those earning over $200,000 annually. If there are to be cutbacks on spending, the public supports shifting funds from spending in Iraq. The current GOP leadership is dangerously out of touch with the priorities of Americans across the country and their refusal to revisit the massive and extremely expensive tax cuts -- the easiest and most logical way to pay for Katrina-related spending -- is politically greedy and morally suspect.

Republicans in Congress have been slow to realize this, however, as they are continuing with plans to cut an additional $70 billion in taxes later this month in another reconciliation bill.

CONGRESS PASSES STARK CONTINUING RESOLUTION; MANY PROGRAMS WILL SEE FUNDING CUTS

With the end of the fiscal year looming before them, lawmakers were forced to adopt a stopgap funding measure last week to avoid a government shutdown. The measure -- called a continuing resolution (CR) -- will fund government operations for the next seven weeks. Because of the unusual structure of the CR, however, it will result in the dramatic under-funding of programs, setting spending levels at the lowest of three possible levels: the enacted totals for Fiscal Year 2005 (FY05), or either of the completed levels of the House or Senate FY06 spending bills.

The unique funding structure of the CR will result in either freezes or cuts to most government accounts. In addition, it will prohibit agencies from initiating or resuming programs not funded in FY05 or awarding new grants during the seven week CR period, which ends Nov. 18. House Appropriations Chairman Jerry Lewis (R-CA) pushed through this bare-bones CR in response to calls from congressional conservatives to hold down spending. Lewis worked hard to make sure that the CR did not include numerous special add-ons requested by his colleagues. The CR passed the House, 348-65 on Sept. 29, and passed the Senate by unanimous consent on Sept. 30.

The low funding rates in this CR, however, have a number of senators wondering aloud how programs and agencies under their committees' jurisdictions will be able to pay for the services they provide over the next two months. Senate Commerce-Justice-Science Appropriations Subcommittee Chairman Richard Shelby (R-AL), for example, has expressed concern over spending for the National Oceanic and Atmospheric Administration. The office is of particular important now as it provides both navigation and hazardous material cleanup services, and has jurisdiction over the fishing industry, which has been largely wiped out in the Gulf Coast.

In addition, Sen. Tom Harkin (D-IA), Ranking Democrat on the Labor-Health and Human Services-Education Appropriations Subcommittee, argued the unprecedented CR would result in a 50 percent cut in community service grants, which would have a devastating effect on low-income families. Other programs Harkin pointed out as being negatively impacted include heating and housing assistance, Head Start, transportation for the elderly, and help for people applying for the earned income tax credit.

In an attempt to avoid these cuts, Harkin offered an amendment to fund the Community Services Block Grant (CSBG) -- which provides low-income families with meals, transportation, job-training and heating assistance -- at FY05 levels , instead of allowing them to face a nearly 50 percent cut, as was passed by the House. (The Bush administration proposed to zero out CSBG.) Even under Harkin's amendment, funding CSBG at FY05 levels would not have allowed for increases for population growth or the effects of inflation. The amendment, however, was defeated by a 53-39 vote.

While the CR prevented a government shut down, it clearly bears the handprint of the Republican philosophy of shrinking or eliminating important government investments at any opportunity and will interrupt normal operations for many programs and agencies. A number of House Democrats spoke out against the CR at a news conference on Sept. 29. Rep. Lynn Woolsey (D-CA) commented that the CR and more generally the budget, which cuts healthcare and education programs, shows where Congress' misguided priorities lie. Rep. Jim McDermott (D-WA) told reporters that Congress is "pursuing a path that is not in the best interests of this country."

Congress Pushes Ahead With Appropriations Work

The Senate will use the time allotted by the CR to continue working through appropriations bills. Late last week, the Senate continued its work on the defense spending bill, adding $5.2 billion in emergency funds to the measure, including $3.9 billion to combat the deadly avian flu virus and $1.3 billion to bolster National Guard equipment for domestic disaster response. These additions come on top of the $50 billion already added for direct war costs (which do not count against budget caps).

The Bush administration has threatened to veto the defense appropriations bill if it falls billions short of the administration's budget request, which was $419.3 billion. A statement released by the Office of Management and Budget on Sept. 30 criticized the Senate Appropriations Committee for falling $7 billion short of the Pentagon's initial budget request.

After wrapping up work on the defense appropriations bill this week, the Senate will turn its gaze either to the Labor-HHS-Education bill or the FY06 Transportation-Treasury bill, to which the District of Columbia budget would be attached. The prospect of completing either bill during the week is uncertain, however, due to a number of contentious provisions associated with each bill, as well as highly disputed funding levels. Finally, the House and Senate are also expected to clear the Homeland Security bill this week. If completed, the bill will be only the third appropriations bill for FY06 signed into law thus far.

EPA Proposes Collecting Less Information on Toxic Pollution

EPA recently announced plans that would essentially dismantle its Toxic Release Inventory (TRI), the nation's premier tool for notifying the public about toxic pollution. The TRI annually provides communities with details about the amount of toxic chemicals released into the surrounding air, land, and water. The information enables concerned groups and individuals to press companies to reduce their pollution, resulting in safer, healthier communities. Despite the program's widely hailed success, however, EPA is proposing to significantly rolling back the program's reporting requirements.

The EPA has proposed three changes, each of which would dramatically cut information available to the public on toxic pollution. The agency is proposing to:

- Move from the current annual reporting requirement to every other year reporting for all facilities, eliminating half of all TRI data;
- Allow companies to release ten times as much pollution before being required to report the details of how much toxic pollution was produced and where it went;
- Permit facilities to withhold information on low-level production of persistent bioacculuative toxins (PBTs), including lead and mercury, which are dangerous even in very small quantities because they are toxic, persist in the environment, and build up in people's bodies.

These proposals are part of EPA efforts to reduce the amount of paperwork companies must file. In seeking to reduce the reporting burden on industry, however, EPA has been aggressively pursuing major changes to the TRI

program with little consideration of the vital information communities will lose under these changes. Many public interest groups have asserted that the TRI program does not impose any excessive or unnecessary burden on companies.

Critics see little reason to interfere with a program that has worked so well. Many credit the TRI program with encouraging companies to massively reduce the production and release of toxic waste. Since the program began in 1988, disposals or releases of the original 299 chemicals tracked have dropped nearly 60 percent. Reductions have continued even as the list of TRI chemicals has grown. This year, EPA reported that the last five years of data show a 42 percent drop in the disposal and releases of the nearly 600 chemicals now tracked under the TRI program.

In the aftermath of Hurricane Katrina, government officials, citizens and other groups used TRI data to identify potential sources of toxic storm-related releases. Critics of the proposed rollbacks believe that the Gulf Coast emergency highlights the need for more -- not less -- reporting on toxic hazards. They assert that the more information collected by government on hazardous chemicals, the safer and more prepared to deal with potential disasters citizens and first responders will be.

EPA has tried to justify its proposal to eliminate every other year of reporting by claiming the agency would save $2 million for each skipped year. The agency reasons that the saved money could be reinvested in the TRI program, thereby improving the quality and accuracy of the remaining information.

EPA is mandated by law to consider public input before making the significant changes proposed to the TRI program, and is accepting public comments for at least 60 days. Click here to submit comments and tell EPA to abandon its plans to rollback TRI reporting.

KATRINA UPDATE: GOVERNMENT'S INADEQUATE RESPONSE CONTINUES

Even weeks after Hurricane Katrina swept through the Gulf Coast, the Environmental Protection Agency's (EPA) response to the storm's aftermath continues to be grossly inadequate. The insufficiency of its testing for environmental hazards, the absence of informative health warnings for recovery workers and returning residents, and its failure to provide protective equipment all clearly point to the agency's inability to accomplish its goal of protecting public health and the environment.

According to reports from a number of sources including *The Dallas Morning News*, Gulf Coast floodwaters have been contaminated by roughly 6.7 million gallons of petroleum spilled from refineries and pipelines and between one and two million gallons of gasoline from gas stations and submerged cars. There have been at least 400 smaller oil spills. Flood waters have washed over 31 designated hazardous waste sites, at least 446 industrial facilities that use or store ultra-hazardous chemicals and 57 sewage-treatment plants.

The agency has acknowledged that it has detected elevated levels of bacteria, lead, mercury, hexavalent chromium, arsenic, and pesticides. Despite these dangers, thousands of disaster responders and returning residents are being allowed into the area without receiving any specific information about health risks, necessary precautions or warning signs of contamination. Nor has the EPA issued protective gear to people in the area, in order to prevent harmful exposures.

According to Joel Shufro, Executive Director of the NY Coalition for Occupational Safety and Health (NYCOSH), "it is irresponsible of EPA, which is a public health agency, to imply that people will be adequately protected if they use caution. EPA does not know exactly what is in the water and the air, and they certainly don't know how much there is. What is needed is not just caution, but rather precaution, and that means training and protective

equipment."

The EPA's response has been so deficient that it indicates a lack of understanding of what exactly is expected of the agency in times of crisis. The agency has yet to publicly put forward a plan delineating what it hopes to accomplish or how it hopes to bring this about. From the mission of the agency and the obvious needs on the ground, OMB Watch has developed the following recommendations, incorporating concerns of residents and groups working to protect public health and safety in the Gulf Coast region.

Recommendations:

- **Environmental Testing:** The government should conduct comprehensive environmental testing to determine the nature and extent of environmental health hazards. Testing should include air, water and soil sampling, and should be designed to track down toxic hot-spots. The government should involve citizens and community experts in the process and fund independent testing as well. Given the lack of extensive test results, the government's testing thus far has either been inadequate, poorly publicized or both.

- **Cleanup:** The government must oversee and assist in cleaning up all identified sites of toxic and hazardous contamination. Every effort should be made to identify and involve companies whose materials contributed to storm-related chemical releases. Residents and workers should not be allowed to return to contaminated sites until cleanup has been completed and government agencies have approved the location's return to use.

- **Health Monitoring:** The government should track the long-term health effects for recovery workers and returning residents. The government should aggregate the collected data and publicly report on any common problems or detected health trends. Individuals and communities should have access to their own health monitoring results. Experts fear that without adequate information a mysterious "Katrina Syndrome" will develop, similarly to "9-11 Syndrome" experienced by recovery workers at Ground Zero who were unwittingly exposed to airborne contaminants.

- **Rebuilding:** The government should fully enforce all federal and state environmental, workplace and health standards as rebuilding plans move forward. These protections are the first line of defense against serious short- and long-term health effects and should not be recklessly tossed aside to speed the reconstruction process along. Residents and community leaders should participate in the re-building of their communities. The government should not grant no-bid contracts and should make every effort to employ local companies in clean up and reconstruction.

- **Preparing Citizens:** The government should fully communicate test results and known health hazards to recovery workers and returning residents through all available means. Health warnings of possible problems, symptoms to watch for and steps to take should be aggressively distributed. Protective equipment, along with instructions on use, should also be made available to all workers in the area. Currently, residents and emergency workers are not being adequately informed or equipped before being allowed into polluted areas and some are already reporting complications from exposure, such as chemical burns.

GAG ORDERS EXTENDED; LIBRARY CONSORTIUM MUST REMAIN SILENT

The U.S. Court of Appeals extended a gag order on a library consortium that received a National Security Letter (NSL) while it considers a lower court ruling that the organization has a First Amendment right to fully participate in the discussion surrounding the USA PATRIOT Act. The gag order is preventing the NSL recipient, an unidentified member of the American Library Association, from discussing its experience openly and participating in the broader debate about the controversial legislation.

The lawsuit specifically challenges the NSL provision of the PATRIOT Act that allows the FBI to demand a range of records without any judicial oversight. The NSL gag order prevents the recipient from speaking out about personal experiences with the law. The ACLU sought an emergency court order to lift the gag order, so the client could participate in meaningful discussions of the PATRIOT Act with Congress, the press, and the public. The government argued that the gag order blocked the release of the client's identity, not his ability to speak about the law itself, and that revealing the client's identity could jeopardize a federal investigation into terrorism and spying. U.S. District Court Judge Janet Hall ruled the gag order caused immediate and irreparable harm in preventing the group from revealing the fact that it received the National Security Letter. Judge Hall found that the specific group having received an NSL letter is relevant to the national debate about the PATRIOT Act and that its speech as a recipient would be viewed differently than the speech of a non-recipient. The ruling concluded the act did infringe upon the plaintiff's speech rights.

The American Civil Liberties Union (ACLU), who is also a plaintiff in the case, representing "John Doe," filed the lawsuit on August 9 against the U.S. Department of Justice. The case was originally under seal in U.S. District Court in Bridgeport, Connecticut. The U.S. Court of Appeals set an expedited schedule for appeal, bearing in mind that Congress is set to take up final discussion of PATRIOT Act reauthorization in the next few weeks.

Read more about the case.

Sign the ACLU petition to urge Attorney General Alberto Gonzales to stop preventing librarians from participating in the PATRIOT Act debate

SUPREME COURT, FEC TAKE ON REGULATION OF ISSUE ADVOCACY

On Sept. 27, the Supreme Court accepted an appeal from the Wisconsin Right to Life Committee (WRTL) that challenges the constitutionality of federal campaign finance restrictions as applied to genuine grassroots lobbying communications. Oral argument in the case is expected in early 2006. Meanwhile, more than 100 nonprofits submitted comments to the Federal Election Commission (FEC) on its reconsideration of an exemption from its "electioneering communications" rule for groups that are exempt under Section 501(c)(3) of the tax code. Comments stressed the need to protect the grassroots lobbying and advocacy rights of nonpartisan groups. A public hearing will be held on Oct. 19 and 20.

The Bipartisan Campaign Act of 2002 (BCRA) created a new bright-line "electioneering communications" rule that bars corporations, including nonprofits, from airing broadcasts that refer to federal candidates within 60 days of a federal election, or 30 days of a primary. In October 2002 the FEC exempted 501(c)(3) organizations because of their nonpartisan character. As a result, these groups did not have to stop airing grassroots lobbying or educational messages that mention federal candidates during the 2004 election.

However, other nonprofits, including action organizations like WRTL that are exempt under Section 501(c)(4) of the tax code, are subject to the rule, regardless of the nature of their broadcast message. In the summer of 2004, WRTL began running an ad asking Wisconsin residents to call their U.S. Senators (Democrats Herb Kohl and Russell Feingold) and urge them not to support filibusters of judicial nominees. According to WRTL attorney James Bopp Jr., lead counsel for the James Madison Center for Free Speech, the ads "did not state either Senator's position on the filibusters, nor their political affiliation, nor any words supporting or opposing either Senator and made no reference to the upcoming election."

Feingold was running for re-election; so, as the 60-day blackout period under the electioneering communications rule approached, WRTL filed a lawsuit asking for an injunction against application of the rule to these facts. The challenge was limited to the law "as applied" to their grassroots lobbying effort. (The Supreme Court had upheld the

general provisions of the law in December 2003 in *McConnell v. FEC*.) The District Court rejected WRTL's argument that the Supreme Court did not preclude "as applied" challenges when it upheld the rule generally. It also found that, even if the challenge were permitted, the electioneering communications ban is constitutional as applied to grassroots lobbying.

As a result of this ruling, WRTL discontinued the ads after August 15 and appealed to the Supreme Court. The court will be considering two issues:

- whether challenges to specific applications of the electioneering communications rule are allowed, and
- whether WRTL's grassroots lobbying ads must be exempted from the rule for constitutional reasons.

In a press release, Bopp stated the Supreme Court has indicated it "is willing to seriously consider whether campaign finance laws can be used to insulate federal candidates from genuine grassroots lobbying about upcoming votes in Congress."

The fact that the Supreme Court agreed to hear this challenge only a few years after upholding the constitutionality of BCRA, coupled with the court's changing composition may signal stronger interest in the First Amendment ramifications of campaign finance laws. In the past the court has decided many campaign finance decisions, including *McConnell*, by a 5-4 vote.

Charities Ask FEC to Keep Exemption for 501(c)(3) Groups

The FEC is conducting a rulemaking proceeding to review the "electioneering communication" exemption for 501(c)(3) organizations, after it was the subject of a court challenge by BCRA's sponsors. The court sent the rule back to the FEC for reconsideration to address whether it should leave enforcement to the Internal Revenue Service (IRS), and whether this would result in exempt broadcasts that "promote, support, attack and oppose" a federal candidate. However, the FEC did not define what it means by the "promote, support, attack and oppose" standard, making responding to many issues raised by the proposed rule difficult if not impossible.

OMB Watch filed comments that urged the FEC to:

- Exempt 501(c)(3) organizations that are in compliance with Internal Revenue Service (IRS) rules
- Use IRS rules to define what is and is not a partisan broadcast communication for a 501(c)(3) organization. There must be one body of law governing nonprofit communications;
- Publish a new proposed rule for public comment if it proposes a definition under the "promote, support, attack, or oppose" standard that is not based on IRS rules.

OMB Watch stressed that compliance with the IRS ban on intervening in elections effectively prevents 501(c)(3) groups from supporting or opposing candidates. On the other hand, the comments note that these groups have a *constitutional right* to support or oppose policies and legislation. The comments criticize the proposal, because "it does not distinguish between references to a candidate in his or her capacity as a candidate and references to public officials acting in their official capacity. It could mean grassroots lobbying messages that ask people to call a senator and urge him or her to change a past position on a bill are considered partisan attacks on that senator. This approach would have a chilling effect on constitutionally protected speech."

The comments challenged the need for restrictions on 501(c)(3) organizations, as "there is no anecdotal record from the 2004 election that indicates abuse of the rule. While charities may have supported or opposed ideas or legislation, they have not supported or opposed candidates."

A letter signed by 64 charities also asked the FEC to preserve the exemption, noting that "FEC rules should

regulate federal campaign finance, not legitimate public policy debates." The letter pointed out that, "research on so-called sham issue advocacy has never uncovered abuses by 501(c)(3) organizations... Absent a record of abuse, there is no justification for limiting fundamental constitutional speech rights of these organizations. Speculation about the potential for loopholes does not equal a record of abuse. Indeed, restrictions aimed at preventing an unthreatened harm amounts to a prior restraint on speech."

Whatever rule is eventually approve by the FEC could be effectively overruled by the Supreme Court in the WRTL case.

NONPROFIT ANTI-ADVOCACY LANGUAGE PROPOSED FOR HOUSING BILL

Supporters of H.R.1461, the Federal Housing Finance Reform Act of 2005, are optimistic it will go to the House floor soon, without nonprofit anti-advocacy language proposed by a group of conservative Republicans. The language would have disqualified any nonprofit that lobbies or carries on other advocacy activities from applying for grants under a proposed new affordable housing program.

On May 25, the House Financial Services Committee passed H.R. 1461, a proposal to strengthen oversight of government-sponsored enterprises (GSE), such as Fannie Mae. The bill creates an independent regulator for the GSEs known as the Federal Housing Finance Agency (FHFA). The legislation is, in large part, a response to accounting irregularities at Fannie Mae and Freddie Mac that came to light in 2004.

Financial Services Chairman Michael Oxley (R-OH) and Financial Services Capital Markets Subcommittee Chairman Richard Baker (R-LA) modified the bill to create an Affordable Housing Fund (AHF). Fannie Mae and Freddie Mac would be required to contribute 5 percent of their after-tax income to this fund. The provision, which prompted committee Democrats to vote for of the bill, has been the center of negotiations between the sponsors and the Republican Study Committee (RSC), which is comprised of conservative House members. RSC members opposed the fund, claiming it would harm private enterprise. After failing to stop the bill in committee, members of the RSC contended that money from the fund will be used to "finance third-party advocacy groups that have agendas far beyond simply increasing affordable housing for low-income Americans." Rep. Tom Feeney (R-FL) took an even stronger tone, explaining that he would "rather burn the money then give it to advocacy groups."

The RSC wrote to then-Majority Leader Tom DeLay (R-TX), opposing the AHF and asking that the bill "not be scheduled for consideration by the full House until these concerns were addressed in the appropriate manner." DeLay held up the floor vote on the bill, but has since stepped aside as Majority Leader after being indicted in a Texas campaign finance case.

Oxley and Baker are opposing inclusion of the RSC's suggested anti-advocacy language. Along with Rep. Bob Ney (R-OH), they circulated a letter on Sept. 20 to colleagues, entitled "The Truth About the Affordable Housing Fund." The letter clarified misleading information about the AHF put forward by the Republican Study Committee, countering RSC accusations that grants will be used for political advocacy, that the AHF is a "slush fund," and that it will become an entitlement fund.

To assuage the RSC, Oxley and Baker added a provision that restricts the funds to "the production, preservation, and rehabilitation of rental housing" and "the production, preservation, and rehabilitation of housing for homeownership." Additionally, administrative and outreach costs are limited to the costs of maintaining the affordable housing fund and carrying out the program. Any organization found to be violating the provision would be permanently banned from receiving additional grants from the fund.

Critics of these restrictions believe they hinder the free speech of AHF grantees, forcing them to choose between

receiving federal grants or speaking out on behalf of the people they serve. Many nonprofit groups provide valuable information and perspective that enable Congress and federal agencies to make more informed decisions. Nonprofit advocates fear this would be severely restricted by the language proposed by the RSC. In contrast, the Oxley provision, a restatement of current law, provides ample protection against violations of the prohibition on using federal funds for lobbying. The current system -- in place for more than 20 years -- works well and does not need to be changed, according to opponents of the RSC restriction.

A companion bill, S. 190, passed the Senate Banking, Housing and Urban Affairs Committee on July 28 by a party-line vote of 11-9 without an affordable housing provision. Chairman and sponsor Richard Shelby (R-AL) reportedly has "deep concerns" about creating a program that would encourage Fannie Mae and Freddie Mac to grow larger. This could be a major sticking point should the House bill pass with the AHF provision.

EARLY REPORTS OF FEMA REIMBURSEMENT POLICY MISLEADING

Early reports about the U.S. Federal Emergency Management Agency (FEMA) reimbursements to faith-based groups for their hurricane relief services were misleading and lacked essential details. At a press conference last week, FEMA announced that it will reimburse churches and faith-based groups; however, this is simply an extension of its Public Assistance Program that currently provides funding to private nonprofit groups that have provided food, shelter and supplies to victims of Hurricane Katrina at the agency's request. A Sept. 27 *Washington Post* story gave the impression that only faith-based groups would receive such reimbursements, prompting some protest.

In 2002, President Bush ordered FEMA to change its policies so that religious nonprofits could qualify for emergency relief after a natural disaster. However, the new FEMA policy marks the first time the government has made payments to faith-based groups for assisting in a natural disaster. Due to the sheer enormity of the response needed for Hurricane Katrina, state and local governments requested that nonprofit organizations establish shelters for evacuees. This effort required expenditures far in excess of normal operating costs for many organizations.

The policy on what sheltering costs will be reimbursed by FEMA is outlined in a Sept. 9 internal agency memorandum, "Eligible Costs for Emergency Sheltering Declarations." Under the new reimbursement policy, religious groups, like secular nonprofit groups, are reimbursed for allowable costs. They will be required to document their costs and file for reimbursement from state and local emergency management agencies, which will in turn seek funds from FEMA.

The faith community provided valuable and needed immediate assistance in the Gulf Coast. As long as religious indoctrination was not part of the services provided, few have criticized a FEMA policy that would reimburse faith-based for their expenses. However, concerns have been raised over the precedent such policies may set, shifting responsibility for disaster relief, and over religious messages, such as sermons or prayers, potentially bundled with shelter and other emergency services provided by faith groups.

CARE ACT RE-INTRODUCED IN THE SENATE AND HOUSE

On September 27, Sens. Rick Santorum (R-PA) and Joe Lieberman (D-CT) introduced S. 1780, the Charity, Aid, Recovery and Empowerment Act (CARE). The legislation includes charitable giving incentives such as tax-free charitable contributions from Individual Retirement Accounts (IRA), and partial deductions of charitable contributions for taxpayers who do not itemize their tax returns. In an attempt to neutralize the charitable reform package expected to come from the Senate Finance Committee, Santorum also included accountability provisions designed to improve oversight of charities. A companion bill in the House does not include the accountability

provisions.

BODY TEXT S. 1780 is copied from the CARE Act that passed both the House and Senate in the 108th Congress. That bill received significant bipartisan support, but became mired in partisan politics over rules for a House-Senate conference committee, which was never convened. In the 109th Congress, CARE was introduced as Title III of S. 6, a larger welfare reform bill. That larger bill has not moved forward.

Key provisions of S. 1780 include:

- A two-year program allowing non-itemizers to deduct a portion of charitable contributions. (Single filers could deduct contributions over $250 up to a ceiling of $500; these figures are doubled for joint filers.)
- Individual Retirement Account rollover. Donors aged 70 1/2; and over may make direct cash contributions to a charity from a traditional or Roth IRA. Donors aged 59 1/2; and over could rollover amounts for a "life income gift," such as a charitable remainder trust or gift annuity.
- $150 million for the Compassion Capital Fund for capacity building to assist small community and faith-based organizations.
- $1 billion in additional funding for the Social Services Block Grant (SSBG)
- Simplification of lobbying expenditure rules for charities, by eliminating the separate reporting requirement for grassroots and direct lobbying
- Charitable deductions for contributions of food and book inventories; an enhanced deduction for charitable contributions of literary, musical, artistic and scholarly compositions; and
- Mileage reimbursements for charitable volunteers that can be excluded from gross income.

Santorum also included nonprofit accountability measures in the legislation, in order to preempt charitable reform legislation, currently being written by the Senate Finance Committee, and of which he has been increasingly vocal in his criticism. In a Sept. 7 letter sent to various nonprofit organizations, Santorum commented, "[u]nfortunately, there is a current movement in Washington that will change the way charitable and nonprofit organizations operate and that could severely hinder the ability and willingness of average Americans to give."

According to Santorum's letter, the Senate Finance Committee recently issued a staff discussion document outlining a number of charitable reform proposals. While Santorum agrees that the reports of charitable abuses are cause for concern, he proposes that "the government... authorize sufficient resources to facilitate full implementation of existing law" rather than create new reporting and accountability rules. Accordingly, the accountability and oversight measures in the CARE Act are designed to strengthen current enforcement while resisting a "one-size fits all" approach. A summary of these provisions is available on Independent Sector's website.

Earlier this month, certain provisions of the CARE Act were incorporated into Public Law 109-73, the Katrina Emergency Tax Relief Act of 2005. However, the charitable giving provisions of the law are a short-term quick-fix limited in scope and duration, with giving incentives expire at the end of 2005.

Reps. Roy Blunt (R-MO) and Harold Ford (D-TN) have introduced companion legislation, H.R. 3908, the Charitable Giving Act of 2005, in the House. The House bill, however, does not include the accountability provisions.

SOCIAL JUSTICE GRANTMAKING RISES, SHIFTS TOWARD PRAGMATISM

A significant proportion of grantmakers who fund public policy, advocacy, and other social-change activities are increasingly moving away from supporting grassroots advocacy and movement-building. Instead, these funders are choosing more "neutral, technocratic, and results-oriented" approaches to social change, like research, policy

analysis, and outreach to decision-makers.

That's just one conclusion of Social Justice Grantmaking: A Report on Foundation Trends, a new publication by Independent Sector and The Foundation Center. The report is the first comprehensive study to define and measure social justice funding by U.S. foundations. Based on the Foundation Center's grants sample database, the report looks at almost $1.76 billion in 2002 foundation support for social justice activities and compares it with similar support in 1998. The 2002 figure represents more than 13,000 grants and approximately 11 percent of all dollars in the sample.

The report defines social justice grantmaking as "the granting of philanthropic contributions to organizations based in the United States and other countries that work for structural change in order to increase the opportunity of those who are the least well off politically, economically, and socially." This definition, which the authors emphasize is a work in progress, was developed by a high-profile advisory committee and based on work by the National Committee for Responsive Philanthropy.

According to this definition, social justice giving grew by more than half during the period 1998-2002. It did not quite keep up with the growth in overall grantmaking, though, which rose by nearly two-thirds.

The good news is that the number of foundations in the sample making at least one social justice grant grew by more than 9 percent (from 686 to 749). The bad news is that although the number of very large grants increased by more than three-quarters, most social justice grants remained under $50,000.

A handful of funders were responsible for the majority of the support. The top 25 foundations in the sample gave more than two-thirds of all the dollars, and just two grantmakers--the Ford Foundation and the Robert Wood Johnson Foundation--gave nearly a quarter of the total $1.8 billion.

Perhaps the most interesting section of the report is a summary of interviews researchers conducted with 20 major social justice grantmakers. It was these interviews that revealed a majority of social justice grantmakers increasingly rejecting the language and principles of traditional social-justice philanthropy, which they see as weighed down with too much baggage and ineffective in the "increasingly conservative and decentralized political environment of our times." These are the funders opting for more neutral, policy-oriented approaches.

The interviews also illuminated a number of barriers to social justice grantmaking. External obstacles include the current political landscape and a lack of good models for measuring the success of social change efforts. More under grantmakers' control was a perceived incoherence within the field. Among the factors contributing to this lack of cohesion and coordination were funders' divergent objectives; inconsistent and often competing strategies; scattershot capacity-building efforts; short attention spans; and an increasing turnover rate among foundation program officers. Despite a reported rise in formal donor collaboratives, the impact of such efforts is being offset by narrow issue segmentation and by increased insularity among social justice funders.

Other trends emerging from the interviews include a movement towards more pragmatic and programmatic funding (which translates into increased project support and decreased core support), less funding of social justice litigation but more investment in leadership development and communications, and an expanding concentration of support for multi-issue groups that have both policy development and base mobilization capacities.

In order to build social justice philanthropy, interviewees believe the field must clarify its goals, funders must be less timid about saying what they believe in, and grantmakers must reach out to stakeholders in other fields, such as business and academia. Also helpful would be regular convenings within the field to "strengthen infrastructure ties and... provide needed space for new ideas, projects, and relationships."

The report includes numerous other breakouts and analyses, as well as lists of the top funders in each of 14 sub-fields and in-depth profiles of 26 leading social justice foundations. A four-page executive summary can be downloaded for free from the Foundation Center website. The full report can also be purchased online.

EPA MAY BE NEXT FOR POWER TO WAIVE LAW

The push to establish an Imperial Presidency kicked into overdrive when Sen. James Inhofe (R-OK) introduced a bill that would give the Environmental Protection Agency the power to waive or weaken the law for matters related to Hurricane Katrina.

Inhofe introduced the bill on Sept. 15, just one day after Homeland Security Secretary Michael Chertoff announced that he was exercising the power granted by the REAL ID Act to waive all laws in order to expedite construction of border fencing near San Diego.

Inhofe's bill, S. 1711, would give EPA the power to waive or modify a wide range of laws and regulations when the EPA administrator determines that doing so "is necessary to respond, in a timely and effective manner, to a situation or damage relating to Hurricane Katrina." EPA must also determine that the waiver or modification "is in the public interest, taking into account" both the emergency conditions of the aftermath of Hurricane Katrina and the waiver's potential "consequence[s] to public health or the environment."

The extent of the proposed waiver authority is enormous. EPA would be granted the power to waive not only laws and regulations under its jurisdiction but also any law or regulation "that applies to any project or activity carried out" by EPA. If, for example, EPA is supervising cleanup projects that require the use of private trucking companies, EPA could exercise this proposed new power to waive the regulations setting the maximum number of hours that those companies can force their drivers to work. EPA could also apply this power to waive or weaken workplace safety and health regulations intended to protect the workers involved in testing environmental conditions and conducting cleanup efforts. For that matter, it could waive anti-discrimination laws and regulations with which the agency must comply.

The bill would establish a default time limit of 120 days for the duration of any waivers, but EPA would be able to extend the waivers for an additional 18 months.

The bill might even create a shield from accountability for long-term effects of waiver decisions. Section a(2)(C) of the bill adds that "[a]ny effect of a waiver of modification... shall be considered to be in accordance with the requirements of the waiver or modification, regardless of whether the effect occurs during the effective period." If EPA immunizes private contractors from liability during the post-Katrina recovery, this clause could potentially extend that immunity so far into the future that it would even bar cancer cases arising years after workplace exposures to toxins in the Katrina-created wastes.

The bill would also mandate biweekly reporting of EPA's exercise of the waiver power.

Inhofe's bill may not be the only effort in the aftermath of Hurricane Katrina to establish an Imperial Presidency. A bill for Katrina-related relief introduced by Louisiana's senators (S.1766 Section 502) would have allowed private companies to apply for permits that would automatically certify them as in compliance with all federal law and regulation, regardless of their actual compliance or noncompliance. Given the possibility that other Katrina-related bills will give the Bush administration the power to ignore the law, the Natural Resources Defense Council has established an online action center to generate letters to Congress opposing any further waivers.

HOUSE EFFORT TO CREATE SUNSET, RESULTS COMMISSIONS MEETS RESISTANCE

A House hearing on White House proposals to overhaul the federal government was marked by criticism of their "good government" justifications and impassioned arguments about separation of powers.

The Sunset and Results Commissions

The House Government Reform Subcommittee on Federal Workforce and Agency Organization held a hearing Sept. 27 on two bills that advance a White House proposal for fast-track reorganization authority and mandatory program sunsets.

H.R. 3276, the Government Reorganization and Improvement Performance Improvement Act, introduced by Rep. Jon Porter (R-NV), authorizes the president to establish a Results Commission, appointed by the president in consultation with Congress, to review proposals submitted by the president for government reorganization. The Results Commission would be able to amend or add to such a proposal, which would then be fast-tracked through Congress with very limited time for debate and no option for amendments.

H.R. 3277, the Federal Agency Performance Review and Sunset Act, introduced by Rep. Kevin Brady (R-TX), would require agencies to regularly justify their continued existence or be automatically eliminated. The bill establishes a Sunset Commission that will review executive agencies and programs on a ten-year schedule. Congress would then vote to keep or to eliminate the program. As with the results commission bill, this legislation mandates an expedited vote, stymieing deliberation and forcing a "take-it-or-leave-it" vote with no possibility of amendments. H.R. 3277 does make an exemption for regulations that protect the environment, health, safety or civil rights. The exemption, however, applies only to sunsets; key agencies are still vulnerable to being restructured into irrelevance. Further, the exemption addresses only programs related to *enforcement* of regulations; it does not address programs within agencies that conduct needed scientific research or that develop new protective standards.

Norton Condemns Bills as Violating Separation of Powers

The White House proposal embodied in these bills would usurp power from Congress by entrusting unelected commissions with important decisions about the structure and function of all government services, according to Del. Eleanor Holmes Norton (D-DC). Congress already has the power to reorganize government programs when it determines the need to do so. Congress creates the agencies by statute in the first instance, and it revisits their effectiveness and continued existence each year through the budget process as well as through the reauthorization process.

During a fiery question-and-answer period with OMB Deputy Director for Management Clay Johnson, Norton criticized the bills as "a radical assault on separation of powers," because they force an up-or-down vote from Congress and preclude deliberation or compromise.

Norton also noted that the commission would not be free of political influence or bias and would in no way ensure a more efficient, effective government. "I don't think any of us are naÃ¯ve enough to believe," Norton commented, "that the only programs that would somehow find their way off the table would be the inefficient programs."

Experts Disagree on Mechanisms of Government Reform

The committee heard from a range of experts including OMB Watch's Director of Regulatory Policy Robert Shull; Paul Light, professor of public service at New York University; Tom Schatz, president of Citizens Against Government Waste; and, Maurice McTigue, vice president for outreach at the Mercatus Center. The witnesses provided a diverse array of opinions on government reform, from arguing that the White House proposals for

reorganization were too tepid to questioning the parameters of evaluation. While Light endorsed the bills overall, he argued that the best approach is "a much more aggressive, government-wide assessment of the organization of government, rather than starting with programs as our focus." McTigue also endorsed the bills but disagreed with nuances of the approach, asserting that the focus of government reform should not be on government organization or program effectiveness but should rather focus on the capability of each department. McTigue believes the Office of Personnel Management "should shift from thinking about itself as the manager of the federal workforce, and should think about itself in terms of, do we have the capability in each of the government's organizations to be able to do this job effectively?"

OMB Watch's Robert Shull offered a counter to the results and sunset commission proposals, suggesting that government should be evaluated not in corporate terms of efficiency and effectiveness but instead in terms of whether public needs are met. While supporters of the bills decried what they characterized as wasteful redundancy in government spending, Shull argued that seemingly duplicative programs may be necessary to address the needs of marginalized or underserved populations. For instance, Shull noted, "the severely disadvantaged populations of Appalachia have not been enjoying any of the benefits that come from the EPA, from welfare programs, from all the programs that should be addressing their needs. And that's why Congress created the Appalachian Regional Commission, to coordinate resources, to target new resources to serve that population."

Shull also argued that the bills would divert government resources away from their missions towards needlessly justifying their continued relevance. "When it comes to waste," Shull noted, "forcing programs to plead for their lives every 10 years is a waste." Review of government programs is especially wasteful for programs that have an established public need, such as the Occupational Safety and Health Administration or the Department of Education. "There are some needs that are eternal," Shull commented.

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

In This Issue

Republicans Use Katrina To Push For More Drastic Cuts

The debate in Congress over fiscal priorities has taken a turn toward radical conservatism this week, as the right-wing members of the House Republican Study Committee (RSC) have gained the upper hand in their push for increased cuts in the budget resolution. As Congress returns from its October recess this week, House GOP leaders are planning to amend the budget resolution to include more drastic cuts to mandatory and discretionary spending, ostensibly to pay for rebuilding in the aftermath of Hurricane Katrina.

Two planned reconciliation bills--one for additional tax cuts, primarily to the wealthy, and one for $35 billion over five years in cuts to entitlement programs such as Medicaid--were already scheduled to occur. Reconciliation bills have parliamentary protections so that only 50 votes in the Senate are needed and the bill cannot be filibustered or amended on the floor. In light of Katrina, some had questioned whether these reconciliation bills should continue to move forward. Yet in a major turn of events, conservatives have shifted the debate from whether these bills should be considered at all to how to make even larger cuts. There is little agreement between the House and Senate GOP leadership over using the reconciliation bills to make the cuts, but it appears there is agreement that further cuts should occur.

GOP leadership in the House now supports using the reconciliation bill as a vehicle for additional cuts. The proposed House amendment would increase mandatory cuts in the reconciliation bills this fall by 43 percent (to $50 billion) and institute an immediate 2 percent cut to all discretionary government spending. The budget reconciliation bill was originally designated to cut at least $34.7 billion from mandatory spending, particularly funding for health care, food stamps, student loans and farm supports over five years. Budget Committee Chairman Jim Nussle (R-IA) has announced the House will need another week, and possibly more, for authorizing committees to figure out how they will raise their net savings to reach the new target of $50 billion. The House leaders currently hope to finish assembling the reconciliation spending bill during the week of Oct. 31 and to move the bill to

the floor as early as the following week.

The Senate has rejected the option of amending the budget resolution and is continuing with the original plan to cut $34.7 billion in entitlement spending in its reconciliation bill, with authorizing committees marking up bills beginning this Wednesday. At the same time, Senate Majority Leader Bill Frist (R-TN) is meeting with a small working group of Senators, including Budget Committee Chairman Judd Gregg (R-NH), in order to build consensus for making additional cuts above the $34.7 billion level. Such consensus will likely be difficult to achieve, as many moderate Republicans were already uneasy about the level of cuts to Medicaid and other low-income support programs in the original budget resolution - and those concerns have only grown since Hurricane Katrina.

The budget reconciliation amendment in the House is being spurred by House conservatives' dubious concern over budget deficits and fiscal responsibility in light of increased emergency spending to reconstruct the Gulf Coast after Hurricane Katrina. While GOP leaders were originally hostile to the set of cuts outlined by the Republican Study Committee (RSC) called "Operation Offset," they have according to lawmakers and leadership aides, they "had no choice but to firm up support with their conservative base." Moreover, it is rumored that the RSC members threatened to vote for new House leaders in January if the current leadership does not embrace more spending cuts. So far, House leaders appear to be capitulating.

Now that infighting in the House is over, Republicans in the House appear all on message and talking about fiscal discipline and deficits. Yet their newfound interest in fiscal responsibility and reducing deficits, much like that of many of their Republican counterparts in the Senate, seems half-hearted at best and outright manipulative at worst. At the same time they are supporting drastic cuts to reduce federal spending, they are insisting on a new round of tax cuts in reconciliation - a total of $70 billion in un-offset federal spending. In fact, they support the full extension of all of Bush's 2001 and 2003 tax cut provisions, which would cost over $1 trillion in lost revenue over ten years. The reconciliation bills, if passed as originally planned, would actually *increase* the deficit by $35 billion,leaving many to wonder how fiscal discipline plays into them at all.

The cost of reconstruction and renewal after Hurricane Katrina--a one-time expenditure that will not add to the deficit over the long-term--is simply an excuse to gain traction for the underlying conservative goal of significantly shrinking government by de-funding public investments. The latest is a cold-hearted push for disinvestment in our country during a time when so many people--both Katrina victims and others--are in need. Far from responsible, GOP proposals jeopardize the well-being of citizens by taking away supports so many rely on, while ignoring the cost of massive tax cuts and effectively doing nothing to pare down future deficits.

You can make your voice heard by sending a note to Congress and telling your representatives that these are not your priorities and that you disagree with giving additional tax cuts to the wealthy, while cutting programs serving Americans in need. Recent polls shows strong public support for rolling back tax cuts for the wealthy to pay for rebuilding the Gulf Coast and to put us on a better economic path. Let's make sure Congress reflects the public will.

President's Tax Panel Hints at its Forthcoming Recommendations

The President's Advisory Panel on Tax Reform met last week, for the first time since Hurricanes Katrina and Rita ravaged the Gulf Coast, in preparation for making their recommendations for tax reform to the Treasury Department before the Nov. 1 deadline. During the Oct. 11 meeting, the panel referenced some loose conclusions it has reached on tax reform, mainly with regard to the alternative minimum tax and to deductions for homeownership and employer-provided health insurance.

Although it has held public meetings since February, until last week the panel had not publicly discussed specifics of the reforms it is pursuing. As was discussed in last week's meeting, however, the group has come to a consensus on capping the employee income exclusion for employer provided health care (at $11,000 per employee), as well as the mortgage interest deduction for homeowners (at $350,000 for a jointly filing couple). Former GOP Senator and Panel Chairman Connie Mack said the deductions as they currently exist are not shared equally, and that pursuing caps in both areas would result in "shifting some of the benefit to middle-income Americans."

The panel is pursuing these controversial reforms, as supports for the implementation of another central goal of the panel: repeal of the Alternative Minimum Tax (AMT). The decreased deductions would help to offset the cost of repealing the AMT, which was created to ensure that all extremely wealthy individuals pay some taxes but increasingly ensnares middle-income Americans. AMT repeal was deemed a necessary reform by the panel months ago; however; it was only with last week's meeting that the panel laid out options for offsetting the cost of repeal, which is estimated at $11.3 trillion over ten years.

Besides AMT repeal, the panel focused on tax deductions for charitable donation and appeared willing to consider expanding incentives to individuals who do not currently itemize their tax returns, a controversial provision not widely supported by career staff at the Treasury Department. In addition, the panel rejected replacing the income tax with a sales tax or a value added tax, both of which would unnecessarily complicate the tax code and place a disproportionate financial burden on low-income families.

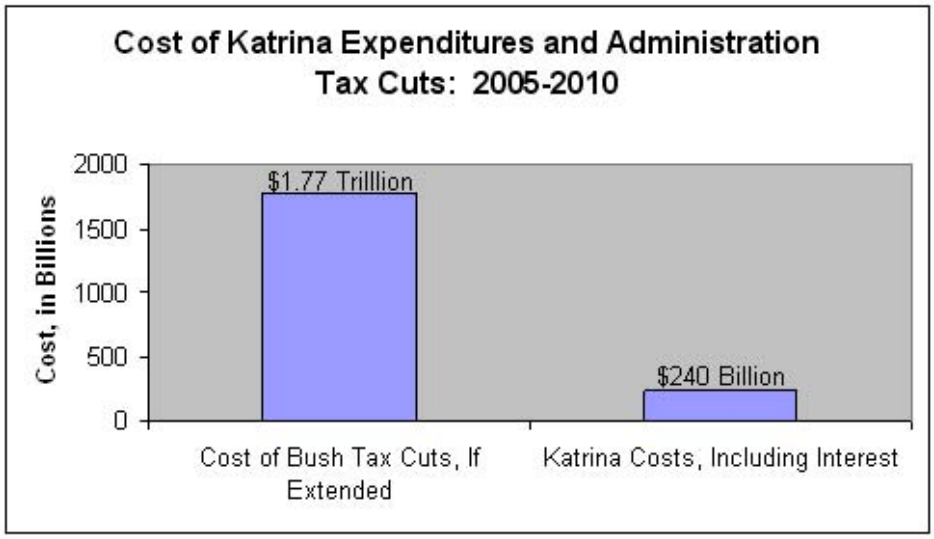
The panel will meet once more publicly on Oct. 18 before the deadline, where it will most likely take up the issue of capital gains and dividends, along with the overall tax rate structure. Panelists will meet for a final time via teleconference before submitting their recommendations to the Treasury Department. Those recommendations will then be incorporated into the recommendations Treasury Secretary John Snow will make to the president. President Bush will likely discuss some of the panel's tax reform suggestions in his upcoming State of the Union address in January, when it is expected he will outline a plan for a broad overhaul of the tax code, similar to his call to overhaul Social Security in last year's address.

Given the administration's unbalanced and regressive tax policies over the last five years, it is likely Bush will ignore the panel's more balanced and progressive proposals. In addition, it is unclear whether certain tax reform proposals can be implemented in 2006, when the political pressures of an election year will warp much of the policy deliberation.

Congress Mistakenly Focusing On Katrina Spending As Top Fiscal Danger

Although conservatives in the House and Senate have been squealing over the past few weeks that budget cuts are necessary to offset spending for Gulf Coast reconstruction, in reality Hurricane Katrina will have little effect on long-term deficits. Despite this minimal impact, many GOP lawmakers are using the disaster as an opportunity to advance calls for sharp cuts in federal spending in the name of "fiscal responsibility." These cuts are neither necessary nor fiscally or socially responsible, considering that federal spending in response to Hurricane Katrina will, at most, cause a slight ripple in our immediate deficits and on the nation's long-term fiscal situation.

In reality, the cost of tax cuts will prove much more threatening over the next five years than the cost of post-disaster spending. The tax cuts passed in 2001 and 2003 cost the federal government more *each year* than the total amount the U.S. government is likely to spend dealing with the one-time expense of hurricane relief. The 2001/2003 tax cuts are slated to cost $225 billion this year alone and even more with each coming year as the tax cuts take increasing effect. As illustrated below, the five-year cost of the tax cuts is more than seven times the anticipated costs of all expenses related to the hurricane.



Congress should be more concerned with the persistently large and growing national debt, and the structural deficits that have caused it, than with the one-time expense of Gulf Coast recovery and reconstruction. Large deficits over a number of years, such as those we have seen over the past few years, can erode the quality of future living standards by reducing national saving - which slows the accumulation of wealth - and degrade overall economic performance. Temporary deficits, on the other hand, can serve the important purpose of supporting economic activity, employment, growth, and other policy objectives in the near term, without significantly harming long-term deficit projections.

In fact, the Center on Budget and Policy Priorities has estimated that if $200 billion is borrowed to pay for hurricane costs, the projected deficit ten years from now will only be about 3 percent higher than it would be had the hurricanes never happened.

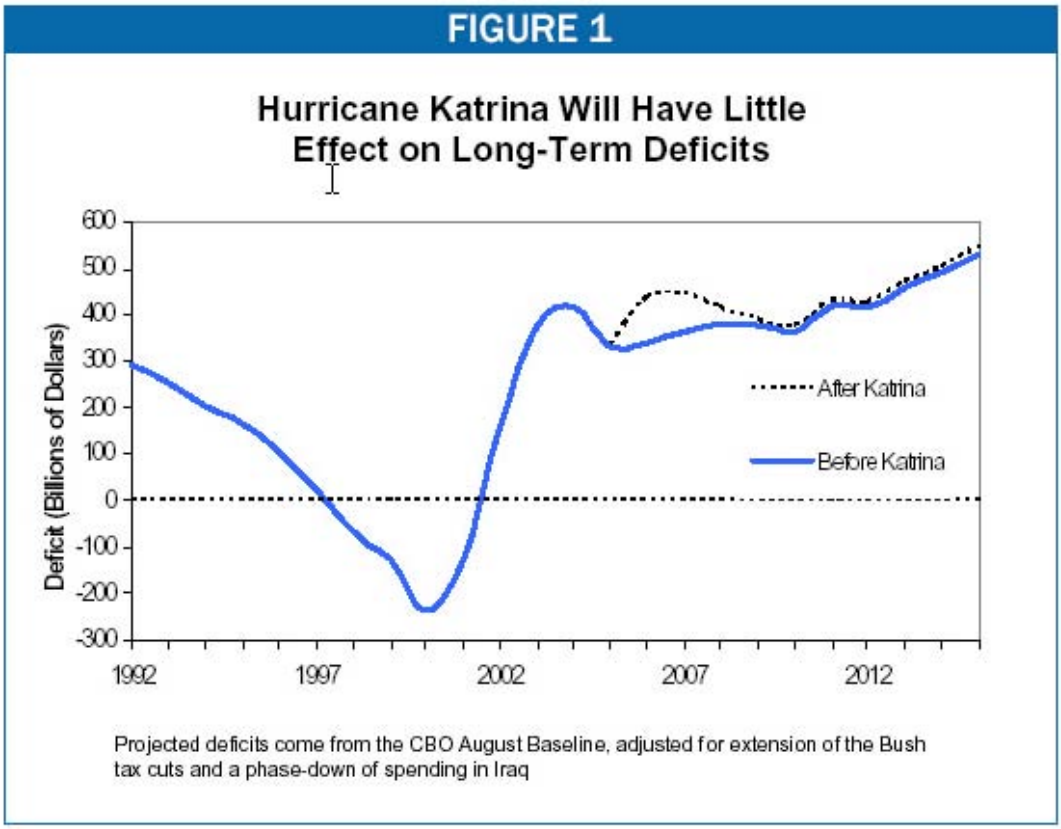


Chart courtesy of Center on Budget and Policy Priorities report, "Getting Serious About Deficits? Calls to Offset Hurricane Spending Miss the Point; Balanced Set of First Steps Toward Fiscal Discipline Needed."

As a Congressional Budget Office report on the subject succinctly states, "Policies that increase the deficit but also provide incentives for people to work, acquire more skills and education, undertake research and development, invest, innovate, or use resources more efficiently may do less harm to future living standards than policies that increase the deficit without providing such incentives." Further tax cuts concentrated toward the wealthy add to the deficit, while providing few of the above-mentioned incentives. Emergency reconstruction spending, on the other hand, if implemented correctly, could have the potential of spurring growth and creating vast and immediate opportunities for people whose livelihoods have been devastated.

This one-time spending could prove to be an important step towards shifting our federal government's focus toward making long-term investments in neighborhoods and communities. Comparatively, such a shift will have much less of an effect on future deficits than President Bush's other budget and tax policies (defense spending, for example) and will do far more good for average Americans.

Study Adds Voice of Low-Income Americans to Debate Over Economic Divide

In the aftermath of Hurricane Katrina, there has been widespread concern that the local residents of New Orleans and other affected communities be an integral part of any and all reconstruction efforts in the Gulf Coast region. In order to embrace a similar approach in addressing deep and persistent U. S. poverty brought to light by Katrina, the Marguerite Casey Foundation commissioned a comprehensive study looking at attitudes of Americans, particularly those of low-income families, before and after Hurricane Katrina.

The Foundation hopes this study, entitled "Different Incomes, Common Dreams," will provoke continuing debate on one of America's most pressing issues - economic disparities and large numbers of Americans living in poverty - as well as to increase the breadth of voices involved in that debate.

According to the Marguerite Casey Foundation, the study involved one of the largest and most inclusive nationwide surveys ever conducted, examining the attitudes, hopes, fears and dreams of nearly 2,000 American families living on both ends of the economic spectrum and all points in between. The survey was conducted by Princeton Survey Research Associates International between December 9 2004, and February 12 2005, and by Lake Snell Perry Mermin/Decision Research between September 30 2005 and October 3 2005.

The survey indicates that even after Katrina, Americans across all incomes levels share many of the same hopes and aspirations for the future. However, most Americans agree that the gap between the rich and poor continues to widen, with 97 percent of survey respondents believing there is a gap between the rich and the poor and 79 percent believing that gap is very big.

Approximately 90 percent of respondents realized that poverty is a problem in America today and a majority supported a broad range of long-term investments to help reduce poverty, such as increased wages, health insurance, education, job training and tax credits. Among the top causes of poverty cited by respondents were a minimum wage that is too low, cuts in benefits, too many part-time jobs, and jobs being exported to other countries.

This is yet another piece of evidence that the Bush administration's and Congress' current priorities are completely out of touch with the concerns and priorities of the American people. With Congress bent on making even larger cuts this fall to programs supporting the type of long-term investments the majority of Americans currently support, they are not only promoting a radical philosophy that ignores the tremendous need in our country, but also continuing to gradually erode what may be the only security and supports for millions of American families living in poverty and struggling everyday just to get by.

California Biomonitoring Bill Stumbles in its Final Hurdle

California Governor Arnold Schwarzenegger vetoed the Healthy Californian's Biomonitoring Program (SB 600), after its narrow passage by the state legislature. The bill would have established America's first state-wide program to assess levels of human chemical exposure. The governor struck down the bill despite its support by the Center for Disease Control and Prevention, U.S. Rep. Nancy Pelosi (D-CA), the California Medical Society, and numerous health advocacy organizations.

Biomonitoring analyzes blood and urine samples to determine an individual's level of toxic exposure. Several recent biomonitoring studies showing troubling levels of toxic chemicals present in people have raised concerns among public health groups.

Supporters of SB 600 claim that a state-wide biomonitoring program would have been more useful than individual studies. The bill would have set up a panel of scientists, public health officials, citizens and government officials to determine participants and chemicals that would be researched. For instance, the panel could have selected farm workers and examined exposure to pesticide and insecticide, chemicals with which they routinely work.

The results of this targeted approach could have lead to more protective occupational safety rules for farm workers or laborers in other industries. A healthier population, supporters say, could have saved the state millions of dollars in healthcare costs and environmental remediation.

After three consecutive years of consideration by the California legislature, the bill reached the governor's desk this year for the first time. Groups that supported the bill, such as the Breast Cancer Fund and Commonwealth, have been sharply critical of the governor's veto and have made clear they will work to see the bill reintroduced next year.

Open Records Problems in Old Kentucky

Kentucky has recently experienced challenges implementing its Open Records Act. Officials have already been accused of abusing new homeland security exemptions to the state's open records law to avoid public scrutiny of matters unrelated to terrorism concerns. One decision to withhold information will be reviewed in court this week. In another case, Governor Ernie Fletcher will likely go to court to challenge the state attorney general's decision to make certain records available to the public.

On April 4, at the conclusion of the legislative session, the Kentucky legislature passed new homeland security exemptions that allow state officials to withhold records and close meetings when public access would reveal a "vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act..." The exemptions are reminiscent of the Sensitive Homeland Security Information provisions of the federal Homeland Security Act, which allow the government to withhold any information vaguely defined as "sensitive but unclassified."

The Associated Press (AP) requested state records of security spending surrounding a March 28 fundraising trip to the state made by Vice President Dick Cheney. Gov. Fletcher and the state police invoked the new exemptions to deny the request. The AP appealed the decision to the Kentucky Attorney General's Office, which upheld the refusal to disclose the information. Unsatisfied, the AP filed a suit under the state's Open Records Law, and the matter will be heard this week by Franklin County Circuit Judge Roger Crittenden.

When Kentucky lawmakers debated the exemptions, open government activists raised concerns that officials could use the new security exemptions to avoid public scrutiny. In addition, opponents warned that withholding information from the public would harm, rather than improve, homeland security, because public knowledge of security deficiencies does more to correct them than ignorance.

In a related case, the attorney general recently opposed the governor's decision to withhold financial information. The attorney general determined that Gov. Fletcher and state agencies violated the Kentucky Open Records Act when they denied a request for information on expenses incurred during a state investigation. Sen. Ernesto Scorsone (D-Fayette) filed the request for information about the cost incurred for a team of lawyers working on an investigation of state hiring practices.

Scorsone believes the bills may total over $1 million and holds that the public has a right to know what the state does with that much taxpayer money. The governor's office plans to appeal the attorney general's decision, creating the possibility of another court battle for access to state information.

Rep. Oxley Strikes Deal with House Conservatives; Housing Bill to Include Nonprofit Gag Provision

A GSE (government-sponsored enterprise) bill that would establish a new affordable housing fund, but limit nonprofits' rights to engage in, or affiliate with organizations that engage in, nonpartisan voter registration or lobbying activities, is racing ahead to a floor vote in the House.

The Federal Housing Finance Reform Act, H.R. 1461, a bill that would increase regulation of federal mortgage entities, will likely come to the floor by Oct. 28, despite a provision, that will be offered on the floor in the form of a manager's amendment, that would disqualify nonprofits from receiving affordable housing grants if they have engaged in voter registration and other nonpartisan voter activities, lobbying, or produced electioneering communications. Organizations applying for the funds would be barred from participating in such activities up to 12 months prior to their application, and during the period of the grant even if they use non-federal funds to pay for them. Most troubling, affiliation with an entity that has engaged in any of the restricted activities would also disqualify a nonprofit from receiving affordable housing funds under the bill.

The sponsors of the bill, Financial Services Committee Chairman Michael Oxley (R-OH) and Rep. Richard Baker (R-LA) reached an agreement with members of the conservative Republican Study Committee (RSC), , to reduce the size and duration of the Affordable Housing Fund (AHF) created in the bill and to address the RSC's advocacy and voter registration concerns. Neither Oxley's office nor

the RSC has released the language of the anti-advocacy provision despite repeated requests. However, newly obtained draft language reveals that AHF grant applicants, "other than for-profit entities," are required to have "affordable housing" as their primary purpose. It restricts the use of grant funds to supporting affordable housing activities.

Most troubling, the draft disqualifies grant recipients if, for the preceding 12 months prior to applying for the funds, and throughout the grant period, the organization:

- Engages in "Federal election activity" as defined by the Federal Election Campaign Act of 1971 (FECA) (2 U.S.C. 431 (20)). This includes voter registration, voter identification, get-out-the-vote, or other nonpartisan voter participation activities;
- Publicly promotes, supports, attacks or opposes a candidate for Federal office in a broadcast 60 days before a general election or 30 days before a primary election;
- Lobbies, except if the group is a 501(c)(3) organization lobbying within permissible limits.

Affiliation with any entity that engages in any of the above activities during the same period - 12 months before applying for a grant or throughout the grant period - will also disqualify the organization from receiving AHF monies. However, the "affiliation" definition contained within the discussion draft has not been disclosed and could have much more extensive implications - including, for example, participation in coalitions or even board membership by staff at another organization.

Nonprofit groups, led by the housing community, have rallied against the provisions. In a letter to House Speaker Dennis Hastert (R-IL), the United States Conference of Catholic Bishops wrote, "[P] roposals that would inhibit recipients from engaging in voter registration and lobbying activities with their own funds during the period they are utilizing affordable housing funds would force Catholic agencies to choose between participating in Affordable Housing Fund programs or engaging in constitutionally protected voter registration and lobbying activities with their own funds."

The legislation, which would create a more powerful regulator for Fannie Mae, Freddie Mac and the Federal Home Loan Banks, passed the House Financial Services Committee in May on a 65-5 vote. The legislation has stalled, however, because of RSC concerns that the Affordable Housing Fund provision would be used to "finance third- party advocacy groups that have agendas far beyond simply increasing affordable housing for low-income Americans." According to a House Republican aide, the RSC's 100-plus members plan on voting for the GSE bill, even though many members have broader concerns about the legislation. "The [restriction on] election activities was the big provision conservatives were looking for," a Republican aide told*Congress Daily*.

Oxley and Baker have also reached an agreement with House Republican leadership to bring the bill to the floor by the end of the month. Rules Chairman David Drier (R-CA) is currently working to schedule a vote on the measure. However, the prospects of Senate passage this year are slim, in part because of opposition to the AHF provision by Senate Banking, Housing and Urban Affairs Committee Chairman Richard Shelby (R-AL). The Senate version, S. 190, passed out of committee on July 28 by a party-line vote of 11-9 without an affordable housing provision. Shelby reportedly has "deep concerns" about affordable housing programs and "believes there are better mechanisms" than the AHF contained in the House version.

OMB Watch has created a Resource Center for information on the anti-advocacy provision in the GSE bill, where concerned individuals will find a summary and ways to take action.

Friend of Court Brief Planned in Supreme Court Case on Grassroots Lobbying

Nonprofits will have a chance to weigh in on a case that may decide their advocacy rights, when the Supreme Court considers whether to uphold a lower court decision to ban certain paid broadcasts of grassroots advocacy messages. The case in question involves messages that mention public office holders who are also candidates in a federal election, funded with corporate, including nonprofit, money. On Oct. 14 OMB Watch and other nonprofit groups met with legal experts to begin work on a friend-of-the-court brief that will highlight the negative impact a ruling against Wisconsin Right to Life (WRTL), the defendant in the case, could have on nonprofit advocacy rights.

WRTL discontinued airing an advertisement 60 days before the 2004 election, because the ad asked residents to contact their senators (Democrats Herb Kohl and Russell Feingold) and urge them not to support filibusters of judicial nominees. Feingold was running for re-election at the time, and, as the 60-day blackout period under a federal electioneering communications rule approached, WRTL filed a lawsuit asking for an injunction against application of the rule to these facts. The lower court ruled against them.

Briefs in the case are due Nov. 14, and oral argument is expected in early 2006. The court will be considering two issues:

- whether challenges to specific applications of the electioneering communications rule are even allowed, and
- whether WRTL's grassroots lobbying ads must be exempted from the rule for constitutional reasons.

In a briefing for nonprofits, election law experts Karl Sandstrom and Bob Bauer of Perkins Coie said it is important for the court to hear from a diverse group of 501(c)(3) organizations to "highlight through examples the impact of the ban absent a grassroots lobbying exemption." They noted that all grassroots lobbying ads that mention federal officeholders running for office would be considered an attack or endorsement of a candidate if the Supreme Court affirms the lower court decision. They also noted that ten states have already adopted similar laws that apply to broadcasts referring to state candidates. A Supreme Court finding against WRTL could also result in an extension of the rule from broadcasts to phone banks, mass mailings and other forms of grassroots communications commonly used by charities, as eight states have already done.

A draft of the brief will be circulated in early November, and signatories will be collected by OMB Watch. Interested organizations can get details and sign on to the brief by emailing amicus@ombwatch.org.

Federal Court Allows Salvation Army to Consider Employees' Faith

A federal court opinion permitting the Salvation Army to consider the faith of employees hired for government- funded projects is being touted as a victory by proponents of President Bush's faith-based initiative, claiming it legitimizes the administration's stance. Yet, opponents of the Bush faith-based initiative are not entirely sure the court decision is a loss.

In a mixed decision, on Sept. 30 Judge Sidney Stein of the District Court for the Southern District of New York found *Lown v. Salvation Army* that the Salvation Army was within its legal rights when it considered the faith of its employees, even though they were paid with public funds. The plaintiffs, former employees of the Salvation Army, charged that they were forced out of their federally-funded social service jobs after they disagreed with the organization's religious policies, including requirements they divulge their faith. In late 2003, the Salvation Army instituted a reorganization plan, designed to promote a "One Army Concept." According to the complaint, under the reorganization, the Salvation Army's religious mission would seep into social service programs, among others, and in particular its Social Services for Children program.

Under the new program, employees allegedly were required to sign a form avowing they had received a Salvation Army Employee Manual, which stated, "I understand the Salvation Army's status as a church and I agree I will do nothing as an employee of the Salvation Army to undermine its religious mission." Additionally, some employees were also required to sign a "Work with Minors Form,"

obligating them to conduct themselves in their work "with children in a way that is consistent with the religious and charitable principles of The Salvation Army."

The initial language in the Work with Minors Form required employees to identify their present church and minister, as well as other churches they attended during the last 10 years. Some employees refused to sign the Work with Minors Form and claim, as a result, they were disciplined, demoted, or fired.

Judge Stein dismissed plaintiffs' claims that by funding a private agency that discriminates based on religion, the government defendants are violating the Equal Protection Clause of the 14th Amendment and the Establishment Clause of the First Amendment. The judge ruled that even though the Salvation Army receives government funding to administer social services, it is a "private entity" and cannot be sued for religious discrimination under the Establishment Clause unless facts show it was engaged in government action. According to the ruling, the plaintiffs "never allude to any state actor participating in the Salvation Army's allegedly discriminatory practices," and did not offer enough facts to find a "pervasive entwinement" between the Salvation Army and the government. The plaintiffs are expected to appeal once the case is concluded in the District Court.

At the same time, the court allowed two of the plaintiff's claims to move forward:

- whether by funding "specifically religious" activities of the Salvation Army, the government defendants are violating the Establishment Clause of the First Amendment; and

- whether the Army may be held liable under city and state law, for retaliating against employees who claimed religious-based employment discrimination.

The first of these holdings allows the plaintiffs to proceed with a separate set of Establishment Clause claims that focus on the use of government funds for religious purposes. These claims arise from the plaintiffs' status as taxpayers of the governmental entities that provided funds for Salvation Army programs. The judge found that there was a "reasonable inference" that government funds were used and "that the Salvation Army may be using government funds to support indoctrination of clients who [m] the government defendants compel to participate in Social Services for Children programs."

Faith-based organizations are barred from using direct federal financial assistance to support any "inherently religious" activity (including worship, religious instruction, and proselytization). An organization that engages in inherently religious activities must offer those services to beneficiaries separately in time and location from programs and services supported by direct federal funds.

For opponents of the Bush faith-based initiative, the ruling reaffirms the principle that faith-based organizations cannot use direct federal funds for religious use. "The court properly ruled that the City and State agencies cannot allow the Salvation Army to use government funds to proselytize or to impose their religious beliefs on those who rely on them for day care, foster care, adoption, juvenile detention and HIV services. Under the ruling, government funds cannot be used by faith-based social service agencies to promote religion when they provide social services to the intended beneficiaries," explained Donna Leiberman, executive director of the New York Civil Liberties Union.

Cases Before High Court Could Redefine Limits of Federal Power to Protect Public

The U.S. Supreme Court has agreed to review two Clean Water Act cases that could prompt yet another examination of the limits of Congress' power to protect the public.

Both cases -- *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2005), and *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004) -- address whether the Clean Water Act extends federal protection over wetlands with less than simple connections to waterways that are protected under the CWA. In the course of addressing these issues, the Supreme Court could potentially address a much larger question than a straightforward interpretation of the Clean Water Act: it could speak to the scope of Congress's power under the Commerce Clause to remedy public harms.

About the Cases

Section 404 of the Clean Water Act requires landowners to obtain permits from the Army Corps of Engineers before dumping fill material into wetlands that are adjacent to navigable bodies of water or their tributaries. A long line of court cases has interpreted this clause broadly to cover many bodies of water that are not actually navigable but do have significance for interstate commerce. Both *Carabell* and *Rapanos* now put into question what counts as *adjacent*.

The Michigan wetlands property in *Carabell* is bounded on one side by a manmade ditch with four feet wide upland berms along the banks. That ditch connects at one end to Sutherland-Oemig Drain, which empties into the Auvase Creek, which in turn empties into Lake St. Clair, a part of the Great Lakes Drainage System. The ditch connects at the other end to other ditches that ultimately empty into the Auvase Creek. The landowners, who were denied a permit to fill in the wetlands in order to build a 130-unit condominium complex, argue that their property is entirely isolated and not governed by the CWA.

The landowners in *Rapanos*, who faced civil and criminal sanction for draining, filling, and building on protected wetlands, argue, among other things, that their parcels are several steps removed from any actual navigable bodies of water, because they are adjacent only to nonnavigable waters that themselves connect only to other nonnavigable waters that only eventually, connection after connection, reach the Great Lakes system. Accordingly, they argue, their parcels are entirely isolated and not adjacent within the meaning of the Clean Water Act.

Commerce Clause Connection

In each case, the U.S. Court of Appeals for the Sixth Circuit addressed the applicability of the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). In *SWANCC*, the Supreme Court rejected the Army Corps of Engineers' CWA jurisdiction over entirely isolated, intrastate bodies of water whose only connection to interstate commerce or interstate movement of any sort was that migratory birds enjoyed them as a habitat. A minority of courts has applied the *SWANCC* holding to mean that Army Corps CWA jurisdiction extends only to navigable bodies of water or nonnavigable bodies that directly abut navigable waterways, but the Sixth Circuit sided with the majority trend reading *SWANCC* more narrowly as prohibiting only federal control over entirely isolated intrastate bodies of water.

As the Seventh Circuit has observed in a similar CWA case, the question of statutory interpretation and the question of the scope of federal authority under the Commerce Clause in such a case are "interchangeable." *See United States v. Gerke Excavating*, 412 F.3d 804, 806 (7th Cir. 2005). When the Court probes the meaning of "adjacent," it could therefore reach the question of Congress' power under the Commerce Clause to legislate in the public interest in cases of intrastate matters that may affect interstate commerce only in the aggregate, if at all. Because the Commerce Clause is the major source of authority for federal action to protect the public interest, any constitutional inquiry raises the risk that the federal role could be circumscribed.

The risk is slight in these cases, however, because the six justices who ruled recently in favor of federal drug regulation even of intrastate trade in medical marijuana are still on the bench. The two seats that are turning over -- those of Chief Justice William Rehnquist and Associate Justice Sandra Day O'Connor -- are from the minority position in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), the medical marijuana case reaffirming that Congress' role in protecting commerce must include the power to regulate entire classes of activity that can affect interstate commerce, even when individual instances of those activities may not have any such effect. It will be interesting to observe what new Chief Justice John Roberts will rule in these cases; nonetheless, even if he opposes the government's position, he will likely be overruled by the *Raich* six.

Katrina Exposes Some, But Not All, Unmet Security and Safety Needs

While the country may now be cognizant of water contamination and other serious safety gaps prevalent in the regions hit by Hurricane Katrina, health and safety threats are not unique to the Gulf Coast.

Threats to security and safety exist throughout the country, and some of these unmet public needs, which receive little media attention, pose even greater threats to public health and safety than risks found in New Orleans. While the examples cited below are by no means exhaustive, they highlight troubling gaps in our security and safety protections.

Water Contamination

As soon as Gulf Coast cleanup began, the Environmental Protection Agency (EPA) issued warnings for workers to avoid contact with floodwater, which was contaminated with unsafe levels of *E. coli*, lead, arsenic and various other chemical and bacterial pollutants. This "toxic soup," however, is not isolated to New Orleans floodwaters. In fact, weak regulatory protections have allowed contaminants from construction and factory farm runoff to flow into rivers and lakes throughout the country, and unlike cleanup crews and residents in New Orleans, most Americans are not warned about the potentially hazardous pollutants in waters where they swim and fish.

According to a report in *Grist Magazine*, the Des Moines Water Works, which supplies drinking water to the 300,000 residents of the Iowa City area, recorded "E. coli readings up to three times higher than [the New Orleans] toxic gumbo five times in 2005 alone. The river's all-time high was set in 1996, the first year of regular monitoring, when a 100-mL sample contained 154,020 *E. coli* colonies -- a whopping 770 times higher than the EPA's national no-contact standard." Though the water is sanitized before it reaches the drinking water supply, at its source (the Raccoon River) it is not.

In the case of the Raccoon River, contaminants from factory farms such as animal byproducts, herbicides and pesticides are largely responsible for the unsafe conditions of the watershed. "Last year, state officials investigating a fish kill in a small creek that empties into the Raccoon found readings of 14 million fecal coliform colonies per 100-mL sample. 'Some of these tributaries at times can be little more than liquid manure,' reported a scientist familiar with the area," according to the Grist article. "Investigators from the Iowa Department of Natural Resources ultimately concluded that manure from a nearby cattle feedlot killed the fish." The Raccoon River is a 200-mile river used by the Boy Scouts and many others for recreational purposes including whitewater kayaking.

Unfortunately, the White House's Office of Information and Regulatory Affairs (OIRA) watered down already weak EPA draft rules to address pollution from factory-style animal farms--resulting in standards that are more protective of corporate polluters than of public health and the environment. In 2001, EPA reworked a Clinton-era proposal to regulate factory farms, dropping a number of important provisions--most notably one that would have held corporate livestock owners liable for damage caused by animal waste pollution. These owners often evade culpability by hiring contractors to raise their animals, a loophole that would have been closed by the Clinton proposal. The agency also dropped a requirement that would have forced facilities to monitor groundwater for potential contamination by animal waste, which often seeps into the earth, leaving community drinking water supplies vulnerable.

OIRA further weakened the standards by broadening a provision that exempts "agricultural storm water discharge" from regulation--legalizing the discharge of raw sewage, bacteria, and other elements from land where waste has been applied. The office also altered a provision to allow facilities to avoid strict federal standards governing the land application of animal waste--instead embracing the industry-preferred approach of regulation by state-level authorities.

OIRA also tossed out an EPA proposal to limit runoff from construction and development sites, the largest source of pollution in coastal waters and estuaries in the United States. Additionally, the Bush administration has delayed issuing new standards to prevent sewer overflows. In the meantime, more than a trillion gallons of untreated sewage have poured into U.S. waterways, and Americans are still denied even rudimentary public notice of such contamination in the waters where they swim and fish.

In January 2001, at the end of the Clinton administration, EPA proposed standards that would mandate improved sewer capacity, operation and maintenance, and require that sewage facilities notify the public and public health authorities when overflows occur. These proposed regulations were based onconsensus recommendations developed over five years by a federal advisory committee, which included sewer operators. However, upon taking office, the Bush administration froze the Clinton sewer proposal, and more than four years later no action has been taken. To make matters worse, the Bush administration is seeking greater "flexibility" for drinking water systems in poor areas.

Each year, the United States experiences about 40,000 overflows of raw sewage and garbage--such as medical waste, toxic industrial waste, and contaminated storm water--into rivers, lakes, and coastal waters, and about 400,000 sewage backups polluted the basements of American homes. The vast majority of these overflows is preventable.

EPA has also failed to regulate certain chemicals that have been known to contaminate drinking water systems--such as the weed killer atrazine, which has contaminated certain drinking water systems at levels 12 times greater than allowed by law.

Facility Security

One hundred twenty-five chemical facilities have a "vulnerability zone" encompassing more than one million people who could be killed or injured in the event of a chemical accident or terrorist attack; about 700 facilities put more than 100,000 people at risk; and roughly 3,000 facilities put at least 10,000 people at risk. All told, one in six Americans lives in a vulnerable zone. A recent report by the 9/11 Commission found progress on the nation's chemical security infrastructure sorely lacking.

Disturbingly, no federal law regulates these vulnerability zones in terms of size, chemical intensity, or population at risk. Companies are not even required to assess and consider inherently safer methods of operation.

A legislative proposal introduced in 2002 that sought to bolster chemical security was thwarted in Congress. On April 27, 2005, a panel of government officials and security experts told the Senate Subcommittee on Homeland Security and Governmental Affairs that chemical security remains a looming problem the federal government refuses to address. Proving the point, on that very same day the House Committee on Homeland Security rejected an amendment to improve security related to shipments of dangerous chemicals.

Safeguards protecting nuclear facilities are also sorely lacking. Although the phrases "dirty bomb" and "radiological device" have achieved wide circulation since 9/11, the administration has not addressed securing the more than 100 potential dirty bombs already in the United States: the 103 nuclear reactors in 65 power plants across the country. In fact, according to 9/11 Commission staff, nuclear power plants were among the ten targets originally planned by al Qaeda for the terrorist attacks of Sept. 11, 2001.

In fact, a 2003 report by the Government Accountability Office "identified three major deficiencies in the [Nuclear Regulatory Commission's] oversight of nuclear plant security," according to a joint report by Public Citizen and Greenpeace.

> A year later, it found that little had been accomplished to address the serious shortcomings highlighted by the GAO, including: the NRC's assessment of individual plant security plans is merely a "paper review" and lacks detail sufficient to determine whether plants can repel an attack; security plans are largely based on a template that often omits key site-specific information; NRC officials do not typically visit plants to obtain site specific information; NRC readiness tests at all facilities will take three years to conduct; and the NRC does not plan to make the improvements to its inspection plan recommended by the GAO in 2003, such as following up to see whether cited violations of security requirements have been corrected.

In March 2005, NRC proposed weakening fire safety regulations at power plants by making it more difficult to safely shut down a reactor in the event of a fire caused by a terrorist attack. The proposed

rule will allow plant operators to rely on manual rather than automatic shut-downs of equipment. In 2003, NRC found that many plants were out of compliance with fire protection regulations. Rather than raise the bar on protection, NRC decided to lower the standards instead and put workers and surrounding communities at risk.

Security assessments of nuclear facilities were mired i n conflicts of interest when the same company used to assess nuclear facility security also provided security guards for more than half the nation's security facilities.

Nuclear facilities have been plagued by other safety issues as well. A nuclear facility in Arizona was recently discovered to have a serious design flaw that went undetected for 19 years. The NRC rejected a petition in May for a new regulation to require battery back-ups in sirens used to alert people of a nuclear accident. Thus, if a power failure and nuclear accident occur at the same time, families living near a power plant may not be alerted. At the same time, the Bush administration missed a 2003 deadline to provide families living near nuclear power plants with potassium iodide pills that could protect them from radiation poisoning in case of a nuclear accident.

Bioterrorism and Food Safety

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 required FDA to develop new regulations to protect our food supply. Yet the regulations promulgated provide little protection, prompting former Department of Health and Human Services Secretary Tommy Thompson to call the nation's food supply an "easy target" for a terrorist attack. For instance, one of the rules--administrative detention of food products that pose a serious health threat--is only effective once a threat has been detected, but, as Thompson pointed out, only a very small percentage of food supply is ever inspected. If food threats are not discovered, administrative detention can do little to protect the food supply.

Another rule requiring advanced notice of food shipments arriving in the U.S. was significantly weakened by OIRA. The original proposal, issued in February 2003 for public comment, required importers to notify the FDA by noon the day before a shipment was to arrive. The final standards, however, require just eight hours notice for shipments arriving by sea, four hours for those transported by air or rail, and only two hours for shipments coming by land.

Even more likely than the threat of bioterrorism is the threat of food contamination by listeria, salmonella or *E. coli*. Listeria alone causes 2,500 cases of illness each year, 500 cases of which aredeadly. Unfortunately, FDA and USDA have issued only weak or watered-down regulations to protect the food supply from these prevalent food-borne contaminants.

We Can Do Better

These case examples of unmet needs in the areas of water contamination, facility security, and bioterrorism highlight the important role the federal government must play in protecting the public from harm. As individual citizens, we are defenseless from large-scale harms and must pool our resources into equally large-scale public institutions capable of supplying national solutions to national problems. Rather than seeking to cut the costs of Gulf Coast reconstruction by eliminating programs and lifting federal protections, government leaders should see Hurricane Katrina as a case in point of the consequences of government failure to address the public's unmet needs and as a tragic reminder of their important duty to keep America safe.

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

In This Issue

Service Cuts for the Poor to Pay for Tax Cuts for the Rich

Over the last two weeks, Congress has forged forward with plans to enact fiscally irresponsible budget and tax reconciliation bills that together will raise the deficit by as much as $35 billion over the next five years. That such a plan ignores new fiscal strains and the public's changed priorities since Hurricane Katrina seems of little consequence to lawmakers. Despite reaching agreement earlier this year on the elements of a dreadfully harmful reconciliation package, the House and Senate are currently crafting even more appalling (and now drastically different) bills. The various versions now aim to cut more than the original $34.7 billion from entitlement programs agreed to last April and threaten the ability of the two chambers to reach consensus in conference committee later this fall.

Senate Increases Cuts, But Attempts to Protect Beneficiaries

A number of committees in the Senate spent much of the last two week crafting individual bills that, in total, would cut a net of $39.1 billion from entitlement programs over the next five years. This is $4.4 billion more than was outlined in the original budget agreement that Congress passed last April.

Last Thursday, the Senate Budget Committee compiled those bills into the omnibus spending reconciliation bill and sent it to the floor of the Senate on a 12-to-10 party-line vote. The $39.1 billion outlined in the bill includes cuts to Medicare, Medicaid, agricultural subsides, student loans, pension supports, and other entitlement spending.

It appeared for a time that the Senate Finance Committee would not be able to meet its requirement to cut $10 billion from programs under its jurisdiction, which include Medicaid and Medicare. Sen. Charles Grassley (R-IA), chairman of the committee, spent weeks negotiating with Republican members of the panel from both ends of the political spectrum to forge consensus on a package. In the end, he was able to win the approval of Sens. Jim Bunning (R-KY) and Trent Lott (R-MS), who generally wanted more cuts to Medicaid and none to Medicare, and Sens. Gordon Smith (R-OR) and

Olympia Snowe (R-ME), who would only agree to a package with cuts from both Medicare and Medicaid.

Despite the cuts, the compromise worked out by Grassley in committee is not expected to impact program beneficiaries from either Medicaid or Medicare, instead it focuses on eliminating the Medicare stabilization fund for private health care plans, linking Medicare payments to quality of care, and closing loopholes for seniors who transfer assets in order to qualify for Medicaid nursing home care.

Many other committee chairs in the Senate seemed to go out of their way to spare low-income Americans from a decrease in vital human needs supports. Senate Agriculture Committee Chairman Saxby Chambliss (R-GA) had originally planned to include significant cuts to the Food Stamp program, but eventually reported a bill with no cuts after a number of Agriculture Committee members requested they be removed. The Senate bill also does not include cuts to foster care, supplemental security income, child support enforcement, or child care funding -- all services that primarily benefit children and low-income families.

The Senate began the required 20 hours of debate Monday afternoon at 4:00 pm and the debate will continue through Wednesday and possibly Thursday of this week until time for debate expires. Senators will then begin a succession of votes on amendments to the bill and then eventually vote on final passage. It is unlikely the unexpected secret session that took place in the Senate on Tuesday afternoon will push a final vote on the budget reconciliation bill beyond the end of this week.

House Version Contains More Ruthless Cuts

The House is approximately a week behind the Senate's reconciliation schedule since the House has been maneuvering to increase cuts to entitlement programs to $53,9 billion. Multiple House committees compiled individual bills detailing required cuts last week, and the House Budget committee is scheduled to compile those bills this Thursday, Nov. 3. The bill will likely be considered on the House floor the following week.

The House version is drastically different from the Senate and hits low- and middle- income Americans particularly hard. First, the House version includes no cuts to Medicare, instead slashing $9.5 billion from the Medicaid program and requiring beneficiaries to pay more for prescription drugs, adding new co-payments for children and other new costs, while also limiting beneficiaries' access to medical care. The stark contrast between this and the Senate's approach to program cuts in Medicaid and Medicare could be a central point of contention between the two chambers during a conference.

Also unlike the Senate's version, the House bill will cut $844 million from the Food Stamp program that will, according to Congressional Budget Office estimates, exclude between 225,000 and 300,000 working families from this essential nutrition support. It would seem the proposal could not come at a worse time for the working poor, with a report from the Agriculture department released the same day the cuts were approved showing the number of "food insecure Americans" has increased for the fifth consecutive year. The USDA reported the total number of people living in "food insecure households" -- those suffering from hunger without resources to purchase an adequate diet -- increased to 38.2 million last year, an almost two million person increase from 2003. The food stamp program cuts proposed by the House would undoubtedly increase those ranks, leaving hundreds of thousands more Americans struggling to put food on their tables without the support.

Both the House and Senate include cuts to student loan programs, but the House includes almost twice as much ($8.5 billion vs. $15 billion). The State Public Interest Research Group's Education Project has calculated these cuts in the House bill will cost a typical student $5,800 per year on average in additional education costs - causing many financially strapped students to drop out of school.

The list of cuts continues, with the House bill including cuts to foster care ($600 million), supplemental security income for the disabled ($730 million), and a whopping 40 percent cut to child support enforcement ($5 billion). In general, the Senate has been less draconian in proposing cuts that affect low-income Americans, yet any compromise reached with the House during conference will almost assuredly add or increase cuts to low-income programs from the Senate level.

All For The Tax Cuts

Most troubling of all is that the savings from these miserly proposals would merely pay for new tax

cuts for wealthy Americans. GOP leaders, leaving out this inconvenient fact, claim the reconciliation bills are needed to reign in spending to get the deficit under control. Yet, the same voices calling for tightening our belts, plan to pass $70 billion in additional tax cuts through the fast-tracked reconciliation process in the next two weeks, after the spending bill is completed.. Once the spending bill is passed, the reconciliation process -- designed to make easier enacting difficult legislation to cut entitlements and increase taxes in order to *reduce* deficits -- will actually **increase deficits by at least $35 billion**.

Neither the House nor the Senate is considering canceling plans to pass these new tax cuts or delaying the enactment of planned cuts benefiting the richest of the rich. A disproportionate share of the burden is being hoisted on the shoulders of those least able to bear it - the young, the old, the sick, disabled, and hungry, and many other vulnerable citizens. All the while, the well-off continue to receive very generous benefits through continued tax cuts.

House GOP leaders announced today that a final agreement between the House and Senate on a tax cut reconciliation bill could slip into 2006 due to difficulty not only building consensus among House Republicans, but also finding support within the Senate GOP, as to the necessity of enacting another round of new tax cuts. Acting House Majority Leader Roy Blunt (R-MO), however, remained optimistic about passage in the House of the additional tax cuts this year.

The Urban Institute-Brookings Institution Tax Policy Center (TPC) reports that households with incomes of over $1 million are receiving tax cuts this year from the 2001 and 2003 tax-cut legislation that total on average $103,000 a year. The total cost for these tax cuts for this year alone is $225 billion.

In addition, neither chamber has even broached the subject of stopping two extremely expensive tax cuts that will exclusively benefit very high-income households that have yet to take effect but are scheduled to do so on Jan. 1. The TPC estimated that 97 percent of the benefits from these tax cuts (commonly referred to as the PEP and Pease provisions) will go to the 4 percent of households with incomes greater than $200,000. When these two tax cuts are fully in effect, more than half (54 percent) of their benefits will go to households with income of over $1 million a year -- each millionaire household will receive $19,200 *each year* -- an amount nearly equal to that earned by two working parents each year making minimum wage: $21,424.

Speak out now and tell your representatives to scrap the reconciliation bills this year and enact sound fiscal policies that promote the common good for all Americans.

Congress' Reconciliation Work Crowds Out Appropriations

A month after the close of Fiscal year 2005, the Senate has finally completed work on all appropriations bills funding discretionary spending in 2006 after wrapping up the Labor/Health and Human Services bill last week. Conference negotiations with the House, however, remain on eight of the 11 spending bills, and time is running out for Congress to complete the appropriations bills before the stark continuing resolution currently funding the federal government expires on Nov. 18. While it is not rare for Congress to miss its appropriations deadline, this year's delays are especially contentious given that much of the congressional leadership's energies over the past month have been spent working on reconciliation bills that lack fiscal responsibility, compassion and, perhaps most importantly, necessity.

Last April when Congress voted on and passed the budget resolution for Fiscal year 2006 (FY06), they chose to include in the resolution reconciliation instructions aimed at cutting taxes (by $70 billion) and entitlement spending (by $35 billion). Reconciliation is a two-step process to change current law in order to bring revenue, spending, and debt-limit levels in line with the policies of the annual budget resolution. The first step is to instruct committees to find savings to achieve the objectives in the budget resolution. The committees provide their recommendations to the Budget Committees, which then begin the second step.

The second step involves consideration of the reconciliation legislation under expedited rules that limit the amount of time for debating the legislation, the type of amendments that can be offered, and, in

the Senate, prevent filibusters. Unlike the budget resolution, the reconciliation legislation must be signed by the president to become law. While reconciliation is usually used to lower the deficit, this year the reconciliation instructions will actually increase the deficit by $35 billion.

Anyone following the reconciliation process over the past six weeks has seen that it has been anything but expedited. Since Hurricane Katrina, many Republicans, particularly House conservatives, have been pushing the envelope to increase the entitlement cuts done under reconciliation by $15 billion (for a total of $50 billion) before final passage. In the meantime, the appropriations process languishes. While all work has been completed on the House and Senate floors only two bills out of 11 have been signed into law by the president. FY06 programs, which began one month ago, have not been funded at an amount agreed to by both chambers in conference. In fact the continuing resolution passed to keep the government afloat is drastically under-funding many programs and services.

Congress' role as appropriators of all public funds -- arguably its most important duty -- has not always been completed by the stated deadline. When this occurs, lawmakers pass a continuing resolution (such as the resolution passed this year), until they can complete all spending bills or, as a last resort, combine bills together in one massive omnibus bill. This year it is very likely that Congress will serve up yet another omnibus, with the likelihood of conferees completing work on all bills in the next few weeks being slim at best.

An omnibus bill this year, as with ones before it, promises to be large and so complex that many lawmakers may hardly know what they are voting on. Omnibus bills are bad legislative practice: they remove transparency and accountability from the appropriations process and usually lead to fiscal irresponsibility. Could this year's continuing resolution and the likely omnibus have been avoided if congressional leaders were not so wrapped up in cutting funding for low-income supports to pay for more tax cuts for the wealthy? It is certainly possible as reconciliation has received the lion's share of Congress' attention this year, while the appropriations process has floundered.

Congress' priorities need to shift away from a misguided, far-right agenda back to completing the core functions for which it is responsible in a way indicative of concern for both the direction of our nation and the most vulnerable Americans. The Senate will be voting on a budget reconciliation bill this Thursday, and the House is expected to vote on its version next week. **Take action now!** Send an email to your senators and representative telling them to vote against harmful budget cuts and irresponsible tax cuts.

Congress Remains Out of Step with Public in Hurricane Relief Efforts

It has been two months since Hurricane Katrina hit and one month since Rita made landfall on the already-ravaged Gulf Coast, yet reverberations continue to be felt not only in Washington, but throughout the country. Congress was forced to reshuffle the legislative calendar to address the immediate needs of the relief effort, postponing consideration of the reconciliation bills and a vote on repealing the estate tax, dropping Social Security reform legislation, and passing a stark continuing resolution to fund government services past the end of the fiscal year and allow for more time to pass the annual appropriations bills. Outside of Washington though, a larger reshuffling is occurring as the vast majority of Americans no longer believe the country is on the right track and are turning to government to help redress some of the startling inequalities witnessed in the wake of the hurricanes.

Polls conducted post-Katrina have overwhelmingly shown a public that places higher importance on combating poverty and inequity in American society than ever before. The results of a recent national poll released Oct. 27 by New California Media, a San Francisco-based coalition of ethnic media, showed Americans more concerned with eliminating poverty than fighting terrorism, establishing democracies in Iraq and Afghanistan, or rebuilding cities devastated by natural disasters. In the poll - which surveyed whites, blacks, Asians and Hispanics about how Hurricane Katrina influenced the way people view poverty, race relations, climate change and government - a majority of the 1,035 respondents felt the United States should be using revenues to build strong cities and communities here at home rather than oversees.

Waning public support for U.S. involvement and spending in Iraq has been seen in other recent polling, notably in the results from an AP-Ipsos poll conducted last month. The AP poll found that 42

percent of people favored cutting spending on Iraq to pay for relief efforts in the Gulf Coast. In that same poll, respondents identified poverty as the number one issue the government needs to dedicate time and resources to overcoming.

Sergio Bendixen, whose firm conducted the poll, stated, "I don't remember poverty ever finishing as the number one priority on any kind of list. The aftermath of Hurricane Katrina [and Rita] and the images of poverty have clearly made a large impact on many Americans."

According to a study released in October by the Marguerite Casey Foundation, approximately 90 percent of those surveyed realized that poverty is a problem in America today and a majority supported a broad range of long-term investments to help reduce poverty, such as increased wages, health insurance, education, job training and tax credits.

Unfortunately, Congress does not seem to be listening. While the hurricanes have had a significant impact on Congress' schedule this fall, they have not changed the priorities of Republican leaders in either the House or Senate. Following Katrina Congress immediately passed a $10.5 billion emergency supplemental bill to keep the Federal Emergency Management Agency operating, and followed it with a much larger $51.8 billion bill to fund short-term relief and recovery efforts throughout the region. On Oct. 28, President Bush sent a third supplemental request for aid to Congress, which will consider it over the coming weeks. This third supplemental does not require any new funds to be approved by Congress; it simply reallocates $17 billion of the $62 billion that was previously provided for FEMA's disaster relief fund. According to the Office of Management and Budget (OMB), sufficient funds will remain in the disaster relief fund to continue meeting ongoing and current recovery demands. In addition, the White House requested $2.3 billion in rescissions to programs it deemed to be a "lower priority."

The $17 billion transferred would include funds to reconstruct military bases ($3.31 billion); repair and rebuild highways and bridges ($2.33 billion); rebuild levees and improve waterways and wetlands ($1.6 billion); support Community Development Block Grants ($1.5 billion); reconstruct veterans health care facilities in New Orleans and Biloxi ($1.16 billion); and help meet child care, mental health, and other human services needs ($500 million), among other smaller projects.

The $2.3 billion in rescissions, which will come from twelve cabinet departments and the Environmental Protection Agency, would, according to the OMB, "offset the unprecedented cost of this disaster and control growth in discretionary spending." In reality these extraordinarily small spending cuts will have little long-term effect on the growth of unsustainable deficits.

In addition to supplementals, Congress has worked to pass tax packages to bring relief to some victims and spur new growth. On Sept. 21, Congress agreed to a $6.2 billion tax package to expand tax deductions for dislocated victims and provide charitable incentives to encourage other Americans to help. The bill, sponsored by Rep. Jim McCrery (R-LA), will provide some financial support in the future, but will do less to get victims back on their feet than direct spending would.

This very point was made by Daniel Doctoroff, the deputy mayor for economic development and rebuilding for New York City, in his Sept. 28 testimony before the Senate Finance Committee. Doctoroff testified that tax breaks were not the most effective approach to assist those most in need in the wake of a disaster and that direct spending by the government was more immediately beneficial. Doctoroff described the tax code as "a crude vehicle for delivering assistance - particularly in comparison to appropriations."

Despite reservations raised by independent analysts, McCrery has introduced a second tax package that focuses on tax cuts for businesses in the Gulf region. On Oct. 27, McCrery, a senior member of the Ways and Means Committee, introduced the bill, which is expected to carry a 10-year cost of slightly less than $8 billion. The bill would:

- Provide new cash for tax-exempt bonds, in order to help states and localities rebuild infrastructure and private industry rebuild commercial and residential property;
- Authorize $14 billion in new private activity bonds and allow the interest on those bonds to be excluded from income for purposes of calculating the alternative minimum tax (AMT), ensuring that any tax benefit investors gain from the bond will not be recaptured by the AMT;
- Allow for a second advance refunding of outstanding bonds to allow state and local

governments to restructure their debt, a key provision sought by hurricane-effected states;
- Double the limit on expensing of new property and equipment for small businesses to $200,000, but only for businesses operating in the disaster zone;
- Establish Gulf Opportunity Zones, or GO Zones, for areas effected by Hurricane Katrina, similar to the Liberty Zones set up after the Sept. 11 terrorist attacks;
- Create a new tax credit bond, which would allow states to offer investors a federal tax credit instead of paying interest on the bond. Authority would be limited to $200 million for Louisiana, $100 million for Mississippi and $50 million for Alabama.

It is unclear when Congress will take up work on this second tax relief package. GOP leaders continue to claim they will finish all legislative duties before the Thanksgiving holiday, but with many appropriations bills still left unfinished, starkly different reconciliation bills to rectify, and an open seat on the Supreme Court to fill, more than likely Congress will be working in Washington well into December this year.

TRI: The Tool For Public Protection Against Toxic Pollution

The Environmental Protection Agency (EPA) implied that the public had already received most of the benefits the Toxic Release Inventory (TRI) could offer when the agency recently proposed significantly cutting the amount of information companies report under the program. This is not, however, reflected in the facts, which show the TRI continues to be an important public health tool widely used by community groups, labor unions, local officials and citizens.

The following examples demonstrate the ongoing importance and usefulness of the annual data on toxic pollution collected under the TRI. Approximately 26,000 industrial facilities in neighborhoods across our country annually report under the program the amounts of some 650 chemicals that they release or dispose of The program which has been in place since 1988 has been tremendously successful in achieving reductions in toxic pollution by simply making the information public.

However, on Sept. 21, EPA officially proposed allowing thousands of companies to pollute more before requiring they report the details of that pollution. The agency also plans to cut the TRI program in half by letting facilities report every other year. The changes will make it difficult for communities to track local polluters and demand reductions.

EPA claims that TRI reductions have 'leveled off,' and implies that companies have already learned the importance of reducing toxic pollution. One EPA official claimed that the major reductions under TRI occurred years ago. However, each of the examples to follow illustrate how the TRI continues to play a vital role in protecting public health.

- Louisville, Kentucky -- On June 21, Louisville city officials approved a new program that requires industrial facilities to reduce emissions of hazardous air pollutants. The TRI was critical in passing the new clean-air program. As Tim Duncan of the Rubbertown Emergency Action Community Taskforce (REACT)explains, "the combination of the TRI numbers and local air monitor data provided a powerful combination of numbers for us to use to show that Hazardous Air Pollution levels were serious in our area."

- Phoenix, Arizona -- The Arizona Department of Environmental Quality (ADEQ) also uses the TRI to address Hazardous Air Pollutants (HAPs) emissions. The ADEQ used TRI data to identify facilities that had significantly increased their HAP releases from 2002 to 2003. The agency can then work with those facilities to better manage their air emissions. Alternate-year reporting would have missed these pollution increases.

- Green Bay, Wisconsin -- The Clean Water Action Council of North East Wisconsin recently told OMB Watch, "we use the TRI frequently to call attention to toxic releases, as the counties we work with are home to some of the state's top toxic sources and highest cancer rates. (The) TRI helps us understand the relative importance of various pollution sources, focus our public education efforts where they can make the most difference, and is the only comprehensive dataset of its kind, providing valuable insights which the public would otherwise be unaware of."

- Peoria, Illinois -- The Sierra Club Heart of Illinois Chapter uses TRI data in its efforts to get the Peoria County Board to close a hazardous waste landfill, owned by the private company located at the edge of town. The TRI data has revealed that the landfill -- less than three miles from 20,000 Peoria residents -- contains dangerously high levels of chromium and cadmium, and emits large amounts of air-born pollution. The landfill company has applied for a permit that would extend the landfill's life by 15 years.

- Dorchester, Massachusetts -- The JSI Center for Environmental Health Studies, based in Boston, conducted a project called, 'Informed Communities: Environmental Health Initiative.' With support from the National Network of Libraries of Medicine, they piloted training programs on using the TRI in Dorchester, which compelled health centers and community groups to use the TRI to address local environmental health concerns. The project was such a success that it is being disseminated to other New England communities.

- Modesto, California -- Haleh Niazmand, a recent transplant to Modesto, found out from TRI data that she and her family until recently lived between a quarter mile and four miles from several industrial facilities in Cedar Rapids, Iowa that released neurotoxins, including mercury into the air and water. Niazmand, whose three-year-old child has regressive autism, tells OMB Watch, "the TRI made it plain that these facilities were releasing poisons into the air. This information will help me make informed decision regarding my son's detox regime."

- Seattle, Washington -- The Washington Toxics Coalition used TRI data to track millions of pounds of toxic waste being turned into fertilizer and sent to farms. The coalition told OMB Watch that "in 1997, we found out the practice was occurring and then looked to TRI data to find that steel mills were sending millions of pounds of lead to be turned into fertilizer. Shedding light on this and taking regulatory action has basically put an end to the practice of bagging steel mill waste for fertilizer."

- Albion, New York -- Diane Heminway with the United Steelworkers Association (USWA) conducts trainings using the TRI to better inform workers of the health risks associated with the chemicals to which they are exposed. According to Heminway, the trainings teach workers to spot reporting violations or inconsistencies, and companies with formal employee participation programs are up to three times more successful at reducing pollution.

- Chicago, Illinois -- TRI data informed concerned residents of Chicago's Pilsen neighborhood that the nearby brass foundry was the city's largest emitter of airborne lead. In 2004, the residents formed the Pilsen Environmental Rights and Reform Organization and pushed for air testing, which found highly elevated levels of lead in the area. As a result the group was able to secure agreements from the company to reduce emissions.

- Homer, Alaska -- The Cook Inlet Keeper, a citizens' group that works to protect Alaska's Cook Inlet, uses the TRI to generate media coverage highlighting the pollution being released by industries into the inlet. The group uses the news coverage to make companies aware that their toxic pollution is being watched and to encourage them to make reductions. In this way, they act as an important check in an area that experiences almost 2 million pounds of toxic pollution each year.

Send your TRI stories to gsorvalis@ombwatch.org.

Industry Derails Labor Safety Rule with Data Quality Challenge

A coalition of mining companies and trade associations appears to have used the Data Quality Act to derail a Mine Safety Health Administration (MSHA) rule that would protect miners from harmful particulate matter in diesel exhaust. The challenge did not raise actual objections to data quality; instead it couched industry's disagreements with the rule in data quality language. The tactic, however, appears to have succeeded in impelling the agency to publish a modification to the rule that weakens the mine worker protections.

The Issue

Diesel engines are widely and increasingly frequently used in mining operations because of their high power output and mobility. Diesel-powered machines, from bobcats to loaders, are more powerful than most battery-powered equipment and can be used without electrical trailing cables which can restrict equipment mobility. The downside, especially in the underground mining environment, is the potential health effects -- both acute and long-term -- of exposure to various constituents of diesel exhaust, which consists of noxious gases and very small particles. The Center for Disease Control and Prevention (CDC) has determined that diesel exhaust is a potential human carcinogen.

In addition, acute exposures to diesel exhaust have been linked to health problems such as eye and nose irritation, headaches, nausea, and asthma. Currently, underground miners can be exposed to over 100 times the typical environmental concentration of diesel exhaust and over 10 times that measured in other workplaces. In addition, miner exposure to diesel emissions promises to become more widespread as diesel equipment becomes more popular within the mining community.

MSHA sets limits on miner exposure to a number of the gases in diesel emission (see Title 30 CFR Sect. 75.322 and Sect. 71.700 for underground and surface coal mines and Sect. 57.5001 and Sect. 56.5001 for underground and surface metal and nonmetal mines).

MSHA also addresses the particles in diesel emissions. Diesel particulate matter is small enough to be inhaled and retained in the lungs. Each particle has hundreds of chemicals from the exhaust adsorbed (attached) onto its surface. Accordingly, MSHA proposed a June 6 rule to limit workers' exposure to diesel exhaust particles by requiring mine operators to remain under a Total Carbon (TC) limit of 160 micrograms per cubic meter of air. MSHA had been working on the rule for years and had carried out extensive negotiations with the mining industry, which has long argued the rule is unnecessary and unenforceable. The TC limit was identical to provision originally proposed by MSHA in a 2001 rule, when the agency first attempted to address the issue.

The Challenge

MARG Diesel, an informal group of mining companies and trade associations, filed a data quality challenge on Aug. 10, arguing that the TC rule fails to meet the data quality standards laid out in the Data Quality Act and the Department of Labor's guidelines for implementing that law. The group claims the rule is based on data that is not transparent or reproducible and that it underwent a flawed peer review process. MARG Diesel claims that the only "correction" possible is for MSHA to either stay or entirely overturn the 160 TC limit rule until these issues can be resolved.

This challenge represents another industry abuse of the Data Quality Act, in order to impede the processes of government agencies. While the petition raises issues and concerns about the studies and data used to produce the new TC rule, the studies are not listed as the challenged information. Instead, MARG identifies the rule as the target of its challenge.

Transparency and Reproducibility
MARG Diesel claims that the two main studies heavily relied upon in the rulemaking (called the 31-Mine Study and the Estimator) fail to meet the reproducibility and transparency standards of Labor's data quality guidelines, which indicate that the research process should be transparent enough that another entity could conduct the study and reach the same outcomes. The group asserts that MSHA's study makes incorrect assumptions, regarding, among other things, air ventilation, that "continue to contradict reality, even if input emission measurements were representative, which they are not." Among the specific assumptions MARG disagrees with is the effectiveness of filters required to

become compliant with the 160 TC limit, arguing that some pieces of equipment cannot be fitted with filters, and therefore the particle limit is not achievable.

MARG clearly fails to raise a legitimate data transparency or reproducibility concern. Data is reproducible if it "is capable of being substantially reproduced, subject to an acceptable degree of imprecision," according to the data quality guidelines. Data is transparent if the source of the data is revealed along with the supporting data and models. The issues raised by MARG Diesel are not issues of reproducibility or transparency. The problems do not concern a hidden assumption or any undisclosed data or models. In fact, MARG Diesel, in an effort to disprove the MSHA results, conducted its own version of the study, thereby proving that the study was transparent.

Independent Peer Review
MARG Diesel also argues in its petition that the 31-Mine Study and the Estimator were not independently peer-reviewed, because the reviewers were "self selected personnel in its sister agency the National Institute for Occupational Safety and Health (NIOSH)," a division of the CDC. Additionally, MARG claims that, "a review of the Estimator for publication in a mining magazine does not constitute the needed independent peer review for use of the Estimator to determine feasibility of compliance for a mine or for the industry, due to the incorrect assumption in the Estimator described therein."

While MARG Diesel makes several assertions about the biased peer review, the group fails to provide any specific evidence or proof that the peer review process was not conducted objectively. The Department of Labor Information Quality Guidelines defines peer review as the "independent assessment of the technical and scientific merit of research by individuals knowledgeable in the particular subject interest and with no unresolved conflict of interest." NIOSH employees were clearly selected for their extensive knowledge of the material. The petition makes no mention of any specific conflict of interest or bias for the reviewers at NIOSH. It also makes little sense to claim that an independent peer review done by a mining magazine is insufficient, because the material they reviewed was flawed. The purpose of the review is to determine the merit of material and discover such flaws if they exist. MARG is challenging the peer review of the Estimator study, simply because it disagrees with its conclusions and the rule MSHA is basing on it.

The Result

The MSHA has not yet issued a formal reply to the MARG Diesel Coalition's challenge. However, the agency has already published a modification to the TC Rule. On Sept. 5, about one month after receiving the data quality challenge, the agency proposed to phasing in the 160 TC limit over six years, instead of requiring compliance next year.

Conclusion

The MARG Diesel coalition has failed to make a valid reproducibility, transparency, or independent peer review complaint. The other claims of the MARG Diesel challenge fall even further from the mark: the "feasibility" of complying with the TC rule, the "regulatory confusion" that the rule would cause, and the "significant loss of jobs" that instituting the rule would cause. None of these charges have anything to do with data quality, nor is the data quality mechanism the appropriate forum for MARG to make these complaints, which should be raised during the rulemaking process. Instead, MARG is misusing the data quality process to disagree with the policy of instituting the 160 TC rule.

The MARG Diesel petition does not constitute a valid data quality challenge, but rather a disingenuous complaint that divert agency resources and wastes agency time. The Department of Labor's own Data Quality Act guidelines acknowledge that, "Program efficiency must be a critical goal as DOL agencies carry out their responsibilities under these guidelines," MSHA, as the division of DOL responsible of miner safety, in the interest of program efficiency should reject such spurious industry tactics.

Nonprofit Gag Passes in House, Has Uncertain Future in Senate

A bill dealing with oversight of Fannie Mae and Freddie Mac that establishes a new affordable housing fund passed the House, but at the expense of nonprofits' rights to engage in, or affiliate with organizations that engage in, nonpartisan voter registration or lobbying activities.

On Oct. 26, H.R. 1461, the Housing Finance Reform Act, which would increase regulation of federal mortgage entities, passed the House 331-90 despite a provision offered as a manager's amendment by Rep. Michael Oxley (R-OH) that disqualifies nonprofits from receiving affordable housing grants if they have engaged in voter registration and other nonpartisan voter activities, lobbying, or produced "electioneering communications." Organizations applying for the funds are barred from participating in such activities up to 12 months prior to their application, and during the period of the grant even if they use non-federal funds to pay for them. Most troubling, affiliation with an entity that has engaged in any of the restricted activities also disqualifies a nonprofit from receiving affordable housing funds under the bill.

Much of the debate on the floor centered around whether nonprofits should have to make a choice between their right to freely associate, advocate and conduct voter registration, and their ability to provide much-needed services. Republicans argued that the bill did not limit political speech - as long as an organization did not want affordable housing fund monies. They also misrepresented the provision, claiming it is aimed at preventing federal funds being used for political purposes. According to Rep. Tom Feeney (R-FL), "They want to allow folks that engage in political activity, including voter registration, to have access to money that otherwise would go to low-interest loans or to help affordable housing builders at the local level that actually build bricks and mortar."

However, nonprofits are already barred from using federal funds to lobby or electioneer, and have long supported current laws and regulations that prohibit the use of federal funds for lobbying and partisan political activities. Additionally, investigations have shown no pattern of abuse by nonprofits.

The Rules Committee did not allow Rep. Barney Frank (D-MA) to offer his amendment to strike the anti-advocacy provision from the manager's amendment. In response to debate on the House floor that money is "fungible" and therefore housing grant funds indirectly help support nonprofit political speech, Frank argued:

> "We are talking about whether groups with their own money can do other things. People have said the money is fungible. Well, when we were debating faith-based groups, when we said if you give money for day care, is that going to go to religious activities, we were told, no, they will be segregated. I agreed with that. So the argument about fungibility, apparently, appears to be itself very fungible."

Frank also agued that this provision would hit faith-based groups the hardest. The provision restricts grants to those groups that have building houses as their "primary purpose." Since the "main purpose" of many faith-based groups is faith-related, they would likely be barred from receiving housing grants.

Frank urged other representatives to vote against the manager's amendment with the promise that his motion to recommit with instructions forthwith would include essentially the same manager's amendment, however, the "primary purpose" language would be changed to "among its primary purposes," and the restriction on nonpartisan voter registration and "get out the vote" work would be dropped. Such a motion to recommit forthwith, if adopted, would have forced the committee chairman to immediately report back to the House in conformity with the instructions and the bill to then automatically return to the House floor.

In an extremely close vote, the House voted 210-205 in favor of Oxley's manager's amendment, which contained the nonprofit gag provision.

After a number of other amendments were addressed, Frank moved to recommit with instructions forthwith to the Financial Services Committee. In another close vote, this motion failed 200-220.

The members who spoke on the floor largely avoided the "affiliation" restrictions in the provision.

Extremely far-reaching, the language creates "affiliations" between organizations that share resources, have overlapping boards or staff, or receive too much money from one entity. Once affiliated, the action of the affiliated entity can disqualify the nonprofit from receiving money under the Affordable Housing Fund. For example, if a private company donates office space or equipment to a housing group, the two entities are now affiliated. If the private company lobbies or endorses a candidate for federal office, the housing group would be barred from receiving money under the Affordable Housing Fund.

The legislation passed the House Financial Services Committee in May on a 65-5 vote, indicating strong bipartisan support. At that time, there was no gag provision. The legislation stalled, however, because of concerns voiced by the conservative House Republican Study Committee (RSC) that the Affordable Housing Fund provision would be used to "finance third- party advocacy groups that have agendas far beyond simply increasing affordable housing for low-income Americans." As RSC member Tom Feeney (R-FL) said, "I'd rather burn the money than give it to an advocacy group."

The RSC essentially blocked the bill from coming to the floor unless it contained the gag provision. At the same time, an ongoing dialogue was taking place between the sponsors of the legislation and some from the faith-based community. As the faith community learned of the restrictions on speech and voter engagement activities, it mounted a strongly opposition to the provision. Despite objections raised during drafts, the final version of the gag provision went further in the direction of restricting nonprofit speech and association rights than earlier drafts. While this further inflamed the issue for supporters of the affordable housing fund, it provided the poison pill the RSC sought, and the RSC thus allowed it to go the House floor for a vote.

The prospects of Senate passage this year are unclear. Reportedly, Senate Banking, Housing and Urban Affairs Committee Chairman Richard Shelby (R-AL) opposed an affordable housing fund. The Senate version, S. 190, which passed out of committee on July 28 by a party-line vote of 11-9, does not contain an affordable housing provision. The main debate in the Senate has not focused on the affordable housing fund, but rather on the main provisions in the legislation - the oversight of Fannie Mae and Freddie Mac. Some speculate that, if an agreement on the broader oversight issues can be worked out, a compromise could likely be reached on the affordable housing fund. There is also speculation that, while the Senate bill has stalled, it may pick up speed over the next month when two reports regarding Fannie Mae oversight are expected to become public. Nonetheless, considering the tightness of the Senate's schedule, it is unlikely the bill will reach the floor this year.

FEC Considers Broadcast Rule Change, Congress Mulls Internet Speech

On Oct. 20 the Federal Election Commission (FEC) heard testimony on its reconsideration of a rule on treatment of grassroots broadcasts by charities and religious organizations in campaign finance regulations. OMB Watch testified in support of an exemption for grassroots lobbying from the "electioneering communications" rule, which bans corporations, including nonprofits, from referring to federal candidates in broadcasts made 60 days before a general election or 30 days before a primary.

In 2003 the FEC approved an exemption for 501(c)(3) organizations from the "electioneering communications" rule. The new rulemaking is a response to a federal court order to reconsider the exemption because the court found the FEC did not provide adequate justification for it. The FEC appealed the ruling, but on Oct. 24 the U.S. Circuit Court for the District of Columbia turned down the FEC's request for full court review of that decision. FEC Commissioners have said they do not plan to pursue appeal to the Supreme Court but will move forward with revisions on this and over a dozen other rules rejected by the court.

At the same time, the Supreme Court recently accepted a case involving application of the "electioneering communications" rule to grassroots lobbying by a 501(c)(4) organization, Wisconsin Right to Life. At the FEC hearing Robert Bauer, an election law expert of the firm Perkins Coie, testified that the FEC should wait to approve a new rule until after the Supreme Court's decision, which is expected early next year. OMB Watch's testimony, delivered by former FEC Commissioner Karl Sandstrom, supported a nonprofit grassroots lobbying exemption to the electioneering communications rule. He emphasized the right of nonprofits to petition the government for redress of grievances, noting that next fall's appropriations legislation will be under consideration during the 60 day period prior to the general election, saying, "And the question is, will they have an exemption under your regulations to use television or radio to put forth to the public what is at stake, to

encourage the public to contact their legislators to tell them that something matters here?" Other nonprofits, such as the Alliance for Justice and Independent Sector supported continuation of the 501 (c)(3) exemption. The American Cancer Society's testimony supported the idea of a grassroots lobbying exemption, saying, "We certainly believe that legitimate lobbying communications for or against specific legislative proposals should be able to continue throughout the year, even if they include a call to action that mentions a lawmaker." They also noted that unpaid broadcasts, such as public service announcements, can be covered by the "electioneering communications" rule. Since broadcasters often repeat public service announcements on a schedule that is not under the control of the nonprofit that produced it, inadvertent violations could occur without some kind of FEC action.

Campaign reform think tanks, such as the Campaign Legal Center, Democracy 21 and the Center for Responsive Politics testified that they oppose any exemptions to the "electioneering communications" rule in order to prevent potential abuse by those wishing to avoid campaign finance regulations.

OMB Watch Report on Charity and the War on Terror

Since the 9/11 terrorist attacks, federal measures intended to cut off terrorism funding have imposed undue burdens on the nonprofit sector. An OMB Watch report released at the end of October, Safeguarding Charity in the War on Terror, addresses the unbalanced anti-terrorist financing regulations and guidelines that, according to the report, "lack a basic understanding of how nonprofits function, and ultimately do not help -- and may even hinder -- the global war on terror." The report then goes on to call for improving the current system, so that nonprofit organizations and foundations can pursue legitimate charitable activities.

On June 14, 2005, a diverse panel sponsored by the Georgetown Public Policy Institute's Center for Public & Nonprofit Leadership convened to discuss U.S. regulations, laws, and guidelines that seek to curtail the financing of terrorism. Among the new and troubling anti-terrorism provisions discussed were President Bush's Executive Order 13224, which addresses terrorism financing and identifies lists of suspected terrorists, and the Treasury Department's *Anti-Terrorist Financing Guidelines, Voluntary Best Practices for U.S. Based Charities*.

'Safeguarding Charity in the War on Terror' focuses on the Treasury Department guidelines that, although voluntary, have led to troubling practices by grant-making institutions. Testimony from scholars and nonprofit practitioners during the panel, as well as the stories of nonprofits directly effected, expose three prevailing myths, explored in the report, that obscure the true nature and impact of current policy:

The myth of "voluntariness." The threat of government investigation and asset seizure make the government guidelines anything but voluntary.

The myth of utility. Policies such as the Treasury Department guidelines are ineffective as counter-terrorism measures and waste resources that could be more usefully channeled to other areas of the war on terror.

The myth of minimal impact. The consequences of current policy go far beyond administrative costs to threaten the nonprofit sector and its ability to deliver services.

The report finds "in the absence of clear, sensible guidance and information from government about what is legally required, confusion and fear are driving the response of the nonprofit sector in the campaign against terror financing." Foundations and grantees alike have widely adopted practices such as terror list checking and certification -- a process requiring signatures from grantees, employees, partner organizations, and even vendors -- without consideration of the consequences to civil liberties and without assurance that these steps will offer protection from legal sanction. Charities are also increasingly fearful that continuing to provide legitimate services and activities might cost them funding from either foundations or the government.

Charitable Reform and Giving Legislation For the Long Haul

Charitable reform and giving legislation is moving piecemeal in both the House and Senate, focusing on specific abuses of the sector and charitable giving incentives in the wake of Hurricanes Katrina and Rita.

In an Oct. 24 speech delivered to Independent Sector's 25th Anniversary Conference, Senate Finance Committee Chairman Charles Grassley (R-IA) explained the importance of "reform and oversight" of the sector to "safeguard the donors and taxpayers." He went on to say he would have liked a complete reform package to have been ready this fall, but "(Hurricane) Katrina has affected this and many other plans." Nonetheless, Grassley made clear that he will not give up his quest to bring greater accountability to the nonprofit sector, emphasizing that he is taking the "long view" on the issue.

Grassley noted that reforms he is considering focus on "better transparency and improving board governance, particularly on self-dealing and high salaries." He also highlighted three types of abuses he will target:

- Abuses with donor-advised funds, supporting organizations, and nonprofit credit counseling services (The abuses of concern in these institutions were not specified.);
- Abuses involving non-cash donations, such facade easements and other real estate transactions;
- Abusive transactions, such as those dealing with "life insurance and corporate tax shelters."

Grassley acknowledged that his reforms have met with some resistance, from both the nonprofit sector and within Congress. A number of charities have discouraged reform and found a partner in Sen. Rick Santorum (R-PA), a member of the Senate Finance Committee. These critics have raised concerns that enforcement of current laws is inadequate, and thus passage of new laws may not be the best solution. Instead, they emphasize providing adequate resources to ensure enforcement of existing laws. They have also expressed concern over the impact of reform proposals on smaller nonprofits.

Santorum has advocated for passage of his legislation to encourage charitable giving. That bill, the CARE Act, includes a non-itemizer deduction for charitable giving, an ability to rollover Individual Retirement Accounts to a charity, and other incentives. The non-itemizer, however, has not been universally embraced, particularly in the House.

In his speech, Grassley noted the importance of providing charitable incentives, and emphasized his role in enacting temporary incentives in recent Hurricane Katrina legislation. Most of these incentives expire at the end of the year.

Grassley hopes to include some nonprofit reforms or incentives in the upcoming reconciliation bill in the Senate. The House, however, has no such plans, making it uncertain whether such legislation will be part of any final package.

Grassley indicated there would be a second, broader phase of reforms that will be addressed in 2006. The details of these reforms remain unclear.

House Action

The House has not taken Grassley's active approach to nonprofit oversight and reform. Instead, the House seems more focused on addressing specific abuses by certain types of nonprofits.

In the post-Katrina environment, the House seems more focused on fraud by charities. H.R. 3675, the American Spirit Fraud Prevention Act, which would double the amount of fines that could be levied against individuals or groups that commit certain types of fraud during national emergencies, passed 399-to-3 on Oct. 25. Introduced by Rep. Charlie Bass (R-NH), H.R. 3675 would enable the Federal Trade Commission to double penalties -- up to $22,000 -- for individuals or organizations committing fraudulent acts.

The bill was previously passed by the House in the 107th and the 108th Congresses, but died each time in the Senate. It was originally introduced in response to reports of deceptive charity solicitations following the Sept. 11 terrorist attacks. Unfortunately, the generosity exhibited in the aftermath of Hurricane Katrina has spawned a similar wave of dishonest fundraising schemes and fraudulent solicitations.

Senate Uses Minimum Wage Increase to Push Anti-Regulatory Agenda

The recently revised unfunded mandates point of order was invoked in the Senate to kill dueling amendments to raise the minimum wage, one of which included a Republican counterproposal to "offset" the wage increase with several pro-business anti-regulatory provisions.

The exchange revealed dramatically the power of the recently revised point of order to stop legislation.

In a replay of events from last March, on Oct. 19, both Sens. Edward Kennedy (D-MA) and Michael Enzi (R-WY) offered amendments to the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act of 2006 (S. 3058) to raise the minimum wage by $1.10 over the next 18 months. Enzi's amendment (S. Amdt. 2115), however, included multiple lengthy provisions to ease regulations and paperwork requirements on small businesses in order to "offset" the costs of increasing minimum wage.

Both amendments were eventually defeated by an unfunded mandates point of order, but the amendments are likely to resurface in the future.

"Offsets" Translates as "Weakened Protections"

Enzi's amendment, which was more than 80 pages long, had dangerous anti-regulatory and anti-worker provisions. The amendment, for instance, would have increased the threshold for businesses to comply with minimum wage standards and other fair labor practices from those with sales of over $500,000 to those with sales over $1,000,000, thereby exempting many employers from minimum wage requirements just as it raised the wage. According to remarks on the floor by Sen. Richard Durbin (D-IL), the increase could "deny to more than 10 million workers across America the minimum wage, overtime pay, and equal pay rights."

The amendment also included anti-regulatory language that would have allowed small businesses to avoid punishment for failing to provide federally mandated information if the violation is a "first-time" offense. The amendment mirrored language of an amendment to the bankruptcy bill offered by Sen. Rick Santorum (R-PA) last March. Like Santorum's amendment, Enzi's 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 Enzi amendment would have eliminated this flexibility and actually could have encouraged even more violations by allowing small businesses to avoid reporting requirements without fear of fine until they were caught for the first time.

Businesses could have *many* "first-time" violations under the 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 business's violations of requirements from other agencies. A business could thus have failed to comply with a workplace safety requirement for the Occupational Safety and Health Administration, a toxic substance reporting requirement for the Environmental Protection Agency, and a pension fund reporting requirement under the Employee Retirement Income Security Act -- each time getting the "first-time" violator exemption.

In remarks on the senate floor, Sen. Chris Dodd (D-CT) reacted with surprise to the sweeping impact of this exemption: "That is a license, in my view, to go off and do anything, notwithstanding any other provision of law. It could wipe out all other Federal laws. Do my colleagues know which laws are being eliminated, notwithstanding any other provision of law? You could lie and cheat and steal. Am I reading this correctly?"

Kennedy went on to say that the amendment would effectively "preempt all 50 States from being able to enforce any of the Federal laws which they are mandated to enforce. I don't know where we get this idea. That could be on safe water, environmental, toxic substances. It could be on oil spills. It could be on any other matter. They preempt the States."

Like Santorum's amendment, Enzi's amendment posed a many other problems that could have threatened public protections and undermined state and federal regulations.

UMRA Foils Minimum Wage Hike

Kennedy's minimum wage amendment (S. Amdt 2063) went down in flames when Sen. Kit Bond (R-MO) raised an unfunded mandates point of order. The Unfunded Mandates Reform Act created a new point of order against any bill that would impose costs on state and local governments above a specific threshold, but the vote count required to overcome the point of order and allow a bill to move forward for a final vote was only a simple majority. Last April, Sen. Lamar Alexander (R-TN) snuck in an amendment to the Senate budget resolution that raised the vote count to a 60-vote supermajority.

Kennedy attempted to overturn the point of order raised to foil his minimum wage amendement, but the 47-51 vote to preserve the amendment fell short of the 60 votes needed. Fortunately, Enzi's amendment was also subject to an UMRA point of order and likewise failed.

As this case exemplifies, Alexander's alteration of UMRA procedures has transformed a relatively harmless procedural mechanism into an insurmountable roadblock to important protections for the public interest. Any improvements for workers, such as a real increase in the minimum wage, are at stake. If the costs to states of applying new safeguards for their own employees reach $62 million or more, bills creating those safeguards could be killed in the Senate by the UMRA point or order. In fact, since UMRA became law, one of the few statutes ultimately enacted that met the UMRA threshold was the minimum wage increase from the mid-1990s. New environmental protections, for example, 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.) could be subject to an unfunded mandates point of order.

Nanotech, Genetically Modified Crop News Spotlights Regulatory Gaps

New evidence of long-term persistence of genetically modified crops and new concerns about gaps in monitoring of nanotechnology underscore the risks from failing to embed the Precautionary Principle in regulatory policy.

The first of the two developments is the stunning revelation from a British study that genetically modified crops "contaminate the countryside for up to 15 years after they have been harvested," according to the British newspaper *The Independent*. Researchers studied five sites across the UK in which genetically modified oilseed rape had been cultivated for one season but later turned over to conventional crops. The researchers found that the GM crops persisted in those fields years after they had been harvested: there were, on average, two GM rape plants per square meter nine years later and one plant per square meter 15 years later.

The second major development is a pair of announcements of gaps in the monitoring of nanoparticles at a recent Environmental Protection Agency nanotechnology workshop held Oct. 26-28, as reported by BNA's *Daily Report for Executives*:

- Federal agencies currently lack methods to monitor environmental releases of nanoparticles, declared Mihail Rocco, co-chair of the National Science and Technology Council, at the opening of the workshop. Although there are initial indications that some engineered nanoparticles may pose little risk to consumers because they are embedded so firmly into the final product, Rocco observed that environmental releases of the particles from the manufacturing process are not being monitored. "We do not even monitor" environmental releases of nanoparticles, Rocco added, "yet we know they can go to the brain" and potentially cause health damage equivalent to the known harms of ultrafine particles. Another participant added that "some companies are incinerating carbon nanotubes," some types of which have been shown to damage the lungs of laboratory rodents.

- Another workshop presentation covered developing research into the ways that nanoparticles can pass through skin, causing inflammation and potentially other health consequences. Nancy Monteiro-Riviere, a professor at North Carolina State University, presented results from an ongoing examination of a range of engineered nanoparticles and the conditions that affect the speed with which they enter the skin. Andrew Maynard, scientific advisor to the Woodrow Wilson International Center for Scholars' nanotechnology project, told BNA that toxicologists are not accustomed to studying "all aspects of nanoparticles, including their size, shape, and charge" but need to begin doing so. "If we can't characterize the material we're dealing with," he told BNA, "we can't say anything serious or significant about them." The finding that some nanoparticles can enter through the skin is alarming, given that some products meant to be applied on the skin, such as sunscreen and baby products, are on the market with nanoparticles.

Brave New World, Strange New Risks

Both new developments spotlight the new risks created by the emergence of advanced technologies and the insufficiency of current regulatory policy to address those risks. The potential harms to the public health and the environment may, in some cases, be irreversible.

Nanoparticles may, as was pointed out in the EPA workshop, pose risks similar to ultrafine particles released through combustion and welding, which are known to cause a range of health problems that include respiratory and cardiac ailments. Other potential risks and uncertainties include the following:

- "Once in the blood stream, nanoparticles can 'move practically unhindered through the entire body,' unlike larger particles that are trapped and removed by various protective mechanisms."
- "During pregnancy, nanoparticles would likely cross the placenta and enter the fetus."
- "In water, nanoparticles spread unhindered and pass through most available filters. So, for example, current drinking water filters will not effectively remove nanoparticles."
- "Even in soil, nanoparticles may move in unexpected ways, perhaps penetrating the roots of plants and thus entering the food chains of humans and animals."
- "The smaller the particle, the larger its surface in relation to its mass. . . . [T]heir large surface means nanoparticles are highly reactive in a chemical sense. . . . 'As size decreases and reactivity increases, harmful effects may be intensified, and normally harmless substances may assume hazardous characteristics.'"
- "Nanoparticles may harm living tissue, such as lungs, in at least two ways -- through normal effects of chemical reactivity, or by damaging phagocytes, which are scavenger cells that normally remove foreign substances."
- "Nanoparticles may disrupt the immune system, cause allergic reactions, interfere with essential signals sent between neighboring cells, or disrupt exchanges between enzymes . . . ."

Genetically modified crops likewise give rise to substantial concerns for public health and the environment. Different species and modifications pose specific risks of their own, but there are also several "clear reasons, a priori, to be concerned about GM crops," according to an article in the *International Journal of Occupational and Environmental Health*:

- **Gene spills:** GM crops could contaminate non-GM landraces through cross-breeding and thus "could potentially threaten biodiversity, destabilize important ecosystems, or limit the future agricultural possibilities in a given region." Such contamination could well be irreversible. Cases have already been observed in the United States, Mexico, and Australia.
- **Consequences for human health:** The risk of health hazard is "particularly [notable] when genetic engineering introduces the possibility of unpredictable physiologic or biochemical

effects in the target varieties." Such fears have increased with news of a secret industry study finding that "[r]ats fed on a diet rich in genetically modified corn developed abnormalities to internal organs and changes to their blood," harms that were "absent from another batch of rodents fed non-GM food as part of the research project."

- **Environmental harms:** Aside from biodiversity concerns, GM crops could result in secondary environmental effects, such as increased pesticide use following the planting of pesticide-resistant varieties, such as Monsanto's RoundUp Ready crops.

Yet more risks are posed by biopharming, or genetically modifying crops to produce specialty proteins for pharmaceutical and industrial uses -- essentially using crop fields as factories. Notes law professor Rebecca Bratspies, "Many such crops are currently being planted in small test plots throughout the country. Once they are fully developed and approved, these biopharm crops will be grown in the same agricultural fields that are currently devoted to producing traditional agricultural crops." Open-air field tests of biopharm crops in the Corn Belt put the food chain at risk of contamination by crops that produce substances intended for pharmaceutical or industrial uses but not human consumption.

Precaution and Obstacle

The monitoring gap in nanotechnology and the almost complete regulatory gap in GM crops are symptoms of a larger failure to adopt the Precautionary Principle as a guiding force in regulatory policy. The precautionary approach can be contrasted with the reactive approach. In the reactive approach, risk creators are generally free from regulation until it is certain or nearly certain that the risky activity results in harm; the people exposed to those risky actions are forced to bear those risks and the burden of proving the case for regulation. In the precautionary approach, by contrast, absolute certainty is not a condition precedent of regulation; inconclusive, uncertain, and preliminary scientific conclusions can be the basis of regulatory protections, and the companies undertaking the risky endeavors bear the burden of showing that their activities are appropriately safe.

The Precautionary Principle is just that -- a principle, not a system of decisional criteria that rigidly apply the same way in all cases. Because it is associated with regulation putting the public above the private interests of corporate special interests, the Precautionary Principle has become the target of a vigorous and unrelenting campaign opposing it. Critics argue, among other things, that the Precautionary Principle must be rejected because it is not ultimately dispositive of policy questions (even though many of those same critics argue that cost-benefit analysis deserves a primary role in regulatory policy, despite its lack of neutrality, on the ground that it is not meant to be ultimately dispositive but, instead, merely a *guide* to sound decisions).

Attacks on the Precautionary Principle are part of a larger campaign against regulation in the public interest, funded by corporate special interests which believe themselves to be under attack by the public's demand for protections. This larger campaign includes the use and abuse of scientific uncertainty and promotion of cost-benefit analysis as a government-wide implementation of the reactive approach.

The Precautionary Principle is often unfairly characterized as demanding an absolute ban on all emerging technologies, even though there are many precautionary approaches that can apply in any given policy setting, including the cases of nanotechnology and GM crops. For example, it is conceivable that a precautionary approach to biopharming would stop short of an absolute ban by barring open-air field testing and requiring safeguards to prevent contamination of the food chain. Similarly, precautionary approaches to the environmental release of nanoparticles could respond with monitoring requirements and treatment of nanoparticles as hazardous substances. (Stringent protective policies could even benefit the industry by stimulating innovation and developing green technologies that give the United States a competitive advantage once other countries follow the precautionary lead.)

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

In This Issue

A Test of the Integrity of Moderate Republicans

The upcoming vote in the House over "mandatory spending" cuts is being hailed as one of the most important votes this year -- as it rightly should be. The vote will indicate as much about the direction our country is headed as it will about Congress' spending priorities. And the outcome is likely to be shaped by the courage and integrity of moderate Republicans.

Conservatives see the House vote as an opportunity to blaze forward on the path to "starving the beast" -- dramatically downsizing the federal government. Progressives and some moderates see it, instead, as an opportunity to reject a radical agenda and begin to realign national policy with the values of the American people.

Until recently, with the Bush administration commanding high public approval, conservatives quietly complained as Congress accelerated spending for defense, homeland security, and new entitlements. Behind closed doors, however, they grew bitter that deep cuts to domestic spending had not been accomplished, despite Republican control of both chambers of Congress and the White House. At the same time, conservatives pursued reckless tax cuts, largely benefiting corporate elites and wealthy individuals. Their "have your cake and eat it too" policies have exacerbated a ballooning deficit and, along with major issues related to health care and pensions that loom unresolved, created an unsustainable long-term structural problem in the federal budget.

Now, with Bush's popularity tanking and the House leadership in disarray, conservatives have stood up and taken the gloves off. Shortly after Hurricane Katrina, the House Republican Study Committee, a group of roughly 100 Republican conservatives, launched "Operation Offset" -- a potpourri of proposals to de-fund the federal government by slashing budgets or completely removing programs, including such mainstays as subsidized student loans, NASA, Medicare, and food stamps. The far-right group claimed that any spending on Gulf Coast reconstruction needed to be offset with cuts in spending elsewhere.

This conservative assault came at a time when many believed Congress, faced with glaring domestic need, would suspend yet another set of new tax cuts, particularly those to the wealthy, in order to retain revenues and pay for Gulf Coast reconstruction. With President Clinton, in recent speeches and

interviews, making a strong case for the difference between good deficits (created by investments in the infrastructure and people affecting by natural disasters) and bad deficits, (created by unlimited tax giveaways to corporations and the rich), the moderate Republicans who hold real sway in Congress appear poised to assert themselves.

These moderates certainly have public support. Various polls have repeatedly shown that the public believes hurricane recovery costs should be paid for by rolling back tax cuts for the wealthy. In one poll by Greenberg Quinlan Rosner Research for the Democracy Corps, 75 percent of respondents wanted planned tax cuts for those earning over $200,000 per year to be cancelled. The American people are clearly expressing their recognition of the need for more government now, not less.

It's not just polls where this message comes through loud and clear. In Colorado last week, the "starve the beast" coalition was soundly defeated by an alliance forged between a Republican governor and a Democratic House speaker. Fifty-three percent of Colorado voters supported Referendum C and agreed to give up $3.7 billion in automatic tax refunds over the next five years in order to ease strict limits on state spending on education, health care, and transportation.

The voters in Colorado implicitly acknowledged the importance of government services and the need for an adequate revenue base to support these services. This notion of shared sacrifice, a long-standing American value, has been all but absent from this Congress and the current administration. This absence is particularly glaring when you consider that households earning more than $1 million are expected to receive $103,000 in tax break windfalls this year, according to from the Tax Policy Center. Even more startling, starting Jan. 1, these millionaires will get an additional $20,000 with two more tax breaks kicking in that benefit only the top 4 percent of wage-earners. Incredibly, on top of all that, the House and Senate are now debating an additional $70 billion tax cut that primarily benefits the wealthy, leaving many to wonder how Congress and the president can be so woefully out of touch with the will of the American people.

Last Thursday, the day before Veterans Day, moderates in the House and Senate stepped up and exercised the power newly at their command. In the House, the vote on harsh spending cuts collapsed as the Republican leadership could not rally enough votes to pass the bill. This spending bill was one of two under the reconciliation process, making $35 billion in mandatory spending cuts (such as Medicaid), while the other cuts $70 billion in taxes. Despite its design as a deficit reduction tool, this reconciliation package actually *increases* deficits by at least $35 billion.

It was thought that, in light of Hurricane Katrina, Congress might choose to suspend these reconciliation bills. When Majority Leader Tom DeLay (R-TX) was indicted and forced to give up his leadership post, however, the conservative Republican Study Committee (RSC) saw an opportunity and leaped.

Instead of canceling reconciliation, RSC members decided to up the ante, calling for a 58 percent increase in spending cuts. At first it appeared that their plan was to enact spending cuts across the board, including for defense and homeland security. But quickly the conservative agenda shifted: the cuts would target programs serving low- and moderate-income families, with about one-third of the spending cuts coming from poverty programs. (See Service Cuts for the Poor to Finance Tax Cuts for the Rich for a description of the bill.) The moderates expressed concern over these cuts along with riders attached to the bill, including authorization of drilling in the Arctic National Wildlife Refuge (ANWR) - and their lack of support threatened the bill.

These conflicting pressures began to squeeze the options available to the House leadership team, and the action last week revealed the ugly inner workings of a Congress trying to ram through radically misguided and unpopular policies. The Republican leadership was willing to give up ANWR drilling to get the moderates votes, but conservatives threatened to vote against a bill without ANWR drilling. Then the Republican leadership agreed -- with a wink and a nod to conservatives -- that ANWR drilling would be removed for now, but reinserted later in conference. But the moderates continued to withhold their support for the bill because of the cuts to Medicaid, student loans, food stamps, and other low-income supports. With members anxious to return home for Veterans Day, the Republican leadership gave up and withdrew the bill, promising to take it up this week. It is scheduled to be voted on again this Thursday.

In the Senate, a similar principled stand by a moderate Republican derailed efforts to pass more tax cuts for the wealthy. Sen. Olympia Snowe (R-ME) said no to extending the tax cuts on capital gains and stock dividends at a time when the Congress is also enacting spending cuts affecting poor Americans. Senate Finance Committee Chair Charles Grassley (R-IA), moved to accommodate her concerns in order to get enough votes to get the tax cut bill out of committee, but the other Republicans reportedly went "ballistic" over dropping capital gains and dividends cuts from the package of tax cuts, especially since tax breaks on investments are the mainstay of the Bush tax cuts. With no possibility of getting enough votes to get the tax cut bill out of committee, Grassley postponed the committee markup. While Grassley could try to employ a similar wink and nod maneuver with conservatives on the Finance Committee to win passage and bring the bill to the Senate floor only to attempt to reinsert the capital gains and dividend cuts, other moderate Republicans such as Sens. George Voinovich (OH) and Lincoln Chafee (RI) have concerns similar to Snowe.

While success if not assured, these issues are not dead yet in either the House nor the Senate. Fierce negotiations are underway and enormous pressure is being applied to the moderates to cave. According to columnist Robert Novak, conservatives are "outraged" by the "coddling" of the moderates. "[W]istful Republicans [are] longing for the strong arm of suspended majority leader Tom DeLay." Conservatives have already made implicit threats of holding a vote for new House leadership in January or supporting more conservative Republicans against these moderates in the 2006 elections if spending reductions are not enacted this year.

With conservative Republicans increasingly advancing policy options outside the mainstream, moderate Republicans are left with the task of controlling the direction of future policy. It is clear that some combination of tax and spending cuts will continue to be pushed this year. The hope among those observing from the middle is that the moderates will stick with common sense and the will of the public and reject the radical minority's push to institute an ideological agenda of shrinking government.

Whatever the outcome, the House vote is sure to be just the tip of the iceberg. Calls for controlling spending will increasingly be heard emerging from Congress and the White House. The rhetoric will convey an out-of-control spending machine, but the evidence shows that domestic discretionary spending has steadily dropped as a percentage of the economy over the past 30 years and will decline precipitously in the next five.

By framing the issue as a spending problem, both Republicans and Democrats fail to address the real issue: the need for an adequate revenue base to meet the spending needs of the country. Supposedly "rational" members of Congress may claim we have a spending problem but disagree over where spending cuts should be made. While this may be an important theoretical debate, it is the wrong debate for the current times. Truly rational members of Congress should instead concern themselves with raising the resources that are clearly needed now.

It is clear that moderate Republicans in the House now have the power to make an important statement about our immediate needs and the proper priorities of the country by defeating the budget reconciliation bill this week. It remains to be seen if they will have the integrity or the courage to stand up to their far-right colleagues.

Senate Finance Committee Struggles with Tax Cuts, Addresses Charitable Giving

After postponing the markup three times and significantly modifying the contents of the bill, the Senate Finance Committee finally approved its version of the tax cut reconciliation bill this evening 14-6. The committee was originally scheduled to markup the bill last Thursday morning, but ran into opposition from Sen. Olympia Snowe (R-ME) to provisions to extend cuts to capital gains and dividend taxes, the heart of the Bush tax cut plan. As recently as this morning, Chairman Charles Grassley (R-IA) was unable to compile a package that would win the support of all Republicans on the committee but eventually convinced conservatives on the panel that removing the tax cuts for wealthy Americans would not put the issue to rest.

During the markup last Thursday morning, Grassley attempted to salvage his proposed tax reconciliation bill by removing provisions to extend the capital gains and dividend cuts to appease Snowe. Winning her support was essential to moving the bill out of committee, as the Democrats were prepared to vote against the package. With Snowe on their side, the vote would be even, resulting in the bill not being reported out. But removing those cuts caused a sharp backlash from the other conservative Republicans on the committee, particularly Sens. Trent Lott (R-MS) and Jon Kyl (R-AZ). The committee recessed to a members-only meeting in an attempt to find a compromise acceptable to all of the panel's Republican members.

Grassley and others were unable to find an acceptable compromise on Thursday, despite an hour and a half of discussion, and postponed the markup until Tuesday morning. After meeting with Majority Leader and committee member Bill Frist (R-TN) to find a compromise proposal, Grassley released a revised bill that removed the capital gains and dividend cuts completely, made numerous smaller modifications to the bill, and added a number of charitable giving incentives favored by committee member Sen. Rick Santorum (R-PA). The standstill in the markup was finally ended when Grassley convinced conservative Republicans on the Finance Committee, particularly Sens. Mike Crapo (R-ID), Kyl and Lott that removing the capital gains and dividend tax cuts from the bill to ensure its passage out of committee would not doom the prospects of including those very same cuts in the final version of the bill. In fact, it seems almost assured that those cuts will return, since they are already in the House version, and many Senate conservatives demanding they be included.

The opposition of committee Democrats and Snowe to the capital gains and dividend tax cuts is certainly understandable. First, the cuts do not even expire for another two full year at the end of 2008. Second, at a time when Congress is attempting to cut programs supporting low-income Americans, Snowe and others felt passing large and unnecessary tax giveaways to the super-rich to be questionable at best. The capital gains and dividend tax cuts would cost $12 billion to extend for

one year, 80 percent of which would go to Americans with annual incomes over $200,000.

In addition to tax cuts and extension of certain expiring credits, the approved bill includes both charitable incentives and reforms. The incentives include five provisions previously included in S. 1780, the Charity Aid, Recovery and Empowerment Act (CARE), sponsored by Sen. Rick Santorum (R-PA). Santorum's negotiations with Grassley largely determined the CARE charitable incentives ultimately included in the bill:

- A deduction for a portion of charitable contributions made by individuals who do not itemize their tax returns, with a floor of $250 ($500 for joint filers) and no cap.
- Tax-free distributions from individual retirement arrangements (IRAs) for charitable contributions. This would allow individuals to exclude from their gross income other taxable IRA distributions for traditional or Roth IRA distributions made to a charity during the period between December 2005 and December 2007.
- Modification of charitable deduction for food inventories from the present law that enhanced deduction for eligible contributions of food inventory. (Congress has already addressed the size of deductions individuals can take on donated cars, which took effect this year.)
- Modifications to encourage contributions of capital gains real property made for conservation purposes.
- Increased incentive for S corporations to make charitable contributions.

The above incentives expire on Jan. 1, 2008.

Coupled with the expansion of charitable incentives are reforms to offset the costs. The reforms are for record keeping and substantiation of charitable donations for cash and non-cash items. Reforms include:

- Donor advised funds: imposing a 5 percent payout requirement, establishing requirements for payouts every three years and disallowing distributions to donors and advisors.
- Supporting organizations: imposing a payout of the greater of 85 percent of its income from the prior taxable year or 5 percent of the aggregate fair market value of all the assets of the organizations other than assets directly used for program support.
- Donative value of clothing and household items: imposes the creation of a standard for estimating the donative worth of clothing and household goods through a guide written and published by the Internal Revenue Service (in consultation with donee organizations).

There are a number of other anti-abuse provisions, including a provision that modifies the deduction for faÃ§ade easements. The Joint Committee on Taxation has published a more detailed description of the charitable reforms and incentives.

The narrative of the back-room dealings and private meetings of the Senate Finance committee markup is eerily similar to the actions undertaken by the House of Representatives last week as GOP leaders tried to pass an unpopular spending cut bill. Grassley was in a similar predicament to that of
In Shocking Development, Congress Contemplates Tax Increase

In other tax news, Congress has been wrestling over the past few weeks with a difficult reality. Due to the rise in oil and gas prices, oil companies are making record-breaking profits. For the last quarter, ExxonMobil, the world's largest oil company, reported soaring profits of almost $10 billion. At the same time, large expected increases in the cost of home heating this winter are threatening to harm millions of low-income Americans in the Northeast and Midwest who depend on already cash-strapped government programs to help pay heating bills. Many industry analysts are projecting a 30 to 50 percent increase over last year in home heating costs across the nation.

This stark dichotomy has led many in Congress, Democrats and even some Republicans, to break an unspoken taboo and call for an actual tax increase -- an excess oil profit tax -- the revenues of which could be dedicated to the Low-Income Home Energy Assistance Program (LIHEAP). The LIHEAP program, which currently provides assistance to 4.6 million low-income families around the country, serves less than one-in-five eligible households.

One of the strongest supporters of this proposal and certainly the most surprising has been Sen. Judd Gregg (R-NH). Gregg, the very conservative and business-friendly chairman of the Budget Committee, believes something must be done to reign in the "irresponsibility of Big Oil" and has recently commented that the actions of the major oil companies "infuriate" him. He was the first Republican committee chairman to go on record supporting the reinstatement of a windfall profit tax.

Other proposals have recently been introduced focusing on the extensive profits of oil companies. In addition to Gregg, Sen. John McCain (R-AZ) has proposed that 1 percent of all oil profits be dedicated to hurricane relief. Sen. Gordon Smith (R-OR) and Sen. Maria Cantwell (D-WA) have each introduced bills to combat gasoline price gouging during fuel supply emergencies. Even Sen. Charles Grassley (R-

IA), chairman of the Finance Committee has gone on record stating that "[oil companies] and Congress have a responsibility to help less fortunate Americans cope with the high costs of heating fuels."

In order to further explore the question, the Senate Commerce, Science, and Transportation Committee held a hearing last week, during which the heads of the five largest oil companies testified about record prices for oil, gasoline and natural gas, and the factors contributing those price increases, along with third-quarter 2005 corporate profits, global demand, resource development strategies, and windfall profits taxes. Not surprisingly, all five industry leaders opposed any increase in taxes on their corporate profits. Despite this, Committee Chairman Ted Stevens (R-AK) said afterwards he would craft a bill to give the federal government authority to combat gasoline price gouging, but that such legislation would not be considered until sometime next year.

Many Democrats have already introduced legislation to enact a windfall profit tax on American oil companies, including Senate Commerce Committee member Byron Dorgan (D-ND) and Sen. Hillary Clinton (D-NY). But the prospects for the tax being enacted anytime soon are slim. With most Republicans in Congress against the idea, citing a similar tax instituted during the oil crises in the late 1970s that had mixed results (a CRS report found domestic oil production dropped as much as 6 percent), and with the White House also opposed to the idea, its enactment still faces a long, uphill battle.

Tax Panel Offers "Tough Love" Tax Reform Recommendations

On November 1, the President's Advisory Panel on Tax Reform submitted its report to Treasury Secretary John Snow recommending ways to make the tax code simpler, fairer, and more pro-growth. The panel has been working on these recommendations since January, when President Bush issued an executive order establishing it. Its long-awaited recommendations turned out not to be the rubber stamp for conservative regressive tax policies many observers expected, but instead represent a mix of ideas that confront the difficulty of enacting tax reform, not only in a harshly divided political environment, but also with a deeply unhealthy federal budget.

Despite recommendations avoiding blatantly regressive proposals, such as those advocated by many anti-tax groups, the panel's work should not be blindly accepted. The proposals, overall, continue the trend toward lower revenues and instituting massive structural deficits, while maintaining a steady, albeit slight shift in the tax burden away from the wealthy and toward working families. Perhaps most importantly, because the proposal are only the initial recommendations for Secretary Snow and not the final package, it is highly likely many of the recommendations will be cherry-picked, modified, or outright rejected by an administration which has not demonstrated a previous commitment to pursuing a tax code that is either fair or progressive.

After holding 12 public meetings over a span of nine months, the panel outlined a number of themes reoccurred within public comments and testimony. From these themes, the panel developed two separate proposals, the Simplified Income Tax Plan (SITP), which according to panel members "dramatically simplifies our tax code," and the Growth and Investment Tax Plan (GITP), which moves "the tax code closer to a system that would not tax families or businesses on their savings or investments." Despite the panel's claims, both plans would vastly favor savings and investment, thereby giving preference to high-income, wealthy Americans over those with less disposable income to invest in the stock market or retirement, health care, or education savings plans.

The two plans have many common features:

- Simplify the tax system and streamline tax filing for families and businesses;
- Lower tax rates on families and businesses;
- Extend tax benefits for home ownership and charitable giving to all taxpayers, not just the 35 percent who itemize;
- Extend tax-free health insurance to all taxpayers, not just those who receive insurance from employers;
- Remove impediments to saving and investing; and
- Eliminate the Alternative Minimum Tax (AMT), of which full repeal is estimated to cost a staggering $1.3 trillion over a 10-year period.

Two Plans Handle Exemptions, Credits, and Deductions in Similar Ways

Under both of these plans, the personal exemption, standard deduction, child tax credit, and Additional Child Credit would be consolidated into a "family credit" that would increase with the number dependents claimed. The earned income tax credit (EITC) would be transformed into a "work credit" with a maximum of $5,800 for families with more than one child. Besides simplifying taxes for working Americans, this consolidation would eliminate marriage penalties since the credits could be claimed regardless of the taxpayer's marital status.

In addition to these consolidations, the panel proposed to cap or end a number of popular deductions in order to pay for the repeal of the Alternative Minimum Tax. The first and most controversial recommendation involves capping the home mortgage interest deduction at 15 percent of mortgage interest paid. While this deduction would be available to all taxpayers, it would be limited to an amount based on the average regional price of housing, currently between $227,000 and $412,000. Housing developers and realtor associations have been at the forefront of opposition to the proposed cap.

Also of note is the panel's recommendation to replace the tax-free status currently enjoyed by the self-employed and employers who pay health insurance premiums with a system that allows all taxpayers to use pre-tax dollars to purchase health insurance up to the amount of the average premium. The average premiums are currently estimated at $5,000 for individuals and $11,500 for families.

Finally, the panel would end the deductibility of state and local taxes, a provision opposed by many from states with high state and/or local income and sales taxes.

Differences Between Plans

While the two plans largely treat reform of personal income tax similarly, they differ substantially in their taxation of business and capital income. Under the GITP, companies would be allowed to immediately write off the cost of all capital investment, but they would lose the ability to deduct interest costs on the money they borrow. Under the SITP, companies could keep their valuable interest deduction, but would have to write off the costs of facilities and equipment over time, as is currently the case. Additionally, the SITP would:

- Establish four income tax brackets at 15, 25, 30 and 33 percent;
- Exclude 100 percent of dividends and 75 percent of capital gains from any tax, and tax long-term capital gains at rates ranging from 3.75 percent to 8.25 percent;
- Tax small business income at rates equal to individual income tax rates, and large business income at a 31.5 percent rate.

The GITP would:

- Establish three income tax brackets at 15, 25, and 35 percent;
- Tax all dividends, capital gains and interest at a 15 percent rate;
- Tax sole proprietor businesses at individual rates, and tax other types of small businesses at 30 percent. Large businesses would be taxed at 30 percent, although all new investment would be expensed, and -- except for financial institutions -- interest paid would not be deductible and interest received would not be taxable.

Reactions Mixed, Urge Cautious Approach

Reaction to the panel's recommendations has been mixed so far. Many analysts, experts, and observers have praised certain aspects of the proposals and commended the panel for developing reform plans that are realistic in light of the currently unfriendly political and fiscal environments. Overall, however, reactions have urged caution in evaluating the panel's recommendations until after Snow develops his own proposal to give to the president, with many speculating that Snow's proposals will be drastically different than those of the panel.

White House Press Secretary Scott McClellan commended the tax reform panel for completing its work. He did not, however, offer a specific timetable for the unveiling of the president's tax proposals, saying President Bush would "make decisions in due course." Snow, for his part, told reporters that the tax panel's report would serve as a "starting place" for his own recommendations. He is expect by the end of the year to offer recommendations to the president, which Bush then may use in his January 2006 State of the Union Address.

Yet, as was the case with reactions from many analysts and insiders, who separated the proposals into sections, showering praise on some while criticized others, Secretary Snow may pick and choose only those recommendations of the panel that he finds suitable as he develop his own recommendations for President Bush. Unfortunately, for both proponents of the panel's recommendations and those favoring a broad approach to tax reform, what comes out of Treasury will likely be markedly different than the panel's recommendations.

Instead, the administration is expected to keep the recommendations it wants to pursue and leave out those recommendations that do not fit its economic agenda. In particular, the White House plan will likely include the more popular tax breaks and leave out the tax hikes that are necessary to pay for them. As the Center for American Progress states, "It is likely that the final report and the panel's recommendations will be cherry-picked by the Bush administration to fit its prior ideological agenda."

The prospect of administration cherry-picking, however, is hardly a surprise. Senate Finance Committee Chairman Charles Grassley (R-IA) noted that the proposals, while potentially serving as a

good starting point are "bound to be politically unpopular." He pointed in particular to the reduction in the home mortgage interest deduction, which he believes the White House will not support. On the other side of the aisle, Senate Finance Committee member John Kerry (D-MA) labeled the advisory panel "doomed" from the start thanks to Bush's insistence on making permanent $1.3 trillion in tax cuts "skewed to the wealthiest Americans."

Democratic counsel for the House Ways and Means Committee, John Buckley, predicted that the panel's recommendations have little chance of being enacted as a whole but said the process is far from over. While neither plan is likely to pass in its current form, Buckley believes the package under construction at the Treasury Department will be taken seriously by Congress.

Rep. Charles Rangel (D-NY), ranking member on the Ways and Means Committee, issued a statement on the recommendations criticizing them as "unfair and unwise." He also discussed the elimination of deductions important to the middle class, but pointed out that tax cuts for the very rich are not only being preserved, but increased. House Minority Whip Steny Hoyer (D-MD) also criticized the panel's recommendations for increasing the burden on the middle class while doing nothing to address the structural federal budget deficit.

The tax panel likely avoided the messy business of structural deficits, because addressing them would mean rolling back some of the president's first-term tax cuts. Even though the president instructed the panel to make "revenue-neutral" recommendations, the panel was supposed to assume the Bush tax changes would be extended beyond their current expiration dates, thus locking in inadequately low revenue levels and continuing structural deficits. The panel's attempt at "revenue neutrality" is thus misleading, as it started from a point of drastically insufficient federal revenues.

Given the current federal budget morass, it would seem that responsible tax reform would comprehensively address the nation's current deficit, not simply achieving a phony revenue neutrality, but actually increasing revenue levels while maintaining a progressive structure. Such reform could realistically close the deficit in an equitable way, and the creation of such policies is certainly possible. The recommendation of the tax panel, however, do not come close to addressing broader budget concerns in any meaningful way.

Unfortunately, even if the panel had addressed those concerns, its recommendations would be certain to encounter widespread opposition from the Bush administration and Congressional leadership, both of which have vowed not to raise taxes regardless of the consequences. As we have seen this year, those consequences include spending cuts for services on which millions of Americans depend.

PAY-GO Narrowly Defeated in Senate Reconciliation Bill

While the House spent last week fighting to a draw over its spending reconciliation bill, the Senate passed its version the evening of Nov. 3, including a provision that would allow drilling in Alaska's Arctic National Wildlife Refuge. The Senate reconciliation bill cuts $39.1 billion from entitlement programs over a five-year period. While these cuts are not nearly as contentious or damaging to low-income beneficiaries as those being considered on the other side of Capitol Hill, the bill could drastically change during a conference with the House.

The bill passed 52 - 47, after members considered 20 amendments. Two Democrats, Sens. Ben Nelson (NE) and Mary Landrieu (LA), voted for the final bill while five Republicans--Sens. Lincoln Chafee (RI), Susan Collins (ME), Norman Coleman (MN), Mike DeWine (OH), and Olympia Snowe (ME)--voted against it. Out of the 20 amendments offered, just three were adopted.

Perhaps most noteworthy, however, was a vote on an amendment that was not adopted to the bill--a pay-as-you-go (PAY-GO) amendment offered by Sen. Kent Conrad (D-ND), and cosponsored by Sens. Russ Feingold (D-WI) and Bill Nelson (D-FL). The PAY-GO amendment, a necessary step towards legislative fiscal responsibility, failed to pass by only one vote, with Senator Jon Corzine (D-NJ), a supporter of PAY-GO, absent from voting.

The PAY-GO vote is significant because Republican Tom Coburn (OK) voted in favor of the amendment, shifting positions from his previous vote on this issue. If Coburn continues to vote with the handful of other fiscally responsible Republicans in the Senate, a PAY-GO amendment stands a strong chance of passing as part of next year's budget resolution. Such an amendment would require both new entitlement spending and any additional tax cuts to be fully offset in the budget. The inclusion of a true PAY-GO rule was instrumental in the success of the deficit reduction plan enacted in 1997 and will be crucial in forcing Congress to enact fiscally responsible budgets in the future as well.

Open Government at Stake in Patriot Act Negotiations

Lawmakers in the House and Senate began negotiations last week on renewing 16 provisions of the USA PATRIOT Act, set to expire this year. Several important differences exist between the House and Senate bills that affect the government's transparency in its exercise of powers to clandestinely search, seize, and collect information. How these differences are resolved with have broad implications for civil liberties and government surveillance powers.

A recent *Washington Post* story reported that the Justice Department used a USA PATRIOT Act power to secretly issue 30,000 mandatory requests for information during the last year alone. The report has raised calls for the need to revise this USA PATRIOT Act power, an issue not previously a part of the Congressional agenda. This is just one of several information access and open government issues at stake in the committee negotiations.

Access to Business Records - Section 215

A controversial provision of the USA PATRIOT Act, Section 215, allows the government to access library records and other business records with little or no oversight. The section allows the FBI to order the disclosure of business records that are certified to be "for an authorized investigation . . . to protect against international terrorism or clandestine intelligence activities." The FBI merely has to make this claim before the Foreign Intelligence Surveillance Act (FISA) Court, which meets in secret and whose opinions are not publicly disclosed, and the FISA Court must grant the order. The USA PATRIOT Act leaves the FISA Court with no discretion to reject the order. The order is automatically accompanied with a gag provision that prohibits the recipient from disclosing to any third parties that the order was received.

One of the most significant differences between the bills passed by the House and Senate on the USA PATRIOT Act powers concerns Section 215. The Senate bill would require the government to link the requested records to a suspected terrorist subject, whereas the House bill merely requires the FBI to demonstrate that the records are "relevant" to a terrorist investigation. By requiring the connection to a suspected terrorist, the Senate revision would prevent the FBI from engaging in "fishing expeditions," capricious exercises of the power. Moreover, the Senate bill schedules the provision to sunset, or expire, in four years, while the House bill establishes a 10-year sunset.

Sneak and Peek - Section 213

Section 213 of the USA PATRIOT Act gives the government the power to conduct searches and seizures without notifying the target. The section allows law enforcement agencies to delay notifying the subject of such a "sneak and peek" search for a "reasonable period" if the agency believes that such notification will have "an adverse effect." While such searches are not new, the lack of a definition for "reasonable period" in Section 213 creates a troubling loophole for government disclosure. Moreover, under this provision, the government can seize, as well as search, property without giving notice.

The Senate bill would modify this section to require the government to give notification within seven days, with the ability to receive extensions. The House bill would allow the government to wait up to 6 months before giving notification.

Reporting Requirements

The requirement to report on the use of USA PATRIOT Act powers promotes the openness and transparency of government necessary to ensure that the Justice Department, as well as other departments and agencies, does not abuse these powers. Currently the USA PATRIOT Act contains few such reporting requirements for any law enforcement agencies.

The Senate bill includes important reporting requirements relating to the use of, among other things, "sneak and peek" searches and Section 215 business records orders. The House bill contains a provision requiring the Attorney General to issue a report on the use of data mining technology by each federal agency and department. Data mining is increasingly utilized in anti-terrorism efforts. Such reporting requirements could help curtail another Total Information Awareness program that would collect the personal information (e.g., buying habits, medical records, traveling habits) of innocent Americans. The House bill would also require reporting on the use of National Security Letters (NSL), which could in and of itself reduce the Justice Department's reliance on this secret tool.

National Security Letters - Section 505

One section of the USA PATRIOT Act that has recently raised controversy but that is not subject to a sunset is the NSL power of Section 505. Thanks to a recent Washington Post article, this provision has become a focus of attention among members of the House and Senate and could potentially be revised in committee.

Without court approval, the FBI can issue an NSL that requires an Internet Service Provider (ISP) or telephone company to disclose all information (e.g., web history, email addresses, telephone use) relating to a person. Similar to Section 215, the NSL is issued with a gag order that prohibits the recipient from discussing it with a third party. Previously restricted to suspected terrorists or spies, the USA PATRIOT Act revised the standard to cover any information that is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." In other words, NSLs can be used to collect information about almost anyone.

The Washington Post story found that in the last year alone the government has issued 30,000 NSLs. The government stores the collected information in databases that are shared across government agencies. Additionally, President Bush's Executive Order 13388, expanded access to these records to state and local governments and "appropriate private sector entities."

The NSL provision has been declared unconstitutional in two cases. The U.S. District Court in Manhattan ruled in *John Doe v. Ashcroft* that an NSL to an ISP was unconstitutional, because it violated the right to free speech and the protection against unreasonable searches and seizures. More recently, the U.S. District Court in Bridgeport, CT ruled in *John Doe v. Gonzales* that an NSL to a library consortium violated the right to free speech. Both decisions were stayed pending a Nov. 2 appeal before the U.S. Court of Appeals for the Second Circuit.

Currently, the language of the USA PATRIOT Act does not specify that the recipients can challenge NSLs in a court of law, and the sweeping language of the gag provision prohibits recipients from discussing NSLs with a lawyer. Both the House and Senate bills would clarify that the NSL recipients have the right to challenge such orders in court and to consult with an attorney.

Last week, Sen. Pat Roberts (R-KS), chairman of the Senate Intelligence Committee, expressed his hopes that the subpoena powers of the FBI would be strengthened, giving the government even more powers than the NSL provision currently allows. Having failed to get this provision included in the House or Senate bills, however, Roberts is now trying to influence the committee. But many legislators seem hesitant to support the provision. A bi-partisan group of five senators -- Dick Durbin (D-IL), Russ Feingold (D-WI), Ken Salazar (D-CO), Larry Craig (R-ID), and John Sununu (R-NH) -- sent a letter to Attorney General Alberto Gonzalez and Inspector General Glenn A. Fine, requesting that the Justice Department disclose more information regarding the use of NSLs, and a host of senators recently spoke out against the powers currently granted to the FBI. To alleviate concerns relating to Section 505, some have suggested that a sunset be placed on the NSL provision and that NSLs be restricted to terrorist suspects (similar to the restriction the Senate bill places on Section 215).

Conclusion

The negotiations between the House and Senate on the bills could be completed as early as this week. The new powers given to the government in the USA PATRIOT Act could prove potent weapons in the war on terror; but if misused these powers pose a significant threat to open government and civil liberties. It is vitally important that the committee preserve the Senate bill, which establishes better safeguards against abuse and stronger mechanisms for accountability. Such safeguards ensure the USA PATRIOT Act will help protect against terrorist attacks, while also protecting the public against government abuses of power.

Infrastructure Protection Plan Fast-tracked Right Past the Public

The Department of Homeland Security (DHS) released a Nov. 2 draft of its National Infrastructure Protection Plan (NIPP) and only provided a two-week window for requesting a copy of the plan and a 30-day public comment period. According to its authors, the report offers a "comprehensive, integrated national plan for the protection of critical infrastructures and key resources." Yet, the time constraints on viewing and commenting on it do not allow for substantive public review or response. The NIPP Program Management Office rejected a request by OMB Watch to extend the comment period by 60 days with no explanation for its decision.

In a federal register notice, without an accompanying press release, DHS informed the public of the availability of the draft NIPP along with instructions for obtaining a copy for review. The agency announced in the notice that the draft plan would only be available to the public for 15 days by formal request and established a Dec. 5 deadline for public comment on the 175-page NIPP.

These tight timeframes severely limit the ability of groups and concerned citizens to access and provide input on the report. Given the extensive nature of the report, as well as the importance of the subject matter, it seems clear that additional time should be allotted to allow for greater public input.

President Bush commissioned the plan in December of 2003, and DHS has been sharply criticized for its delayed release. It would seem now that, in an effort to save time late in the process, DHS is sacrificing the comment period.

The plan proposes partnerships between private industry and government agencies and identifies 17 infrastructure sectors in need of protection. While the plan has already been criticized as overly vague, the department has announced it will offer a sector-specific set of plans 180 days after the approval of the national plan. "In order to adequately assess such criticisms and examine the intricacies involved in a broad plan to protect the critical infrastructure in the United States, DHS should have extended its shortened schedule for accepting public comments," Sean Moulton, senior policy analyst with OMB Watch explains. "An additional 30 to 60 days to improve the plan for secure some of our most troubling potential targets seems well worth the delay."

Groups Build Support for the Toxics Release Inventory

The many public interest groups that oppose EPA's recent proposals to gut the Toxics Release Inventory (TRI) are now working in concert to produce materials and resources that support the environmental right-to-know program. OMB Watch is hosting an Online Resource Center, developed with participating organizations to act as a clearinghouse for concerned groups and individuals to learn about the program and to take action to defend it.

The anti-right-to-know proposals have caused wide-spread concern among state officials, labor unions, firefighters, and members of Congress. Officially announced on Sept. 21, the proposals would allow polluting facilities to withhold critical details about their toxic emissions and, notably, releases of persistent bio-accumulative toxins (PBTs), like lead and mercury. A second proposal, which was announced as a rulemaking one year from now, would cut TRI reporting in half, requiring facilities to report every other year, instead of annually, as is currently the case. Critics of the proposals are creating the Resource Center to inform parents, teachers, community leaders and other concerned citizens that their right to know about pollution is in jeopardy if these proposals move forward.

The Resource Center is a repository for:

- Background materials and supporting data on the TRI from EPA and public interest groups;
- Full text of EPA's anti-right-to-know proposals;
- Numerous press stories and editorials critical of the proposals;
- Success stories of community groups, companies, enforcement officers, and others that have used the TRI to reduce pollution in their neighborhoods; and
- Action alerts that enable concerned citizens to call on EPA and Congress directly to preserve the public's right-to-know about toxic pollution.

In a related development, Sens. Jim Jeffords (I-VT), Barbara Boxer (D-CA), Ron Wyden (D-OR), Hillary Clinton (D-NY), Barack Obama (D-IL), and John McCain (R-AZ), recently sent a letter to EPA Administrator Stephen L. Johnson to express concern about EPA's proposal to weaken the TRI program.

Several groups also joined in a request that EPA extend the deadline for public comments on the proposed rulemaking by 60 days. The deadline is currently Dec. 5. These groups believe the extra time is necessary to allow groups to fully educate themselves on the EPA proposals and their impacts. Several environmental organizations have expressed the need for extra time to produce community-specific analysis that will reveal the amount of pollution information that will disappear at the community level were the proposals to be adopted. EPA has yet to respond to the request.

Individuals and groups are encouraged to visit the new Online Resource Center, learn more and take action to save this essential resource.

New CFC Rule Does Not Mandate List Checking or Compliance with Treasury Guidelines

On November 7, the Office of Personnel Management (OPM) withdrew a regulation that required all nonprofits participating in the Combined Federal Campaign (CFC), the federal government's workplace charitable giving program, to screen employees and donation recipients for possible terrorist ties. The new final rule, which applies to 2006 CFC applicants, requires participating charities instead to certify that they are in compliance with existing anti-terrorist financing laws. OPM's explanation of the new rule notes that "OPM does not mandate that applicants check the Specially Designated Nationals (SDN) list or the Terrorist Exclusion List (TEL)."

In 2004 the CFC added language to its funding agreement that participating organizations must certify that they do not "knowingly employ individuals or contribute funds to organizations" designated by the U.S. government to be involved in terrorist activities. Through the certification, CFC imposed an affirmative obligation on organizations to check the terrorist watch lists.

In Nov. 2004 OMB Watch, along with 12 other nonprofits, led by the American Civil Liberties Union,

filed suit against the OPM. The suit, filed in the federal district court for the District of Columbia, charged the policy violates the First Amendment rights of participating charities and was implemented without the required open rulemaking process.

In March OPM proposed a new regulation that shifted its position away from the list-checking requirement and toward certification of compliance with existing law. Groups filing public comments, including OMB Watch, generally supported the new approach but suggested clarifications and some revisions. OMB Watch's comments noted that the new approach recognizes the variety of ways different types of organizations can comply with anti-terrorist financing laws, citing 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.

The supplementary information in the final rule suggests following - but does not require compliance with -- the highly controversial Voluntary Best Practices for U.S. Based Charities, published by the U. S. Treasury Department in 2002. The Treasury Department has acknowledged that these guidelines - again, which are not requirements -- are seriously flawed, and Treasury officials are in the process of revising them.

The new certification states,

"I certify that the organization named in this application is in compliance with all statutes, Executive orders, and regulations restricting or prohibiting U.S. persons from engaging in transactions and dealings with countries, entities, or individuals subject to economic sanctions administered by the U. S. Department of the Treasury's Office of Foreign Assets Control. The organization named in this application is aware that a list of countries subject to such sanctions, a list of Specially Designated Nationals and Blocked Persons subject to such sanctions, and overviews and guidelines for each such sanctions program can be found at http://www.treas.gov/ofac. Should any change in circumstances pertaining to this certification occur at any tie, the organization will notify OPM's Office of CFC Operations immediately."

The new OPM rules are a substantial shift in policy and send a signal to the nonprofit community that list-checking is not synonymous with due diligence in addressing terrorism financing concerns. Prior to this rule, many workplace charitable giving programs and foundations embraced certifications and list-checking requirements modeled after CFC's 2004 effort. The current action by OPM should assuage these groups that list-checking should not be required.

While the OPM rules will likely have a significant impact, they remain troublingly ambiguous. OPM specifically indicates that list-checking is not required, yet the new rule does indicate that participants in the CFC should not engage in transactions and dealings with countries, entities, or individuals subject to economic sanctions. How a nonprofit organization is to know whether individuals or entities are subject to economic sanctions without list-checking is unclear.

Ultimately, foundations and nonprofits have called for, and continue to request, clarification on what actions they can take to protect them from investigation and seizure or freezing of assets. Such clarification will require changes in underlying laws or regulations to provide safeguards or safe harbors to protect nonprofits. It will also require due process procedures to protect their rights.

IRS Audits Church for Anti-War Sermon

The pastor of All Saints Episcopal Church in Pasadena, CA announced earlier this week that the Internal Revenue Service (IRS) is conducting a formal examination of the church's tax-exempt status, due to an anti-war, anti-poverty sermon delivered two days before the 2004 presidential election. Conservative and liberal religious organizations alike have criticized the IRS action, which they see as further evidence of an emerging trend -- beginning with last year's audit of the NAACP -- to treat criticism of incumbents on issues as partisan electoral activity.

On Oct. 31, 2004 Rev. George F. Regas delivered a guest sermon at All Saints, beginning with the disclaimer, "I don't intend to tell you how to vote" and noting that, "Good people of profound faith will be for both George Bush and John Kerry..." The sermon then went on to envision what Jesus would say to both candidates about the issues of peace, poverty and the impact of poverty on abortion choices. Regas closed his sermon by urging the congregants to "bring a sensitive conscience to the ballot box," and "vote your deepest values." The imagined statements of Jesus sharply criticized the war in Iraq, nuclear weapons and noted both candidates "failure and the failure of so many political leaders to help uplift those in poverty..."

The IRS initiated its audit as part of its 2004 Political Intervention Program (PIP), a process for reviewing referrals alleging illegal political campaign intervention by charities. The Treasury Inspector General for Tax Administration (TIGTA) issued an evaluation of the PIP program in February, after the IRS audit of the NAACP sparked charges of political motivation. TIGTA found no indications that the random sample of cases it reviewed was handled inappropriately. Of the 131 cases reviewed, 80 were found to warrant further investigation, 34 of which involved religious organizations.

On June 9 the IRS sent All Saints a letter notifying them that "a reasonable belief exists that you may not be tax-exempt as a church..." citing a Nov. 1 article in the *Los Angeles Times* that characterized the sermon as a "searing indictment of the Bush administration's policies in Iraq." The letter requested information about church operations and notified them of their right to discuss the case with the IRS before the examination began. All Saints hired as counsel the former director of the IRS Exempt Organizations Division, Marcus Owens of Caplan and Drysdale.

A Sept. 22 conference call was held to allow IRS representatives, church officials and their counsel to discuss the allegations. In a follow-up letter Owens wrote that the IRS action was unsupported by the facts and threatened the church's core values. Addressing the difference between issue advocacy and partisan electioneering, Owens wrote, "the church takes issue with your suggestion that the mere mention of candidates' names, coupled with statements regarding the speaker's personal values, is sufficient to constitute prohibited campaign intervention."

The letter held that the IRS told All Saints that the sermon may be an implicit intervention in the election, despite the fact that Regas explicitly said he was not telling people how to vote and that criticism was directed at both candidates.

Following the meeting the IRS offered a deal: if the church would admit wrongdoing and agree not to hold similar sermons in the future, the IRS would not pursue the case further. All Saints rejected the offer, with Rector J. Edwin Bacon explaining, "We have a responsibility to articulate our core values... The IRS is arguing implicit endorsement, and that's a slippery slope that could do away with the freedom of speech and freedom of religion."

Leaders in the faith community, from all points on the ideological spectrum, have spoken out against the IRS action. Ted Haggard, president of the conservative National Association of Evangelicals told the *Los Angeles Times* that his group will work with other church organizations "in doing whatever it takes to get the IRS to stop." Robert Edgar, general secretary of the National Council of Churches said the IRS action "appeared to be a political witch hunt on George Regas and progressive ideology. It's got to stop." A statement from Progressive Christians Uniting said the case "raises important questions about how much latitude IRS field offices have been given to initiate these cases based on murky criteria and no clear understanding of what does or does not constitute impermissible electioneering."

A statement by Americans United for Separation of Church and State questioned the impartiality of the IRS in its enforcement efforts. Executive Director Rev. Barry Lynn said that while he could understand why the IRS might question the All Saints sermon, he cannot understand "why the tax agency did not take the same view about an even more partisan sermon by a Baptist pastor in Arkansas who preached on the successes of George Bush." A report in the *Arkansas Democrat-Gazette* said the IRS had declined to pursue an investigation of that church, even though the sermon praised Bush and criticized Kerry.

The IRS currently lacks a clear set of rules defining prohibited intervention in elections, instead it considers each case individually based on the facts and circumstances. The IRS would not comment on the case because of privacy laws, but it has made public its intention to continue the PIP program in the 2006 election cycle.

"Nonprofits should insist," explained Kay Guinane, council for OMB Watch, "that the IRS make it clear that the right of charities and religious organizations to criticize elected officials is not suspended just because an election is taking place."

House Rejects Bi-Partisan Effort to Shield Internet from Campaign Finance Laws

In a surprising vote, the House rejected a bipartisan effort to shield online communications from the strictures of campaign finance reform laws.

H.R. 1606, the Online Freedom of Speech Act, sponsored by Rep. Jeb Hensarling (R-TX), would have codified the current Federal Election Commission (FEC) regulation that exempts the Internet from campaign finance regulations, including the soft money provisions of the Bi-Partisan Campaign Reform Act (BCRA). The current exemption was struck down by a federal court, and the FEC is now considering a new rule. On November 2, the bill failed (225-182) to get the 2/3 vote it needed to pass the House on the suspension calendar. (Under suspension rules, debate is limited to 40 minutes and no amendments are allowed. The process is generally used for non-controversial bills.)

Increased Regulation Coming if Congress Does Not Act

The Hensarling bill would have modified the definition of "public communications" in the Federal Election Campaign Act (FECA) to exempt communications over the Internet. BCRA amended FECA to prohibit political parties, federal candidate campaign committees, and other regulated political

committees from using soft money to finance "public communications." Instead, these communications must be paid for with funds raised under the restrictions of campaign finance rules, which prohibit corporate contributions and limit individual contributions.

"Public communications," under FECA, include those made via broadcast, cable, satellite, newspapers, mass mailings and phone banks. Groups other than parties or regulated political committees, such as corporations, nonprofits and unions, are also subject to the rule if their public communications "refer" to a federal candidate and are "coordinated" with parties or campaigns. Since the definition of coordination is broad, nonprofit Internet postings that link to candidate websites or forward material from campaigns are potentially subject to FEC rules.

However, the FEC exempted the Internet from BCRA regulation because it felt that the omission of the Internet from the legislative definition of "public communications" indicated Congress' intent not to subject the Internet to the same restrictions applied to other mass communications. However, a federal court, in a challenge by BCRA co-sponsors Reps. Marty Meehan (D-MA) and Chris Shays (R-CT), found the exemption was not adequately explained by the FEC and sent it back for further consideration. In April the FEC proposed a new, more restrictive rule. Many public comments supported a hands-off approach to the Internet. A final rule is not expected until February 2006.

The Supreme Court set high constitutional standards for Internet-based speech in its 1997 landmark decision *Reno v. ACLU*. Writing for the Court, Justice Stevens approved the lower court finding "that the Internet- as 'the most participatory form of mass speech yet developed' ...is entitled to the highest protection from government intrusion." The conclusion states, "The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."

Opponents of the Hensarling bill, led by Shays and Meehan, argued that the bill would open the floodgates to unlimited corporate and union money being spent on Internet activities, such as blogging or advertisements. According to Democracy 21, a campaign finance group, "The blanket Internet exemption...would wrongly allow federal candidates to coordinate...the unlimited amounts of soft money to purchase Internet banner and video ads supporting their federal campaigns or attacking their opponents."

Proponents of the Hensarling bill, however, held that this charge is unfounded. They argued that regulation of the Internet will have negative consequences for political speech and civic engagement. In addition, they pointed out that the general ban on corporate spending to influence federal elections would prohibit spending for advertising on the Internet.

About the Vote

The Rules Committee placed the bill on the calendar for floor consideration in the House at the suggestion of Rep. Zoe Lofgren (D-CA), who believed the bill, which had received considerable bi-partisan support, would be non-controversial.

Surprisingly, many members rushed to the floor to object to the bill, both on its merits and the process. Rep. Barney Frank (D-MA) opposed the suspension process for the bill, maintaining,"[W]e have people here defending vigorous open debate and free speech by invoking one of the most restrictive procedures of the House of Representatives." He later stated that he would not vote for the bill because it had been offered under suspension rules.

Hensarling argued that the federal government should encourage a medium that is bringing more Americans into the political process. "The newest battlefield in the fight to protect the First Amendment is the Internet," he said. "The Internet is the new town square, and campaign finance regulations are not appropriate there." He added, "I fear that bloggers one day could be fined for improperly linking to a campaign Web site, or merely forwarding a candidate's press release to an e-mail list."

Next Steps

If the FEC proceeds with new, more restrictive rules, it will establish grounds for continuing regulation of speech on the Internet. Hensarling has intimated that he will re-introduce the bill this session, which would allow for special review by the Rules Committee that could then consider it a "major bill" and create a rule which allows it to be placed on the House calendar.

A companion bill in the Senate, S. 678, was introduced by Sen. Harry Reid (D-NV) in March and has been sent to the Senate Committee on Rules and Administration, but the Senate has yet to take it up.

Oral Arguments Held in Case Challenging Advocacy Restrictions on Legal Services Programs

Litigation challenging the constitutionality of limitations on the advocacy rights of government-funded nonprofit legal services groups advanced recently with oral arguments before a federal appeals court.

On Nov. 2, the U.S. Court of Appeals for the Second Circuit heard oral argument in *Velazquez v. Legal Services Corporation* (LSC), a lawsuit brought on behalf of a coalition of lawyers, indigent clients and New York City officeholders, arguing the government has no business regulating the privately funded, constitutionally protected activities of legal service programs.

The current challenge, also known as the *Dobbins* case, addresses the constitutionality of two key provisions of LSC regulations: (1) the restrictions prohibiting LSC grantees from using their non-federal dollars for class action litigation, legislative advocacy and community education; and (2) the "program integrity regulation," which requires physical separation between LSC grant recipients and any organization that engages in these restricted activities. In Dec. 2004, a federal district judge ordered LSC to cease enforcing the separation rule in the case of the three programs in question because it "unduly burdened" their First Amendment rights.

At the oral argument the Brennan Center for Justice, represented by Burt Neuborne, argued for the legal services organizations. He urged the court to uphold the lower court ruling that found government-imposed restrictions on the ability of the organizations to use their own non-federal funds to be unconstitutional. Neuborne said the district court correctly applied an undue burden standard to the facts, and that this standard was established by the Supreme Court's decisions in several cases, including *Regan v. Taxation With Representation, FCC v. League of Women Voters,* and *United States v. American Library Association*. Applying these standards, according to Neuborne, leads to the conclusion that the government has no business regulating constitutionally protected activities by legal services programs.

Stephen Ascher, of Kronish, Lieb, Weiner and Hellman LLP, arguing for LSC, contended that the plaintiff's case was not yet ripe for judicial determination. Because federal courts only have constitutional authority to resolve actual disputes, legal actions cannot be brought before the challenged law or government action has produced a direct threat to the party suing, when the matter is said to be "ripe" for judicial resolution. He insisted that the plaintiffs should have either submitted a proposal to LSC or set up an affiliate and waited for LSC to conduct an audit, before pursuing the case.

Ascher also argued that the plaintiffs were calculating the costs of LSC's separation rule too strictly. He stated that the plaintiffs had wrongly assumed that LSC permits no sharing between LSC grantees and other non-LSC programs that engage in restricted activities. He stated that it would be constitutionally acceptable for LSC and non-LSC programs to share all employees, space and equipment - according to the level of separation required by LSC's rule. However, it is the extreme level of separation required that is at issue in the case.

Matthew Collette, arguing for the Department of Justice, focused on the proper test the court should use to determine whether the LSC's separation requirement violates the Constitution. He argued that the court should examine whether the requirement "effectively prohibits" the plaintiffs from using their private funds to engage in the activities. In response to Judge Richard Cardamone's questioning as to whether the LSC would inevitably lose under the "undue burden" test applied by the district court, Collette stated that the "district court had failed to acknowledge an important government interest underlying the separation requirement: **the interest in having legal services programs focus exclusively on the categories of case the government chooses to fund**."

Collette's statement cuts to the heart of why the outcome of this case is important to the nonprofit sector. If the federal court upholds the LSC restrictions on the use of the private funds of nonprofit legal services programs, the *Velazquez* case could open the door for an attempt by Congress to limit the use of the private funds of a wide variety of federal grantees, restricting whatever it deems threatening or out of line with its intentions.

The suit, far from being solely concerned with legal services or access to the courts, seeks to protect the broad array of public-private partnerships. Public-private partnerships work, at least in part, because of the many advantages of collaboration. The rule and the possibility that it will be upheld pose a significant threat to the viability of these partnerships in a wide variety of settings and across the full political spectrum. When government seeks to limit free expression under the very programs it deems beneficial to underserved communities and individuals -- whether it involves legal representation for the poor or civic engagement for affordable housing recipients -- government exerts a level of control antithetic to our democracy. Whether government can exert this questionable form of control by proxy in public-private partnerships is at the heart of what the case will decide.

Industry Costs Pitted Against Public Needs in Homeland Security Policy

How much is a human life worth when it comes to a terrorist attack? Should the public be involved in setting the nation's safety priorities? The Bush administration is offering surprising answers to these questions and more as it develops the general framework for homeland security policy.

The administration has aggressively used cost-benefit analysis, risk-based approaches, and market-style mechanisms to benefit corporate special interests by blocking effective regulation for public health, safety, and the environment. The rigid analytical tests that are the cornerstone of these approaches, however, are proving difficult to implement in the context of homeland security. According to BNA's *Daily Report for Executives*, John Graham, outgoing administrator of the White House's Office of Information and Regulatory Affairs, told a gathering of former OIRA administrators at the industry-funded, conservative think tank AEI-Brookings Joint Center for Regulatory Studies earlier this month that "a more practical and 'soft' test" than standard cost-benefit and risk assessment will apply to homeland security rules.

Even if the White House's stringently anti-regulatory analytical policies do not apply to homeland security rules, the Bush administration is nonetheless making sure that corporate special interests will receive special favors in the regulatory process:

- For example, the Department of Homeland Security's draft National Infrastructure Protection Plan (NIPP), which "outlines the core processes and mechanisms DHS and its security partners will use to implement key protection initiatives" (2), insists that a hallmark of protective policy must be "cost effectiveness," meaning that homeland security policies should not be rigorous across-the-board standards but, instead, should contain "market systems," offer industry the option "to select the measure best suited to the particular need," and "[r]ely on self-assessments, where appropriate" (38-39).

- Industry compliance costs are so important in the NIPP that they are repeatedly mentioned as equivalent to government expenditures. One telling line repeated several times in the NIPP was parroted recently by Brigham A. McCown, deputy administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA), who told a Dangerous Goods Advisory Council conference that PHMSA "strive[s] to regulate in a way that maximizes the return and minimizes costs to the economy and the industries we regulate." According to BNA's *Daily Report for Executives*, McCown added that PHMSA is exploring ways to weaken the USA PATRIOT Act's requirement that companies conduct background checks for truck drivers transporting hazardous materials.

- Costs apparently can trump public health when it comes to determining safe levels of exposure to radiation in the wake of a nuclear or radiological terrorist attack. According to the *New York Times*, a leaked copy of upcoming DHS guidance for state and local governments advises that they "should take into account the cost of abandoning or cleaning up contaminated areas when deciding how much exposure to radiation is acceptable." Nuclear Regulatory Commission member Edward McGaffigan, Jr., who participated in drafting the guidance, added that developing strict protective standards "only aids and abets Al Qaeda or any other terrorists."

- Who gets to participate in decisions this important? The draft NIPP emphasizes the close cooperation of government and the corporate special interests that own and operate critical infrastructure, but the NIPP makes no mention of the participation of the public, including those who live in the communities at risk of suffering the consequences from an attack.

These weaknesses in the Bush administration's basic approach to homeland security policy reflect the prevailing trends in the administration's approach to public protections. Years after 9/11, there are still many unmet needs for protection in such basic infrastructure sectors as the water supply, the food supply, and facility security -- safety gaps that match, with discomforting regularity, the special interests that donated to the Bush/Cheney campaign coffers. Even the White House's recent about-face on chemical security was qualified: the administration reversed position from its insistence on voluntary self-regulation by the chemical industry, but it nonetheless expressed support only for *risk-based* regulation and "flexible" approaches instead of across-the-board requirements.

By avoiding setting stringent safety requirements, the federal government is failing to create incentives for owners and operators of critical infrastructure to invest in research that could lead to innovative ways of doing business and achieving the requisite levels of safety. Contrary to the free-market fundamentalist arguments for market-style mechanisms in regulatory policy, the real driver of innovation in industry response is not market-style approaches but, instead, the stringency of the underlying standard. Moreover, calls for site-specific flexibility could mask efforts to set weak and unenforceable standards and could, by failing to create a level playing field through an even-handed, across-the-board standard, disadvantage firms that desire to achieve the highest level of safety possible.

Administration Ignores Scientific Evidence and Pushes Forward with Mountaintop Removal

A long-anticipated Environmental Impact Statement (EIS) on the mountaintop mining waste disposal process ignores scientific evidence in order to validate the waste disposal method preferred by industry and the administration.

Mountaintop mining uses explosives to expose coal seams for mining, resulting in waste dumped in nearby valleys, often burying streams and disrupting local ecosystems.

Federal Protections Undermined

The potential harm to waterways from mountaintop mining triggers the federal government's duties under environmental law. Under the Clean Water Act, the Army Corps of Engineers and EPA are required to prevent serious degradation of waterways. Under current regulation, the act is interpreted as keeping mine waste from being dumped within 100 feet of streams. The National Environmental Policy Act (NEPA) also requires agencies to assess the environmental impact of projects that may have significant environmental effects.

Despite these provisions, the Army Corps of Engineers has issued nationwide general permits for mountaintop waste disposal that do not require prior scrutiny of the environmental impact. Section 404 of the Clean Water Act allows the government to bypass the requirement of detailed, individualized permits for pollution discharges when the discharge in question is "dredged or fill material." In such cases the Clean Water Act permits agencies to issue general permits good on a state, regional, or even nationwide basis. "Fill material" generally refers to material deposited for a beneficial primary purpose, such as development or construction, but a 2002 rule change expanded the definition to include mine waste. In the wake of that rule change, federal agencies are now streamlining the permit process, thus paving the way for more mountaintop mining.

Citizens and environmental groups have been forced to take federal agencies to court in a series of cases aimed at requiring these agencies to comply with CWA and NEPA and protect streams from mountaintop waste. In July 2004, the courts handed environmental groups a victory by determining that 11 mining waste disposal permits required environmental impact statements. The case is currently under appeal, and a final decision could determine if the Army Corps of Engineers may use the streamlined permits for mountaintop mining waste disposal or if the corps must use individual permits that consider environmental impacts prior to mining.

Federal agencies have also failed to enforce the 100-foot buffer zone provision. And in another gift to the mining industry, a 2004 proposed rule would revise the mining standards to allow the Office of Surface Mining to waive the buffer zone requirement for streams as it sees fit. Companies could receive permits to conduct surface mining activities near streams provided that they, "to the extent possible," "prevent additional contributions of suspended solids," and "minimize disturbances and adverse impacts."

Agencies Ignore Their Own Findings

Released Oct. 29, the Environmental Impact Statement (EIS), which was required of the agencies in a settlement agreement with citizens groups, validates both the administration's approach of using the general permit as well as the relaxation of the buffer zone requirements, despite scientific evidence of irreversible damage to streams and the wildlife dependent on them.

The EIS includes more than 30 scientific and technological studies, many of which point to serious environmental harm if the current course is not reversed. One such study found that 2,200 square miles of land will be damaged by 2010 without stronger environmental controls. Rather than developing alternatives that would mitigate the impacts of mountaintop mining, the agencies instead claimed that while the studies used "were useful in identifying data gaps and needs for further study," they could not be used to determine "a bright-line threshold of minimal impacts." Further, the agencies deemed that conducting more studies would be too costly, effectively burying the chance for more stringent regulations under exhaustive analytical requirements.

Citizen action groups have met with limited success at the state level, but without an overarching federal policy, their efforts leave only patchworks of protection for mountains, valleys and streams in Ohio, West Virginia, Kentucky, Tennessee and Virginia.

Timeline

December 23, 1998: Settlement with West Virginia citizens group requires the federal government to halt the routine issuance of nationwide mining waste permits until Environmental Impact Statement (EIS) on the mountaintop mining process could be completed. Instead, the Army Corps of

Engineers would be required to issue a greater number of individual permits with greater scrutiny of the environmental impact. *Bragg v. Robertson* (S.D. W.Va.)

February 5, 1999: The Environmental Protection Agency, the U.S. Army Corps of Engineers, the Office of Surface Mining, and the Fish and Wildlife Service issue a notice of intent in the *Federal Register* to do an EIS. 64 Fed. Reg. 5,778

October 25, 1999: U.S. District Court for the Southern District of West Virginia rules that state and federal agencies overseeing mountaintop mining permits violated the Clean Water Act by failing to enforce a 100-foot buffer zone meant to keep mine waste from disturbing streams.

April 24, 2001: A three-judge panel of the U.S. Court of Appeals for the Fourth Circuit reverses the lower court's decision, claiming that the suit was barred under the sovereign immunity clause of the Eleventh Amendment. *Bragg v. Robertson*, 248 F.3d 275 (4th. Cir. 2001)

May 8, 2002: District Court rules that mining waste cannot be fill material and any rule issued that says otherwise is illegal. *Kentuckians for the Commonwealth v. Corps of Engineers*, 204 F.R.D. 301 (S. D. W. Va. 2002). See Court Rejects Move to Dump from Mountaintop Mining (5/13/2002)

May 9, 2002: New rule relaxes mountaintop mining dumping requirements under the auspices of harmonizing the definition of "fill material." New rule opens the door for greater dumping of rock waste and dirt as well as trash in streams and also grants the Army Corps of Engineers greater discretion in deciding when dumping can be permitted. 67 Fed. Reg. 31,129 See Administration Clears Way for Dumping, Mountaintop Mining (4/29/2002)

January 29, 2003: Fourth Circuit Court rejects the lower court decision restricting mountaintop mining and invalidating the fill material rule, paving the way for further mountaintop removal. *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003) See Court Ruling Overturned: Mining Companies Free to Bury Streams Once Again (2/10/2003)

February 12, 2003: House bill introduced to reinstate original definition of "fill material." See Clean Water Protection Act of 2003.

January 7, 2004: Proposed rule would gut prohibition on dumping mine waste within 100 feet of streams and ease the way for new mountaintop mining. 69 FR 1,035 See Administration Moves to Allow Dumping of Mining Waste into Streams (1/12/2004)

July 8, 2004: Court rules that 11 general nationwide permits for mountaintop mining waste disposal violate the Clean Water Act because they take into consideration the environmental impact only after the fact. The case is now under appeal. *Ohio Valley Environmental Coalition v. Bulen*, No. 3:03-2281 (S.D. W. Va. filed July 8, 2004), *available at* http://www.wvsd.uscourts.gov/district/opinions/pdf/BULEN_FINAL.pdf.

October 28, 2005: Agencies issue a final Environmental Impact Analysis, as required under the 1999 settlement agreement with the West Virginian citizen's group (*Bragg v. Robertson*, 72 F. Supp. 2d 642 (S.D. W. Va. 1999)). The EIA does propose alternatives to the streamlined general grant. None of the alternatives, however, seeks to limit damage to mountaintops, and all ignore incontrovertible scientific evidence of long-term environmental damage of mine waste dumping.

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

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Nonprofits Urge Supreme Court to Protect Grassroots Communications

A diverse coalition of charities filed an amicus brief on Nov. 14 in the Supreme Court case *Wisconsin Right to Life v. Federal Election Commission* urging the court to protect the right of nonprofits to broadcast grassroots lobbying communications.

Wisconsin Right to Life (WRTL) a 501(c)(4) social action organization, wanted to conduct a grassroots lobbying campaign before last year's national election airing ads urging Sens. Russ Feingold (D-WI) and Herb Kohl (D-WI) to oppose upcoming Senate filibusters of President Bush's judicial nominees. Because Feingold was up for re-election, the ads conflicted with campaign finance legislation. The Bipartisan Campaign Reform Act of 2002 (BCRA) prohibits broadcast ads referencing a federal candidate within 30 days before a primary election or 60 days before a general election. WRTL filed suit seeking an injunction to this restriction.

Both the lower court and federal appeals court denied WRTL's bid for an injunction, relying on language in the Supreme Court's decision in *McConnell v. Federal Election Commission* that might be read as disallowing as-applied challenges (i.e., "this law is unconstitutional as applied to me") to the provision. The Supreme Court initially declined to intervene, but James Bopp, the

lead attorney representing WRTL, pursued the case, arguing that the Supreme Court, in its 2003 ruling in *McConnell*, did not preclude all "as applied" challenges to BCRA's electioneering communication provisions. The language in *McConnell* suggests that because the largest number of ads that are run around elections will be sham issue ads, genuine issue ads - such those of WRTL - were entitled to constitutional protection on an "as applied" basis. Bopp also argued that an exception for a provision is constitutionally required for ads aimed at influencing opinion on policy issues.

Oral argument is expected in early 2006. The court will be considering two issues:

- whether challenges to specific applications of the electioneering communications rule are even allowed, and
- whether WRTL's grassroots lobbying ads must be exempted from the rule for constitutional reasons.

The grassroots lobbying exception Bopp is asking the Supreme Court to consider contains numerous criteria that distinguish the ads that BCRA is intended to target from the genuine issue ads that get caught in the crossfire. Qualities characteristic to genuine issue ads, according to Bopp, include: communications are about a legislative matter; communications only references the candidate in asking him/her to take a position; there is no reference to a political party; and no reference is made to the candidate's character or qualifications. For a complete list of factors, see the WRTL brief.

The multi-party amicus brief was filed on behalf of thirty-five charities (exempt under 501(c)(3) of the federal tax code). The brief argued that the electioneering communications restrictions deny charities the right to petition the government for redress of grievances, which is protected by the First Amendment. The electioneering communication restrictions in BRCA cannot be constitutionally applied to 501(c)(3) charities because such organizations are, and must be to retain their tax-exempt status, nonpartisan and nonpolitical.

"Unlike the corporations producing 'sham issue ads' that the electioneering communications provision was designed to prevent," explains OMB Watch policy analyst Jennifer Lowe-Davis, "charities cannot establish federally registered political action committees to engage in political spending. While these corporations may take comfort in knowing they can engage in free speech through a segregated fund, charities are silenced."

The friend of the court briefing also points out no evidence has been found to support claims that the activities of charities have led to corruption of public officials or that they distort the political process. In contrast, charities enhance the political process by serving as a counterweight to the immense resources that corporations use to influence government. "Charities represent the otherwise unrepresented in the deliberations of government," Lowe-Davis continued.

OMB Watch organized the nonprofit coalition, which includes Independent Sector; Independence Institute; Alliance for Justice; American Conservative Union Foundation; Center for Lobbying in the Public Interest; NARAL Pro-Choice America Foundation (along with some NARAL state-level organizations); National Counsel of Jewish Women; National Legal and Policy Center; National Council of Nonprofit Associations (along with some state- and city-level nonprofit associations); National Low Income Housing Coalition; Violence Policy Center;

Association of American Physicians & Surgeons Educational Foundation; Eden Housing, Inc.; Clients Council of the Legal Aid Society; Massachusetts Council of Human Service Providers; Michigan League for Human Services; Montana Conservation Voters Education Fund; Bronx AIDS Services, Inc.; The Urban League of Greater Cleveland; Housing Alliance of Pennsylvania; New Morning; and Liberty Legal Institute.

Revised Nonprofit Anti-Terrorism Guidelines Expected This Week

This week the Treasury Department will likely release its revised anti-terrorism financing guidelines with broad implications for the nonprofit sector. The revision will likely emphasize that the guidelines are voluntary. It will also urge nonprofits to check the terrorist watch lists when doing business with any group or individual.

The Treasury Department's *Anti-Terrorism Financing Guidelines: Voluntary Best Practices for U.S. Based Charities* were published in 2002 as one measure to implement President Bush's Executive Order 13224, signed shortly after the Sept. 11 terrorist attacks in order to cut funding to terrorist networks. According to the Treasury Department, the guidelines "are intended to assist charities in developing a risk-based approach to guard against the threat of terrorist abuse."

The guidelines, however, have been mired in controversy since their inception. For example, despite the Treasury Department's insistence that the initial guidelines were voluntary, many foundations have begun checking against terrorist watch lists the names of potential grantees, including grant seeker's key staff and board members. Some nonprofits have instituted similar list-checking policies when re-granting funds, and several workplace giving programs, such as the United Way, have also taken up the practice when selecting participating organizations.

Even the Combined Federal Campaign (CFC), the government's charitable workplace giving program, instituted list-checking requirements in its 2004 and 2005 applications. On Nov. 7, following a legal challenge brought by several nonprofit groups including the American Civil Liberties Union (ACLU) and OMB Watch, however, the CFC issued new regulations for 2006 which move away from mandating list checking requirements. The new CFC rules do, however, encourage nonprofits to follow the Treasury guidelines and to check terrorist watch lists.

The emphasis on following the Treasury guidelines is somewhat surprising since they have from the start been intended to be voluntary. Moreover, the guidelines are far more limited in scope than the nonprofit sector's implementation of them has been. For example, the guidelines only suggest list checking and other checks of "questionable activity" for "potential foreign recipient organizations," not for all organizations.

On the other hand, the guidelines offer broad advice on a range of other topics only indirectly related to anti-terrorism. For example, the guidelines urge nonprofit boards to meet at least three times a year with the majority of members attending in person and to collect from board members home address, Social Security number, citizenship and other information. It is unclear the extent to which nonprofits have incorporated such advice.

A Treasury Department official said the new guidelines would be made public prior to the Thanksgiving holiday and that there would be a comment period allowed, even though the new guidelines would be operational the day they are published. According to a Treasury spokesperson, the revised guidelines' first section will emphasize the voluntary nature of the best practices and demonstrate a "recognition of flexibility" in embracing the suggestions that the original guidelines did not show. Another new section will provide fundamental principles similar to the Principles of International Charity, developed by a working group of nonprofits and foundations.

The spokesperson also indicated the new guidelines would substantively change other recommendations. Instead of suggesting checking a number of different watch lists, the revised guidelines will refer only to the Treasury Department's Office of Foreign Assets Control Specially Designated Nationals List.

Fate in Senate of Nonprofit Gag Provision Uncertain

Nonprofits Monitoring Other Legislation for Advocacy Restrictions

After a stinging five vote loss in the House, nonprofit groups continue their efforts to oppose the inclusion of any restrictions on the use by nonprofits of private funds for nonpartisan voter registration and advocacy in the Senate's version of an affordable housing provision. At the same time, Head Start advocates are examining pending reauthorization legislation to determine if new language in it would restrict the use of private funds for Head Start grantees.

Led by the affordable housing community, nonprofit groups have rallied against an appalling set of anti-advocacy provisions in a House bill dealing with affordable housing and are continuing to work to ensure the language is not included in the Senate version. The affordable housing language is part of a broader bill providing oversight of Fannie Mae and other government sponsored enterprises (GSE). On Nov. 18, a coalition of 108 nonprofit organizations sent a letter to Sens. Bill Frist (R-TN), Harry Reid (D-NV), Richard Shelby (R-AL) and Paul Sarbanes (D-MD) declaring strong opposition to the inclusion of any anti-advocacy language in the GSE regulatory reform bill.

H.R. 1461, the Housing Finance Reform Act, passed the House 331-90 on Oct. 26, despite a provision that disqualifies nonprofits from receiving affordable housing grants if they have engaged in voter registration and other nonpartisan voter activities, lobbying, or produced "electioneering communications." Organizations applying for the funds are barred from participating in such activities up to 12 months prior to their application, and during the period of the grant even if they use non-federal funds to pay for them. Most troubling, affiliation with an entity that has engaged in any of the restricted activities also disqualifies a nonprofit from receiving affordable housing funds under the bill.

The Senate GSE bill, S. 190, currently does not contain an affordable housing fund provision, to which the anti-advocacy language could be attached. The Senate Banking Committee approved the bill last July on a party-line vote after rejecting a substitute offered by Sen. Jack Reed (D-RI) that would have included an affordable housing fund.

The fate of the Senate's GSE bill is questionable. Although many agree a new regulator providing oversight for Fannie Mae and Freddie Mac is needed, some predict that key areas of disagreement between Democrats and Republicans could doom the legislation next year. The Senate bill includes tight restrictions on Fannie Mae and Freddie Mac's portfolio holdings and also limits the types of mortgage investments Fannie and Freddie could include in their portfolios.

Meanwhile, nonprofits in other issue areas are looking out for possible restrictions on their private funds hidden in other legislation. An example of this is S. 1107, the Head Start Improvements for School Readiness Act. The legislation, which reauthorizes Head Start through fiscal year 2010, could create new barriers to voter registration by slightly tweaking a prohibition on program funds to encompass the program itself, including Head Start grantees' private funds. Twenty percent of Head Start monies are private funds.

The older Head Start language stated that the restrictions applied to program funds. The new proposed language is less clear and refers to restrictions that would be applied to the program - which is not defined under the Head Start Act.. This slight revision could have significant implications for how Head Start grantees may use their private funds, as such funds might be considered part of the program.

Reportedly, the language came out of a compromise between Sens. Judd Gregg (R-NH) and Edward Kennedy (D-MA), after Gregg offered more restrictive language in committee. It is unclear why Gregg offered the language, as regulations in the Head Start Act and OMB Circular A-122 already prohibit a Head Start agency from using Head Start federal funds, federal matching funds (including in-kind donations), Head Start services, or Head Start employees in carrying out any political activities, including voter registration and transportation to or from the polls.

The House Head Start reauthorization bill, H.R. 2123, passed by a 231-to-184 margin on Sept. 22, does not contain the modified language proposed in the Senate.

Experts are now examining possible implications of the language. Nonprofit organizations should be aware that there may be language in other bills that infringe on a grantee's private funds, and to report it to their national association or OMB Watch.

A New Ultra-Secret Government Agency

Legislation is moving in the Senate to create a new government agency to combat bioterrorism that will operate, unlike any other agency before it, under blanket secrecy protection.

Sen. Richard Burr (R-NC) has introduced the Biodefense and Pandemic Vaccine and Drug Development Act of 2005, S1873, that would create a new agency in the Department of Health and Human Services (HHS) to research and develop strategies to combat bioterrorism and natural diseases. While Congress has created several agencies recently in response to homeland security concerns, most notably the Department of Homeland Security, Burr proposes for the first time ever to completely exempt this new agency from all open government laws. The

legislation has already passed out of the Committee on Health, Education, Labor, and Pensions and is now before the full Senate.

The Act creates the Biomedical Advanced Research and Development Agency (BARDA) to work on countering bioterrorism and natural diseases. Apparently in an attempt to protect any and all sensitive information on U.S. counter-bioterrorism efforts or vulnerabilities to biological threats, Burrs has included in the legislation the first-ever blanket exemption from the Freedom of Information Act (FOIA). The legislation states that, "Information that relates to the activities, working groups, and advisory boards of the BARDA shall not be subject to disclosure" under FOIA "unless the Secretary [of HHS] or Director [of BARDA] determines that such disclosure would pose no threat to national security."

Neither the CIA nor the Defense Department has such an exemption. Burr's spokesperson argues that the exemption is necessary to protect national security claiming that "there will be times where for national security reasons certain information would have to be withheld." For instance, the BARDA should not, according to the spokesperson, be required to publicly disclose information pertaining to a deadly virus.

FOIA, however, already includes an exemption for national security information, as well as eight other exemptions ranging from privacy issues to confidential business information and law enforcement investigations. If the public disclosure of information would threaten national security, then the government may withhold the requested information. "The well-established and time-tested FOIA provisions already address Burr's concerns," explains Sean Moulton, OMB Watch senior policy analyst, "thereby making the blanket exemption for BARDA unnecessary and unwise."

Congress established and strengthened FOIA over the years to create a reasonable, consistent level of accountability among government agencies. Under FOIA, when the public requests agency records, the agency is compelled to collect and review the requested information. The only decision for the agency is whether specific records can or can not be released under the law based on the exemptions from disclosure written into the law. However, the Burr legislation reverses the process: it does not require BARDA to collect or review the requests for disclosure. Instead, the agency can automatically reject requests. Still more troubling, the law prohibits any challenges of determinations by the Director of BARDA or Secretary of HHS, stating that the determination of the Director or Secretary with regards to the decision to withhold information "shall not be subject to judicial review."

Mark Tapscott at the Heritage Foundation writes that "BARDA will essentially be accountable to nobody and can operate without having to worry about troublesome interference from courts or private citizens like you and me."

This move to restrict the reach of FOIA appears in stark contrast to the recent Senate vote to strengthen open government. Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) co-sponsored FOIA reform legislation, passed by the Senate in June, that "will bring additional sunshine to the federal legislative process, and was another step toward strengthening the Freedom of Information Act."

The Biodefense and Pandemic Vaccine and Drug Development Act also exempts BARDA from important parts of the Federal Advisory Committee Act, which requires public disclosure of advice given to the executive branch by advisory committees, task forces, boards and commissions.

Other provisions of the bill compound the troubling secrecy provisions. They include:

- Giving BARDA the authority to sign exclusive contracts with drug manufacturers and forbidding the agency from purchasing generic versions of these drugs or vaccines.
- Authorizing BARDA to issue grants and rebates for drug companies to produce vaccines.
- Providing liability protection to drug manufacturers for drugs and vaccines not approved by the Food and Drug Administration, by requiring the secretary of HHS find that a drug company willfully caused injury.

The FOIA exemption in combination with these provisions would prevent the public from knowing whether BARDA is effectively completing these duties. Only information on agency actions could establish if the new agency is protecting the public from bioterrorism and infectious disease or if it is simply providing handouts to drug companies that creates no added security.

"It is essential that open government safeguards remain in place for all agencies," Moulton continues. "It is extremely important to ensure that the nation is protected against pandemics and bioterrorist attacks, but such efforts must not be excluded from open government. By providing the mechanisms for government accountability, these safeguards ensure that the government meets its responsibility to protect the public. In the end, an accountable government is a stronger government which acts to effectively meet all threats, including pandemics and bioterrorism."

Burr is still in the process of revising the Biodefense and Pandemic Vaccine and Drug Development Act, and, with the Senate's incredibly tight schedule, the timing of the bill's introduction on the floor remains uncertain. In the meantime, supporters are rumored to be seeking out a Democratic cosponsor to give it momentum.

Developments Could Hamper, Help Effort to Preserve TRI

In response to a petition from public interest groups, the EPA has extended the deadline for public comments on its proposed cutbacks to the Toxics Release Inventory (TRI) to Jan 13. In an unrelated change, the agency also moved the electronic docket of public comments from its own website to the federal government's www.regulations.gov. The transition was far from seamless, and the possible effects of the location change in the midst of the rulemaking process are uncertain.

In an Oct. 27 letter, several public interest groups, including Environmental Defense, National Environmental Trust, U.S. Public Interest Research Group, and OMB Watch, requested a 60-day extension to EPA's original Dec. 5 comment deadline. The groups argued that the extension was necessary for organizations to submit, "...substantive comments that would illustrate the potential impacts of the rulemaking on community right-to-know." On Nov. 22, EPA Assistant

Administrator Kim Nelson formally granted a 39-day extension of the public comment period. The curious length of the extension appears to be a compromise between the requested 60-day extension and the 30-day extension EPA officials reportedly planned to offer. A 30-day extension would have placed the deadline immediately after the New Year holiday and made it difficult for groups to finalize and submit comments in time. The new deadline, Jan. 13, should allow groups sufficient time following the holidays to finish comments to the agency.

On Nov. 25 EPA shutdown its online docket and moved the TRI rulemaking, along with all of its current regulatory actions, to the regulations.gov site. The transition is part of an effort to consolidate e-rulemaking activities and improve consistency across agencies. EPA, however, has been criticized for its handling of the transition to the new system. Visitors to the old e-docket site receive a brief message which reads: "EDOCKET No Longer Available. As of Friday, November 25, 2005 at 8 am, EDOCKET is permanently unavailable. If you would like to submit an electronic comment for an EPA docket, please visit the Federal Docket Management System (FDMS) at www.regulations.gov." Interested parties could easily misinterpret the message, believing the opportunity to participate in the TRI rulemaking has been missed. Several important functions on the regulations.gov site also appear to be malfunctioning, leaving users unable to download or view documents in the docket. Managers of the site claim the problems will be fixed in a few days. "The agency should have maintained rulemakings begun on the EPA system in that system until they're concluded," explains OMB Watch senior policy analyst Sean Moulton. "The EPA could have managed the transition better by posting new regulatory activities on the new site. At the very least, it should have waited until regulations.gov was functioning properly and then posted a more comprehensive message explaining the transition." OMB Watch staff have confirmed that comments on the TRI proposals are still being accepted through the earlier methods:

- Email comments directly to EPA at: oei.docket@epa.gov
- Fax comments to: 202-566-0741
- Mail comments to: Office of Environmental Information (OEI) Docket, Environmental Protection Agency, Mail Code: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Attention Docket ID No. TRI--0073

To submit comments online or review the TRI docket, including background documents and previously submitted comments:

- Go to: www.regulations.gov
- Search by Keyword for EPA-HQ-TRI-2005-0073
- Click on 'Docket ID' (furthest left), to review submitted comments, proposals and background documents
- To submit comments online through the site: Click on 'Add Comments' which appears furthest right

Post-Katrina Survey Finds Wariness, Desire for Change

Shortly after Hurricane Katrina, OMB Watch launched an online survey seeking feedback and reaction to the possibility of launching an investment agenda, not just for the affected states, but

for the entire country. The response was tremendous, as over 800 respondents from nearly every state completed the survey and contributed a multitude of thoughtful, in-depth comments. The overwhelming consensus among respondents held not only that now is the time for a comprehensive, long-term investment agenda for the country, but that such an initiative is long overdue.

OMB Watch released a summary of respondent comments and a statistical overview of the reactions we received to our proposed outline for an investment agenda. The results of this survey mirror what has been shown in polls and focus groups from the past three months: Americans believe the country is headed in the wrong direction and are ready for a fundamental change.

The survey was conducted between Sept. 21 and Oct. 7 and sought reaction on a preliminary five-part agenda that encompassed investments in communities, the economy, people, the environment, and infrastructure.

While respondents strongly supported the idea of an investment agenda, with many suggested elements of such an agenda scoring very high, the substantial body of comments provided a more nuanced understanding of respondents' beliefs about such an agenda. A review of these comments captures not only the frustration and disillusionment people experienced in the aftermath of a horrible natural and human disaster, but also broader themes important to informing the investment agenda that must be defined post-Katrina and Rita.

Particularly troubling to and consistently lamented by respondents were themes of corporate influence over government, cronyism and incompetence within the government, and politicians working for the benefit of the few instead of the many. These concerns' ubiquity points to the need for a realignment of our national priorities and a renewed commitment to shared sacrifice, unity, and citizen engagement. While respondents overwhelmingly support an investment agenda, they were cautious about its utility if these broader concerns are not addressed.

"Survey respondents were also emphatically clear that it is time to end the 'starve the beast' mindset that has become so pervasive among our elected officials," explained survey author Adam Hughes, senior policy analyst with OMB Watch. "Hurricanes Katrina and Rita illustrated in stark terms the importance of a strong, vital and responsive government, as well as the consequences of underfunding government services."

A summary of the comments and statistical analysis are available at www.ombwatch.org/KatrinaSurveyReport.pdf.

For additional analysis and updates on Hurricane Katrina's aftermath in relation to OMB Watch's work, visit our Katrina blog.

House, Senate To Battle Over Budget Cuts

Among the top priorities for Congress, when its members return to Washington next week, is the construction of a conference report for spending cuts that is acceptable to both chambers. The

House and Senate versions of the reconciliation bill for entitlement spending contain significant differences, particularly with respect to cuts to Medicaid, student loans, and food stamps. The razor-thin margin by which these bills passed in each chamber and the scandals that have increasingly embroiled the Republican Party will likely make reaching consensus during the conference still more arduous by splintering the Republican caucus, decreasing the chances of the cuts being enacted into law.

The House passed its version of the bill cutting just under $50 billion early in the morning on Nov. 18 by only two votes (217 - 215). With the resignation of Rep. Randy Cunningham (R-CA) on Nov. 28 that margin is cut in half. The Senate had already passed its bill two weeks earlier on the evening of Nov. 3, including a provision--removed from the House version--that would allow drilling in Alaska's Arctic National Wildlife Refuge. The Senate reconciliation bill cuts $39.1 billion from entitlement programs over a five-year period and passed 52 - 47.

The Senate cuts are not nearly as contentious or damaging to low-income beneficiaries as those being considered on the other side of Capitol Hill. To what extent Senate provision will be reflected in the final bill is difficult to speculate, however, as the select few Representatives and Senators chosen as conferees will wield considerable power,and the bill emerging from conference for a final vote in each chamber could be drastically different than either version.

Adding to the Republican leadership's woes, more bad news surfaced yesterday as Cunningham, a supporter of the budget cuts in the House, resigned from Congress for taking bribes from defense contractors. His absence this December will further complicate the calculus needed to craft a consensus package and may make pushing through a final version of the bill in the House untenable this year. A special election to replace Cunningham must be held within 120 days.

Help Stop These Harmful Cuts
There is still time to make your voice heard and stop this dangerous reconciliation bill. Email your Representatives and Senators to tell them you do not support more budget cuts in a time of such need to pay for tax cuts for the rich.

Tax Cut Measure Guarantees Increasing Deficits

The House of Representatives will return to session next week after a two-week Thanksgiving break, with the first item on its agenda being a bill to cut taxes--primarily for high-income Americans--by an additional $56 billion. When combined with its companion reconciliation spending bill, which barely passed the House in the early hours of Nov. 18, the bill will actually increase deficits over the next five years - directly contradicting the original intent of the reconciliation process.

The House was originally scheduled to vote on the tax cut bill just before the Thanksgiving recess on Friday, Nov. 18, but the vote was postponed because too many Republicans were getting a headstart on their break, leaving town early that day. Many Republicans reportedly also had misgivings about passing additional tax cuts for the wealthy that would increase the deficit *in the very same day* that they voted to cut programs for low- and middle-income Americans, the stated intent of which was to hold down the deficit.

It remains unclear if the House leadership has sufficient backing from moderate Republicans to pass the tax cut bill. A host of moderate House Republicans have presented a major problem for the leadership team over the past few weeks, refusing to fall into line and lend their support to the spending cuts bill. The initial House vote on the spending cuts bill was postponed one week and required a significant amount of arm-twisting to pass following the delay. The amount of energy and political capital expended by the House leadership on that vote--coupled with the increasing public scrutiny of and faltering confidence in the Bush administration and a number of Republican members of Congress--may make it more difficult to pull the caucus together to pass the tax cut bill.

Even if the House leadership prevails, passage in the House is only the first hurdle the tax cuts will face before being enacted. On Nov. 17, the Senate passed its version of the tax cut bill, which is dramatically than the House version. Among the major provisions that appear in the Senate, but not House, version are tax incentives and cuts related to Hurricane Katrina, inclusion of an one-year Alternative Minimum Tax patch, charitable giving incentives, and a host of revenue raisers. Also of note, an extension of capital gains and dividend tax cuts appears in the House, but not Senate, version. The extension of the 15 percent tax rate on capital gains and dividends is believed by House leadership to be the heart of the Bush tax cuts. Accordingly, the cut should prove to be contentious if there is a conference between the House and the Senate. Negotiating a compromise will be difficult with Senate moderates unwilling to vote to extend the cut with large deficits and program cuts, on the one hand, and conservatives in the House demanding it to be part of the tax cut package on the other.

Comparison of House and Senate Tax Cut Bills

(in billions of dollars)

	House Committee Version	Senate Passed Version
Capital Gains/Dividends	-20.6	-
AMT One-Year Patch	-	-28.8
Research and Develop Credit	-9.9	-9.2
Charitable Giving Changes	-	-0.6
Katrina-related Relief	-	-7.0
Other	-25.7	-28.5
Subtotal	**-56.1**	**-74.1**
Revenue Offsets	-	14.5
Net Total Cost	**-56.1**	**-59.6**

source: Joint Committee on Taxation, Senate Finance & House Ways and Means Committees

With only three weeks to complete this bill before a likely adjournment at the end of the year, and a number of other priorities, Congress will be hard pressed to finish both the spending reconciliation bill and this tax bill before Christmas. It may very well be forced to revisit the reconciliation bills in January when the second session begins.

Help Stop These Harmful Cuts
There is still time to make your voice heard and stop this dangerous reconciliation bill. Email your Representatives and Senators to tell them you do not support more program cuts with so many in need, in order to pay for more tax cuts for the rich.

TABOR: A Losing Proposition for Colorado

Earlier this month, voters in Colorado demonstrated their dissatisfaction with the state's constitutional spending limit law — otherwise known as TABOR--by voting in favor of suspending its spending limits for five years. TABOR, the "taxpayer's bill of rights," had contributed to a significant decline in the state's public services since its enactment in 1992. Unfortunately, this victory in Colorado has come after years of disastrous tax and spending practices eroded state services, harming Colorado's education system, health care programs, and transportation infrastructure.

Despite the lessons learned in Colorado, other state legislatures are attempting to pass measures that would restrict spending in much the same way TABOR did in Colorado. Proponents of these measures argue their initiatives are vastly different than Colorado's TABOR, but despite superficial differences all share one underlying intent: to drastically reduce the size of state governments or "starve the beast." Residents of these states would be wise to study the example of Colorado, lest they become victims of the same draconian spending constraints that have proven so detrimental to that state's economy and to its citizens' quality of life.

TABOR laws are initially appealing because they appear on the surface to be responsible attempts to scale back state spending and give tax breaks when there is an excess of state revenue. However, Coloradans found with TABOR that any minimal savings they received from tax refunds were lost in higher cost and deteriorating quality of services. Residents were forced to pay more for such public services as education, health care, access to parks and recreation areas, public transit, where the state had previously covered a greater share of the cost. TABOR works by limiting state spending to a formula based on population growth plus an inflation factor. The formula has proven insufficient over the long-term for providing adequate revenue to continue important state services as population increases, particularly when unexpected needs arise, such as a natural disaster or economic downturn.

Anti-Tax Advocates Continue to Push TABOR
During the 2005 legislative session, 23 states considered TABOR proposals at one level or another. Most never made it past the committee level or floundered before being brought up for floor debate.

Voters in California, however, were presented with a TABOR-like ballot initiative in the state's Nov. 8 special election. Sixty-two percent of voters rejected the TABOR measure, which would have established a new limit on state spending by restricting it to the previous years' spending plus the average annual growth in revenues over the previous three years. The measure was defeated over concerns that it would have led to a significant reduction in future state spending similar to that experienced in Colorado.

Despite their initiatives having met with little success in 2005, anti-tax advocates plan to continue pushing proposals in 2006, including in the legislatures of Arizona, Kansas, Michigan, Missouri, Ohio, Oklahoma, Oregon, Nevada, and Wisconsin. Many are also expected to attempt passage of TABOR-like ballot initiatives in November when voters will elect federal representatives in mid-year elections. The outcome of the vote in Colorado, however, sends a strong message to these states that TABOR-like laws are ultimately a losing proposition.

The fight over unsustainable spending limits is already heating up. In Nevada, for example, the State University Chancellor Jim Rogers is already planning to use his political action committee in an effort to block gubernatorial candidate Bob Beers' TABOR-like tax cut measure. Rogers has criticized Beers' Tax and Spending Control for Nevada initiative and hopes to educate state lawmakers, regents and community members about the harm done in Colorado by its TABOR law. Rogers and others are using resources and materials developed for the Colorado fight against TABOR to effectively make their case in Nevada. Hopefully the people of Nevada will absorb some of this information and avoid the near-guaranteed decline in state services seen in Colorado.

Such wariness would pay off. As David Bradley from the Center on Budget and Policy Priorities aptly points out, "The only state to actually live under TABOR has had to suspend it for five years. [The recent TABOR] vote reflected the actual experience of deteriorated government services." The "starve the beast" philosophy encapsulated by TABOR laws starved Colorado of the funds necessary to provide the most basic of state services. The successful reversal of this law has now illustrated just how out of sync the "starve the beast" philosophy is with the will of the public.

It's Not the Most Wonderful Time of the Year (for Appropriations Work)

Although five of the 11 appropriations bills remain to be signed into law by President Bush, Congress has completed work on all but two: the Defense and Labor/Health and Human Services bills. While a massive omnibus has been avoided this year, an equally contentious (and still quite large) bill--a so-called "minibus"--could be passed containing those two final bills. With all the items on the schedule for December and likely only three weeks to complete them, Congress still has a lot of work left to do before they are finished for the year.

Besides working to finish appropriations after returning from the Thanksgiving recess on Dec. 5, Congress will be busy trying to find consensus on the vastly disparate House and Senate budget reconciliation bills, moving forward with work on the tax cut reconciliation bills, and attempting to pass a border security measure and a pension reform bill.

It is almost assured some of these priorities will not be completed in 2005. Even some House members are doubtful about the prospects of completing such an ambitious schedule. Rep. Jim McCrery (R-LA) of the Ways and Means Committee told reporters that he doubts the House can pass a tax package, hold conference negotiations with the Senate, and pass a final conference report before adjourning for the year.

But the appropriation bills must be passed before Congress recesses again unless the continuing resolution (CR) the federal government is currently operating under is extended for a third time. The Labor/HHS bill was all but finished a few weeks ago. House and Senate conferees approved the final conference report, and passage was assumed to be a mere formality. But in one of the biggest legislative surprises of the year, 22 House Republicans defied their leadership and joined with all Democrats to reject the conference report on Nov. 17.

Whether the Defense and Labor/HHS measures--the two largest spending bills--will be combined or passed separately remains unclear. The Senate prefers to return to conference and negotiate a solution to the Labor/HHS bill that will satisfy enough House members to pass it as a stand alone bill. Yet House Appropriations Chairman Jerry Lewis (R-CA) prefers to skip what could be difficult negotiations and extend funding for the programs under the bill with a long-term extension of the CR.

If passed separately, the Defense bill will still undoubtly serve as a "catch-all" for other unrelated spending items. It will become something of a *de facto* omnibus, containing a number of non-military items such as a reallocation of Hurricane Katrina reconstruction funds, and funding for avian flu countermeasures. If the Defense bill is passed by itself in that manner, the Labor/HHS bill will most likely be funded throughout the rest of this fiscal year by the CR.

In addition to signaling Congress' failure to complete its work in a timely and responsible manner, omnibus appropriations bills serve as vehicles for reckless pork barrel spending. They give legislators the opportunity to pack specialized earmarks into the appropriations process with little oversight, because few people either inside Congress or out have the time or access to know the details of all the provision of such massive bills before they are voted on.

Unfortunately, regardless of how Congress decides to fund the Labor/HHS bill, programs it covers will see cuts this year. Funding under the CR will impose a real across-the-board cut on all programs due to population increases and inflation. The conference report for the bill also slashes services by $1.4 billion below the CR level, particularly for low-income families. Moreover, groups that depend on federal funding are currently hampered in their efforts to plan for the forthcoming year because of funding uncertainties.

Weak Roof Crush Rule Threatens Victims' Rights

Based in part on flawed cost-benefit analysis, a proposed rule to reduce injuries sustained when vehicles roll over and their roofs are crushed inward fails to require the level of safety available in current technology and threatens to eliminate the rights of roof crush victims to sue manufacturers.

Caving in on Roof Strength

During rollover crashes, vehicle occupants are forced upward into the vehicle roof, and weak roofs compound the risk by crushing inward. A crushing roof can compromise other safety features, such as side air bags and door latches, and automakers' failure to implement rollover pretensioners in seat belt technology means that seat belts can likewise fail during rollovers.

Rollover crashes kill 10,000 people each year, including the 50,000 who have died since the Ford-Firestone debacle in 2000 revealed in shocking detail the dangers of rollover crashes to a horrified public. When the news media began covering the Ford-Firestone scandal (and exposed the federal government's inaction despite early warning signs of the threat), the National Highway Traffic Safety Administration (NHTSA) began work on the first improvement in over 30 years to the standards governing roof strength.

The result was unveiled in August: a proposed rule that NHTSA claims will require vehicle roofs to sustain a force of 2.5 times the vehicle weight, up from the current standard of 1.5. As Public Citizen observes, however, in comments filed last week, NHTSA proposes simultaneously changing the way vehicles would be tested for compliance with the 2.5 standard. Citing analysis from a veteran automotive engineer, the consumer safety group argues that the combination of these changes will result in effectively requiring a much more modest increase to a mere 1.64 times vehicle weight.

Moreover, secret industry documents reveal that the auto industry has available to it feasible, cost-effective technology that can strengthen vehicle roofs more effectively than NHTSA's proposed standard would require, but NHTSA's proposed rule fails to mandate the use of this technology or set the standard at a level commensurate with it. Meanwhile, NHTSA refuses to release those records to the public.

Crushing Victims' Rights

While setting a standard lower than the automakers are capable of achieving, NHTSA simultaneously insists that compliance with the weak rule should shield auto makers from lawsuits by victims of roof crush.

If reviewing courts defer to the agency's assertions about preemption, NHTSA will have shut the court house doors on severely injured victims, many of whom can be left so crippled that they will be unable to care for themselves. Eliminating victims' recourse to the courts will shift the financial burden of rollover injuries from the auto industry to the taxpayer.

Crunching the Numbers

One of the bases for the weak rule is a preliminary regulatory impact analysis (PRIA) that auto safety advocates argue is "riddled with errors":

- It underestimates the benefits to be gained from stronger standards by manipulating the universe of vehicle occupants whose deaths and injuries would be averted.
- It also underestimates benefits of stronger standards by basing its estimates on post-crash observations of vehicle conditions. In the dynamics of rollover crashes, vehicles can be so crunched that the occupants have zero (or less than zero) headroom, even as subsequent changes to the vehicle architecture from further rolls can leave a vehicle showing more headroom or less visible inward crush.
- It *over*estimates the costs to the auto industry by failing to account for existing technology, such as the lightweight, high-strength material used in the Volvo XC-90, that could result in cost-effective achievement of more stringent standards.

- Finally, it assumes away ethical and moral questions that complicate the simple comparison of costs and benefits. It translates serious injuries into the fractional equivalent of a fatality (with the most severe injuries counted as 0.7124 deaths), and then it monetizes the resulting figure with a lowball $3.5 million estimate. Additionally, it fails to account for the automakers' profits in the period when they knew about the need for stronger roofs but failed to manufacture them. "In this case," Public Citizen argued in its comments, "automakers have known for years about the costs of inaction for occupants and have instead resisted or even acted to aggravate risks."

White House Asserts Authority Over Agency Guidance Documents

The White House released a draft bulletin on the day before Thanksgiving that establishes new guidelines for non-rulemaking agency guidance documents.

The proposed bulletin from the Office of Information and Regulatory Affairs (OIRA) within the White House's Office of Management and Budget (OMB) establishes what it calls "good guidance practices" for the content, development, and revision of guidance documents.

The term "guidance documents" generally refers to a wide range of materials used by agencies to clarify or articulate information or further explain regulatory requirements. Guidance documents can include compliance guides that explain how a regulation applies to an industry sector in sector-specific terms, supplemental materials that assist companies preparing applications for agency approval, and much more. Guidance documents are not subject to the procedural requirements that apply to rulemakings, such as the Administrative Procedure Act and Executive Order 12,866.

About the OIRA Bulletin

In an attempt to make guidance documents "more transparent, consistent and accountable," the new draft bulletin provides guidelines for a class of guidance documents deemed "*significant* guidance documents," including requiring approval by senior agency officials for new significant guidance documents, creating standards for the content of guidance documents, and increasing transparency and public comments.

Significant Guidance Documents

The draft defines a broad range of documents as significant guidance document, including the following:

- documents that "raise highly controversial issues related to interagency concerns or important Administration priorities";
- guidance documents that establish "initial interpretations of statutory or regulatory requirements" or announce changes in such interpretations; and
- documents detailing "novel or complex scientific or technical issues."

An additional subset of significant guidance documents are *economically* significant guidance documents, defined as those that are "[r]easonably anticipated to lead to an annual effect of $100 million or more or adversely affect in a material way the economy or a sector of the economy." It is unclear, however, how a guidance document, which is not legally enforceable, could have an economic impact.

The bulletin proposes a number of exclusions, such as "contractor instructions," litigation and other legal documents, scholarly articles, interagency memoranda of understanding, media relations, and "warning letters." The definition section of the bulletin does not specifically exempt other documents used in enforcement actions, but a later section clarifies that the bulletin does not "in any way affect [agencies'] authority to communicate their views in court or other enforcement proceedings."

New Requirements

The OIRA bulletin calls for new requirements to apply to all significant guidance documents:

- **Review and Approval:** The draft bulletin requires that agencies establish procedures requiring the review of significant guidance documents by senior agency staff.
- **Content:** The draft also established content requirements, such as restricting the use of words that suggest mandatory duties and standardizing guidance documents by including the date, agency, docket number and other relevant information.
- **Transparency:** Agencies are also required to make significant guidance documents publicly available on the Internet and compile a yearly list of all significant guidance documents.
- **Public Participation:** Agencies are also required to develop a means for receiving public comment on guidance documents, including requests for review or modification of existing guidance documents or proposals for new guidance documents. The draft bulletin makes clear that agencies do not have to respond to public requests, as the comments would be strictly "for the benefit of the agency." There is, at least not in the current draft of the bulletin, no burdensome equivalent of the procedures related to the Data Quality Act provision for guidance documents, which can be misused by industry to delay the issuance of guidance or derail an agency's priorities.

The guidance makes clear that despite the notice-and-comment requirements, guidance documents are still not legally enforceable.

The draft bulletin requires additional procedures when an agency is preparing a draft economically significant guidance document. In such cases, the agency will be required to publish the draft guidance in the *Federal Register*, invite public comments, and formally respond to the comments.

The bulletin insists that agencies must not avoid the new "good guidance practices" by communicating guidance in forms that escape the bulletin's reach, but it does permit agencies--"in consultation with OMB"--to identify specific guidance documents or entire classes of guidance documents that should be exempted from the new policy.

Next Steps

The proposed bulletin is now open for public comment through Dec. 23.

Public interest groups will likely approach the bulletin with some healthy skepticism. On the one hand, respected bodies such as the Administrative Conference of the United States (ACUS) have called for similar good guidance practices (although the two ACUS recommendations suggested leaving matters up to the agencies without requiring any decisions be made "in consultation with" OIRA). The Bush administration's pattern of failure to develop new protective standards has been aided, in part, by some agencies' use of non-binding, voluntary guidance instead of real protective standards that apply across the board to ensure the public's protection.

On the other hand, corporate-conservative anti-regulatory discourse has aggressively promoted a vision of "regulation by information" as a "problem" in need of correction by such cumbersome overlays as the Data Quality Act and OIRA's peer review guidelines.

InsideEPA (subscription-only) reported that EPA sources expressed concern that the good guidance practices would delay agency's ability to issue new guidance documents, particularly "new risk assessments for controversial chemicals in a major agency risk database known as the Integrated Risk Information System," as well as clean air and drinking water advisories.

It is not clear, however, if the criticism of agency insiders is based on the new notice-and-comment requirements or on the perception that the draft bulletin would increase OMB's review of agency rules. According to the draft bulletin, OMB would not review guidance documents; rather, agencies would develop internal procedures for senior staff to review significant guidance documents.

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The Watcher
December 13, 2005 Vol. 6, No. 25

Cartoon: The Purpose of Government is...

A Letter from Gary Bass

Dear OMB Watcher,

Even as 2005 draws to a close, we here at OMB Watch are gearing up for 2006, developing a game plan for the upcoming year, knowing that our work of advocating for improved government accountability and citizen participation will remain vitally important in the coming year.

OMB Watch exists to increase government transparency and accountability; to ensure sound, equitable regulatory and budgetary processes and policies; and to protect and promote active citizen participation in our democracy. As the issue-specific "year in review" articles to follow show, 2005 presented daunting challenges on all of these fronts.

In 2006, assaults will undoubtedly continue on regulatory protections, on government openness, on the advocacy rights for nonprofits, and on sound tax and spending policies. At the same time, we will confront these attacks head-on; because, though these issues often fall under the radar, we know that they are vitally important to our democracy.

In addition to defending policies for and protections of the common good, OMB Watch is eager to move forward proactively. In a survey we conducted shortly after Hurricane Katrina, many of you said it is time to launch an investment agenda, to put our national priorities back on track. We plan on increasing our efforts toward such an initiative, identifying shared values and helping organize concerned groups and individuals around them.

Many of you share OMB Watch's vision for a more just and democratic society, one in which an open, responsive government protects people's health, safety, and well-being, safeguards the environment, honors the public's right to information, values an engaged and effective citizenry, and adequately invests in the common good. Together, we can make this vision a reality.

I hope you will help us continue to move forward. Take a moment to make a tax-deductible contribution today.

Sincerely,

Gary Bass
Executive Director
OMB Watch

Regulatory Year in Review: 2005

A round-up of the key developments in regulatory policy we have covered in 2005.

In Congress | In the White House | Other Major Developments

In Congress

A new year, a new Congress, and the same old threat: 2005 began with many signs of interest from congressional leaders and the White House in generating anti-regulatory legislation to push in the 109th Congress. The clues pointed to a revival of the anti-regulatory proposals from the Contract With America as well as new, dangerous threats -- all released in a slew of separate,

disconnected bills, some of which would propose regulatory "reforms" one or two steps short of the ultimate anti-regulatory goal, in order to make opposition more difficult.

Many bills have now been introduced, although only a few legislative developments successfully advanced in 2005:

- An immigration reform bill gave the Secretary of Homeland Security the unprecedented power to waive any and all law when securing the nation's borders. It was forced through the Senate when the House appended it to a supplemental spending bill for the Iraq war. The Department of Homeland Security has already used this dangerous new exemption from the rule of law, with little or no press coverage or congressional oversight.
- The public interest community was caught flat-footed by the last-minute discovery of a provision in the Senate budget resolution to modify the parliamentary rules related to the Unfunded Mandates Reform Act. While many public interest advocates and senators focused on the details of one fiscal year's budget framework, the Senate voted to erect a new long-term barrier to new protective legislation, which has since been used to block a proposed increase in the federal minimum wage.
- A House committee reported out a bill that would essentially codify the White House's highly political performance measurement process, but that bill has reportedly been held up from moving to a floor vote by House appropriators, who have objected to the White House's uses of performance measurement to justify slashing the popular Community Development Block Grant.

What's in store for 2006 remains unclear. On the one hand, it is an election year, and many members of Congress will feel pressured to avoid controversial legislation aside from those that are ideologically potent (such as gay marriage bans) and thus resonate with an electoral base. On the other hand, many anti-regulatory initiatives are so technical that they guarantee minimal coverage from an easily distracted press corps, and support for them resonates with the corporate special interests whose campaign donations can make or break an election bid.

A few anti-regulatory efforts stand out, according to the latest intelligence from the Hill, as having the most apparent chances of moving forward in 2006:

- federalism bills, such as bills attacking consent decrees and proposals to amend the Unfunded Mandates Reform Act;
- proposals for government sunsets and fast-track, take-it-or-leave-it reorganization authority;
- proposals to impose paralysis by analysis through amendments to the Regulatory Flexibility Act; and
- the upcoming reauthorization of the Paperwork Reduction Act, which is likely to be used as a vehicle for anti-regulatory process changes.

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In the White House

Unsurprising for an administration historically hostile to regulation, the White House seized opportunities this year to put forward several anti-regulatory initiatives aimed at dismantling needed protections. White House interventions included the following:

- The White House kicked off 2005 by advancing an anti-regulatory hit list, featuring proposals for reversing public protections, mostly proposed by industry lobbyists. The plan, detailed in the Office of Management and Budget's (OMB) yearly report to Congress, instructed agencies to review and complete action plans on a regulatory hit list of 189 safeguards to be weakened or eliminated. In March of 2005, the White House expressly endorsed 76 of the hit list items as high priorities for the administration, though the White House refused to inform the public about its justifications for deciding which regulatory protections were added to its hit list. Even more perplexing, the administration added one rule to the hit list after touting it as a "regulatory reform accomplishment" just three months earlier.
- The White House budget proposals introduced in February included items aimed at giving the White House unprecedented authority to drastically overhaul the federal government. Several pieces of legislation emerged mirroring the budget request, but they have not yet gained momentum.
- In a callous and cynical move, the Bush administration attempted to use Hurricane Katrina as an excuse to relax environmental, health, safety and worker rights laws and regulations, including waiving the Davis-Bacon law that provides fair minimum wages to workers. Though most government agencies worked diligently to alleviate the untold burdens on Hurricane Katrina's victims and to expedite recovery in a safe and effective manner, several agencies took the opportunity to waive needed protections, thus possibly putting recovery workers and others at greater risk. In a small victory for workers and their families, the administration was forced to backpedal on the Davis-Bacon waiver only a few weeks later.
- OMB also took the unprecedented step of asserting authority over agency guidance documents this year. The White House released a draft bulletin on the day before Thanksgiving that establishes new guidelines for non-rulemaking agency guidance documents. By requiring new procedural burdens and approval from political appointees for many guidance documents, the bulletin may restrain agencies' ability to issue needed guidance to regulated communities.

After adding these new anti-regulatory distortions to his already lengthy record of policy interventions that put the American people at risk, John Graham announced his resignation as administrator of the White House Office of Management and Budget's Office of Information and Regulatory Affairs effective February 1.

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Other Major Developments

In an all too familiar pattern, 2005 brought a swath of examples of the many unmet security and safety needs still left in the United States, underscoring the continued necessity of responsive regulation. Unfortunately, we were also reminded of the politicization of science and paralysis by analysis that often lead to weakened protections or festering gaps in needed safeguards. Hurricane Katrina, in particular, highlighted the need for strong public protections. At the same

time, key public health, safety and environmental protections have continued to languish on agency agendas, despite being long-identified as agency priorities. Below are just some of the most egregious unmet needs and weakened protections that came to light this year.

- *Forests Up for Grabs:* Christmas came early for the timber and paper industries in 2004, when, three days before Christmas, the U.S. Forest Service handed them a final rule that will drastically overhaul the U.S. Forest Service's land management system much to the benefit of both industries. The agency served another blow to the nation's forests in May by publishing a final rule that would allow governors to petition for changes to state forest management plans, effectively undoing the Clinton-era forest regulations known as the "roadless rule."
- *Weak Regulations on Mercury Emissions:* In March, EPA introduced a rule to control mercury emissions from power plants using the dubious cap-and-trade method. The rule faced severe opposition from state and local governments, environmental groups and some members of Congress, prompting EPA to seek comments on reopening the rule for reconsideration in October.
- *A Blind Eye to Drug Safety:* Last spring, the revelation that COX-2 inhibitors such as Vioxx and Celebrex can lead to heart failure brought to light the cozy relationship between industry and the FDA. A House hearing revealed how FDA stood idly by while drugmakers aggressively pushed a drug known to have potential harms, leading to the premature death of untold numbers. Unfortunately, efforts to free the Food and Drug Administration from the pharmaceutical industry's excessive influence seesawed between success and failure, as the House voted to ban drug company scientists from FDA advisory committees, while an agency whistleblower revealed that a new drug safety board has been tilted in favor of the drug companies.
- *Teflon--The Wrap that Won't Stick:* In an astounding case of politics over science, DuPont, the maker of Teflon, suppressed information for 20 years on the adverse effects of the product, allowing exposure to dangerous chemicals used in the production of Teflon to go unregulated.
- *Weak Protection on Roof Crush Resistance:* Based in part on flawed cost-benefit analysis, a proposed rule, issued on Aug. 23, to reduce injuries sustained when vehicles roll over and their roofs are crushed inward fails to require the level of safety available in current technology and threatens to eliminate the rights of roof crush victims to sue manufacturers.

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White House Report Spins Bush Reg Failures

In a debate with high stakes for a public that is largely unaware of it, the White House released a report on Dec. 7 spinning its anti-regulatory record as a success.

Contrary to expectations, the annual report on the costs and benefits of regulation for 2005 did not announce new burdens on the regulatory process. Instead, the Bush administration used the report to spin its regulatory record as a success for the public, claiming in an accompanying press

release that the report demonstrated a record of generating more benefits for the American people at lower cost than previous administrations.

To make the claim, the White House compiles data from agency cost-benefit analyses. These analyses blithely ignore fundamental ethical and moral questions and are inherently political tools that may even advise against what Americans consider our most immutable protections.

Even if the data were not so politically subjective, they still fail to convey the substantive merits of this administration's pattern of failure to protect the public. The report is laudatory spin for the record of John Graham, outgoing administrator of the White House Office of Management and Budget's Office of Information and Regulatory Affairs, but it does not begin to convey Graham's troubling record of weakening public protections and putting the American people at unnecessary risk. Here is a quick scan of his record:

- OMB Role in Fuel Economy Change Exposed
- Administration Asks Manufacturers for Regulatory Hit List
- GAO Finds OMB Regulatory Review Not Well Documented
- Graham Advises Agencies on Valuing Lives of Seniors
- OMB Waters Down Standards on Factory-Farm Runoff
- OMB Expands Influence Over Scientific Decisions
- Industry, OMB Press EPA to Offer Exemptions to Clean Air Standards
- Administration Devalues the Elderly
- OMB Blocks Nationwide Health Warning on Asbestos
- OMB Builds Record of Rollbacks
- OMB Weakens Hazardous Waste Rule
- OMB Guts Marine Diesel Rule
- EPA Issues Weak Rule on Snowmobile Emissions After Earful from Graham
- OMB Guts EPA Standards to Limit Construction Runoff
- White House Subverting Health, Safety & Environmental Protection
- OMB Weakens EPA Proposal to Limit Fish Kills from Power Plants
- OMB Hijacks Clean Air Standards
- NHTSA Issues Weakened Tire Pressure Monitoring Rule
- In Rejecting NHTSA Rule, Graham Shows True Colors

Although the final report did not correct the many recurring errors that OMB Watch and other public interest groups have pointed out over the years, it did make some significant improvements from the earlier draft, which include the following:

- The final report eliminated the draft's use of the term "off-budget costs" to refer to the costs borne by industry to comply with regulations. The term, which comes from fiscal policy discourse, has been adopted by industry-funded anti-regulatory think tanks as a rhetorical prelude to proposals for regulatory budgeting. OMB Watch's comments on the draft report urged that the phrase be eliminated from the final report, and we are gratified that OIRA adopted that suggestion.
- The final report made the underlying data of the report more transparent by adding detailed bibliographic information for researchers seeking to look up the agency analyses that serve as the basis for the report. OMB Watch's comments on the draft report called for such information as an aid to those who are commenting on the annual draft release.

We are pleased to see that OIRA adopted that recommendation, and we hope OIRA follows through on the related suggestion to make available an electronic docket with links or downloadable copies of analyses and other secondary sources cited in each year's report.

Although this year's report did not announce any new anti-regulatory process changes, OIRA released a separate bulletin announcing a proposed new policy to politicize and burden the production of agency guidance documents just two weeks prior to the release of this report.

2005's Information Bunny Hop

Over the years many have compared politics and policy formation through our democratic process to a dance between competing viewpoints. Unfortunately for public access to government information, the dance in 2005 closely resembled an old-fashioned bunny hop, involving two steps back for every one step forward.

One hop forward.

- **DHS Drops Non-Disclosure Agreements:** In January, the Department of Homeland Security (DHS), under pressure from congressional offices, federal employee unions and the media, stopped requiring nondisclosure agreements and voided all previously signed agreement for "Sensitive But Unclassified" (SBU) information. DHS officials had been 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 these agreements. Instead, the new directive stresses education and awareness to foster the appropriate level of protection for SBU information.

One hop back.

- **Nuclear Secrets:** In February, the Nuclear Regulatory Commission (NRC) proposed expanding the amount of information that can be withheld from the public as Safeguards Information (SGI). The new regulations broaden the already expansive SGI regulations, allowing the NRC to withhold any information about emergency planning procedures, safety analyses, or defense capabilities.

A hop back forward.

- **Sunshine Week Goes National:** In March, newspapers, TV, and radio helped raise public awareness of pervasive government secrecy and promoted 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 on how citizens use open records laws to make their communities safer. A also poll found that seven in 10 Americans were concerned about excessive government secrecy.

One hop back.

- **Court Dismisses Energy Taskforce Case:** A federal appeals court judge dismissed a lawsuit seeking to uncover secret documents from Vice President Dick Cheney's energy task force on May 10. 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, maintained 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 ruling ended the long legal battle to disclose the energy task force records.

One hop forward.

- **FOIA Focus in Congress:** In 2005 Congress focused a great deal of attention on improving implementation of the country's most fundamental public access law--the Freedom of Information Act (FOIA). Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) introduced several pieces of bipartisan legislation to speed up the FOIA process, clarify that FOIA exemptions in new laws must be explicit, and establish provisions such as an interagency panel to improve FOIA implementation across government. Both the Senate in March and the House in May held their first hearings on FOIA in years.

Two hops back.

- **White House Rewrites Global Warming:** In June a whistleblower revealed that a former oil industry lobbyist, Philip Cooney of White House's Council on Environmental Quality (CEQ), changed language in government climate change reports to undermine scientific findings on climate change and present it as less problematic. The incident highlights the White House's increasing interference with agency reports and analysis throughout 2005. Shortly after the issue came to light, Cooney resigned from CEQ and took a job with Exxon.
- **First Known Piece of CII:** In June, a request from a New Jersey resident to access to a township's electronic map of land parcels brought to light the first public example of "Critical Infrastructure Information" (CII). The Brick Township Municipal Utilities Authority denied the resident's request for information from the land parcels database, which is used for property taxes, because the data had been accepted by DHS under the CII program. While the municipal utility refused to grant the resident free access to the database, they publicly offered paper copies of the maps for $5 a piece, leading some to speculate that the CII program is being misused to ensure revenue for government collected information.

One hop in place.

- **Data Quality Act Hearing:** The Government Reform Subcommittee on Regulatory Affairs held the first congressional hearing on the Data Quality Act (DQA) on July 20. The hearing reviewed implementation of the DQA at three federal agencies and heard from interested stakeholders, including industry associations that have filed data quality challenges and public interest groups seeking the policy's repeal. Agencies appeared supportive of the DQA, but did acknowledge that DQA efforts have diverted agency

resources and that requests have grown difficult to respond to in a timely manner. At the conclusion of the hearing, Chairman Candice Miller (R-MI) appeared supportive of broadening the DQA to include judicial review, a provision that industry has long wanted.

A hop back.

- **The NEPA Lockout:** In 2005, House Resources Committee Chairman Richard Pombo (R-CA) established a congressional task force to review and make recommendations on how to "improve" the National Environmental Policy Act (NEPA). As the task force held hearings around the country, however, environmentalists and ordinary citizens found it difficult to participate. The task force held four "public" hearings during the summer, soliciting input primarily from industry interests that view NEPA's environmental and health requirements as burdensome. Many in the public interest and environmental communities contend that, after nearly 200 NEPA supporters swamped the first task force hearing in Spokane, Washington, Pombo intentionally withheld details on hearing locations and times until the last minute to silence NEPA supporters.

One hop forward.

- **Cities Take On Chemical Security:** After several chemical accidents at U.S. facilities and en route to or from U.S. facilities in 2005, cities across the nation began compensating for the federal government's inability to establish chemical security by enacting their own local laws. The District of Colombia, Boston, Cleveland, Chicago, and Baltimore all pursued local legislation to mitigate the risks of shipping hazardous materials through their heavily populated centers. The District of Columbia became the first U.S. city to pass legislation banning hazardous shipments passing through its city limits destined for other locales in 2004.

One hop back.

- **Courts Halt D.C. Chemical Security Law:** Unfortunately, after a rail company and the Department of Justice challenged the D.C. law, the courts stayed implementation of the ordinance. Despite the court decision, several cities continue to move forward with their own chemical security legislation. With four full years having passed since the terrorist attacks of 9/11, the federal government has still taken no action to protect urban centers from threats posed by hazardous material shipments.

One nomination hop back.

- **Supreme Secrecy:** In September 2005, the Senate held a hearing on Judge John Roberts' nomination to replace William Rehnquist as Chief Justice of the Supreme Court. Despite full disclosure being of the utmost importance to the Senate's difficult task, the White House continually fought against releasing documents from Roberts' time as White House associate counsel during the Reagan administration. Not only were these critical documents to ascertaining the appointee's ability and qualifications withheld initially, when they were eventually released from the Ronald Reagan library, they revealed that

Roberts supported government secrecy and strenuously avoided any implication that the White House had an obligation to provide information to anyone, including Congress.

Two big environmental hops back.

- **Hurricane Katrina:** Both immediately following Hurricane Katrina and as long-term recovery moves forward, the EPA and other agencies responsible to protecting public health have failed to fully inform citizens in a timely manner of the potential dangers from releases of toxic and hazardous materials that had been stored in and around New Orleans. The insufficiency of EPA's testing for environmental hazards, the absence of informative health warnings for recovery workers and returning residents, and its failure to provide protective equipment all clearly point to the agency's inability to accomplish its goal of protecting public health and the environment. As environmental and health groups have continued to press for more information on the agency's testing results, EPA continues to withhold much of this information.
- **Right to Know Less:** In September 2005 EPA announced plans to significantly roll back reporting of toxic pollution under the Toxics Release Inventory (TRI) program. The TRI program has been the nation's premier tool for notifying the public about releases of toxic chemicals for almost 20 years. The TRI annually provides communities with details about toxic chemicals released into the surrounding air, land, and water. Despite the program's widely hailed success, however, EPA has proposed several changes to reduce the amount of paperwork companies must file, each of which would dramatically cut information available to the public on toxic pollution. A broad coalition of environmentalists, labor unions, first responders, state officials, community groups, health professionals, and others have begun an extensive campaign to oppose the changes.

A hop forward with a hop back.

- **State Biomonitoring Arrives, Almost:** After three years of work to pass a biomoniting bill in the California legislature, this year lawmakers narrowly approved a bill. The state bill represents the next generation in the public's right to know about environmental impacts. Governor Arnold Schwarzenegger, however, vetoed the bill on Oct. 7. The Healthy Californian's Biomonitoring Program (SB 600) would have established America's first state-wide program to assess levels of human chemical exposure.

Two hops back.

- **USA PATRIOT Act, Still:** Several powers granted to government agencies to secretly search, seize and collect information on groups and citizens under the USA PATRIOT Act received a great deal of congressional attention in 2005. Many of the most controversial provision were set to expire at the end of the year, including a section that allowed law enforcement agencies to collect records from libraries and bookstores. Lawmakers in the House and Senate negotiated a compromise that extends the provisions four years with only modest modifications of the law's far-reaching powers and sweeping secrecy.
- **Ultra-Secret Agency:** In November, Sen. Richard Burr (R-NC) introduced legislation that would create the Biomedical Advanced Research and Development Agency

(BARDA) to research and develop strategies to combat bioterrorism and natural diseases. The bill would, for the first time ever, completely exempt the new agency from all open government laws. Burr has already begun negotiations with open government advocates to correct the legislation and ensure that the agency will have some level of public accountability and transparency. The introduction of a bill with such overarching and broad secrecy, however, demonstrates just how far open government advocates still must go to instill the principles of openness and accountability into our government and its leadership.

Secrecy Endangers Biodefense Effort

The ultra-secretive agency proposed to lead the nation's effort against biological attacks and national threats posed by pandemics may have to be less secretive if Congress is going to give its approval. You read it right: Congress is balking at approving too much secrecy.

Legislation proposed by Sen. Richard Burr (R-NC) would create the first federal agency completely exempt from the Freedom of Information Act (FOIA), giving it a dubious distinction that not even the Central Intelligence Agency, which is subject to FOIA, would share. In addition, the agency's advisory committees would be exempt from the Federal Advisory Committee Act (FACA), shielding the agency from the very law designed to ensure advice is made with integrity and without undue influence of any special interest. Such exclusion is ironic given other controversial sections of the bill, such as provisions that would give liability protection to drug makers who might create drugs that do medical harm.

The new Biomedical Advanced Research and Development Agency (BARDA) would coordinate the federal government's efforts to address biological, chemical and other threats to public health and would reside within the Department of Health and Human Services. The new agency would fund research and coordinate a national effort to make the country safer from such threats. Currently, these efforts are scattered among several federal agencies.

The unprecedented secrecy, as written into the bill passed out of committee on Oct. 17, received public criticism that the bill's sponsors had not anticipated. They have now promised a "do-over" to make the agency transparent and encourage the open exchange of scientific information.

Congressional staff will sit down on Dec. 14 with open-government advocates and members of the scientific community to craft better language. Open government advocates contend the current exemptions under FOIA and FACA, from which Burr carved deep loopholes for BARDA, are sufficient to protect any sensitive information the new agency may handle. These groups are hopeful the bill's sponsors can better codify specific circumstances and situations which would warrant further secrecy and thus abandon the blanket secrecy of the original text.

Patriot Act Negotiations Come to a Head

With the deadline fast approaching for renewal of USA PATRIOT Act powers, lawmakers appeared unable to reach an agreement. Senate Democrats are proposing to give Congress

another 90 days to negotiate before controversial provisions expire this year, while Senate Majority Leader Bill Frist (R-TN) is calling for renewal before Congress leaves this year.

The House and Senate each passed versions to reauthorize the USA PATRIOT Act, which expires on December 31. The two versions had vastly different provisions that needed to be reconciled in a conference between the two chambers. The Senate version, which passed unanimously, had modest, but important, changes to key provisions affecting civil liberties. The House version did not.

The House-Senate conference on the bill appeared to be quite contentious. The public fight appeared to be over the length of reauthorization for three sections of the bill dealing with government access to business records (including libraries and booksellers in Section 215), roving wiretaps (Section 206), and surveillance of "lone wolf" suspects who have no obvious link to terrorists organizations (added to the Foreign Intelligence Surveillance Act).

Amidst last-minute arm-twisting, Sen. Arlen Specter (R-PA) appeared to be the key swing as he pushed his Republican colleagues in the House to accept the Senate's language that extends these provisions for four years instead of the seven- or 10-year extensions sought by House negotiators. The White House relented and House and Senate Republicans put forth a conference agreement, without Democratic support. The Republican conference agreement contains four-year extensions and modest changes elsewhere, including slight rule modifications that fell far short of the Senate version, under which federal agents can secretly search homes and businesses.

A bipartisan coalition of Senators, as well as a coalition of pubic interest groups, have been critical of the conference agreement, maintaining that the modified rules are not nearly enough to protect civil liberties, and do not meet the bipartisan standard set by the Senate when it passed its version. The six Senators--Larry Craig (R-ID), Dick Durbin (D-IL), Russ Feingold (D-WI), Lisa Murkowski (R-AK), Ken Salazar (D-CO) and John Sununu (R-NH)-- released a statement explaining, "We are gravely disappointed that the conference committee made so few changes to the Patriot Act reauthorization package..." and threatening a filibuster of the conference report if it is not fixed.

The public interest coalition argues that the conference agreement leaves the law open to abuse and "fishing expeditions" into the private records of innocent Americans, instead of focusing on suspected terrorists. Specifically, the coalition has raised concerns over three issues:

- The Library Records Provision (Sec. 215) -- This provision allows the government to obtain a secret court order for any records or items from libraries and booksellers. The conference agreement does not require the government to show a connection between the records being sought and a suspected terrorist. Moreover, the target of the investigation may not be suspected of having any link to terrorism, and the recipient of the court order has limited rights to challenge it. The Senate version of the bill required the government to show a connection when seeking such court order in order to stop "fishing expeditions" that unduly invade privacy.
- Sneak and Peak Provision (Section 213) -- This provision allows delayed notice of searches of homes and businesses. The conference agreement allows a 30-day delay in providing notice of a search. Prior to the Patriot Act, a maximum of seven days could

transpire before notification and the Senate version would have reinstated that requirement. Such sneak and peak searches are not limited to persons or businesses with links to terrorism.

- National Security Letters (Section 505) -- This provision expanded the power of the FBI to issue National Security Letters (NSLs) to obtain records from businesses about their customers. This includes credit reports, records from Internet Service Providers, and financial records. Recently the *Washington Post* revealed that NSLs were used roughly 30,000 times, many times more than had been previously disclosed. The conference agreement does not require court approval or a connection between the requested records and a suspected terrorist, and limits rights to challenge the action.

Other civil liberties issues have been raised concerning the conference agreement. On Dec. 12, the ACLU expressed concern that the agreement would give the Secret Service expanded authority to charge protesters accused of disrupting major events. Also on Dec. 12, several Democratic Senators and members of the House proposed that Congress temporarily extend the current Patriot Act powers for three months to work out a good compromise on these contentious issues. Such an extension may give lawmakers the opportunity to better understand how current powers are used. However, it appears that congressional leadership is uninterested in this approach and, along with the White House, want the bill reauthorized now.

The House is expected to pass the conference agreement next week. It is unclear whether the Senate leadership has the 60 votes necessary to cut off the filibuster by the bipartisan group of six Senators.

For more on the USA PATRIOT Act, see www.aclu.org.

Fight to Save the Toxics Release Inventory Heats Up

Since the Environmental Protection Agency (EPA) announced plans on Sept. 21 to reduce TRI chemical release reporting, the agency has faced an ever-growing flurry of criticism and opposition. The program receives tremendous support, because for nearly 20 years it has been an essential tool in addressing environmental and public health concerns. In response to EPA's proposals to cut reporting on TRI chemical releases, in order to eliminate paperwork for reporting companies, individuals and organization have expressed outrage and begun to rally around the program.

The National Environmental Trust hosted a Dec. 1 press conference where public health professionals, state officials, and first responders described how the proposals would among other things hamper planning for emergencies and hinder the fight against cancer. Michael Harbut, M.D., of the Center for Occupational and Environmental Medicine at the Barbara Ann Karmanos Cancer Institute, explained, "We know that a lot of chemicals regulated under the TRI program cause cancer. To reduce the amount of information available to cancer researchers is just plain terrible."

Several groups used the occasion to unveil reports critical of EPA's management of the TRI program of late. U.S. PIRG coordinated press events and report releases of "Undisclosed

Pollution" in 20 states describing the state-level impact of EPA's proposals. OMB Watch released a report, entitled "Dismantling the Public's Right to Know," that details EPA's systematic weakening of the TRI program. According to Sean Moulton, senior policy analyst with OMB Watch, "The current EPA leadership seems more concerned with sparing companies a bit of paperwork than it is with protecting the public."

Organizations are also making their opposition to EPA's proposals known to members of Congress. More than 100 regulatory, emergency, environmental, labor and social investment groups have signed onto a letter asking Congress to ensure that EPA abandons TRI cutbacks. According to the letter, the groups "oppose the EPA's recent proposals to reduce the amount of information collected and made public under the Toxics Release Inventory" and "urge Congress to call for the EPA to immediately withdraw these proposals."

A bipartisan letter from several U.S. Senators sent to EPA Administrator Stephen Johnson points to congressional leaders' concerns over EPA's plans. According to the letter, "We are concerned that alternate year reporting would deny citizens up-to-date information about local toxic releases, reduce incentives to minimize waste generation, withhold important information from public health agencies, and undermine the ability of States and EPA to guide their compliance assistance and enforcement priorities." The letter was signed by Sens. Jim Jeffords (I-VT), Barbara Boxer (D-CA), Ron Wyden (D-OR), Hillary Rodham Clinton (D-NY), Barack Obama (D-IL) and John McCain (R-AZ).

The proposed cutbacks are receiving increased coverage in media outlets across the country. Newspapers have printed more than 60 stories on the proposals, and at least 10 papers editorializing against the cutbacks. A Dec. 10 *Toledo Blade* editorial entitled "Keep Toxic Release Law" states, "One of the most successful anti-pollution measures in the United States over the past two decades is the Toxics Release Inventory. Congress should put a stop to a plan by the Bush Administration to substantially weaken this important public information law."

In a related development, EPA Assistant Administrator Kimberly Nelson of the Office of Environmental Information has announced her departure from the agency at the start of 2006. Nelson is seen by many as the chief proponent inside the agency of the TRI reporting rollbacks. A Dec. 9 *Inside EPA* story maintains that "EPA information chief Kim Nelson's impending resignation could undermine the agency's ability to finalize controversial changes to the Toxics Release Inventory (TRI) her office proposed this fall..."

The EPA's public comment period on the proposals closes Jan. 13. Those wishing to weigh in on EPA's plans can use OMB Watch's TRI Action Alert to send comments to EPA and Congress. To find out more about the proposals, please visit OMB Watch's TRI Resource Center.

Failing Grade on Chemical Security

As the former 9/11 Commission issued failing grades on the government's preparedness for another terrorist attack, a new draft of chemical security legislation is being circulated by Sen. Susan Collins (R-ME). The bill establishes authority for the Department of Homeland Security to regulate the security plans of U.S. chemical plants. Unfortunately, if its current language remains, the bill will fail to make communities safer from either terrorist attacks or chemical accidents.

The draft bill falls short on several important issues--issues that should be addressed before the bill is formally introduced:

Safer Technologies
The bill requires companies to submit security plans to the Department of Homeland Security (DHS) for review and certification. While the bill mentions safer chemicals and technologies among suggested security provisions, it does not require companies to consider these obvious steps for reducing the risk chemical facilities pose to neighboring communities. Any substantial chemical security effort should require companies to conduct such a review as a first step. Safer chemicals and technologies could eliminate the need to implement extensive security measures to prevent a terrorist attack or establish complex emergency response plans to address a chemical accident.

Universal Requirements
The draft bill also fails to create strong universal governmental standards for chemical facility security plans. Instead of establish specific minimum components that all security plans should include, the draft bill currently allows companies to pick which items to include in the plans they submit to DHS. Universal requirements would ensure that company security plans are in accordance with basic chemical safety practices and procedures. The bill also contains overly broad provisions that encourage DHS to accept voluntary industry association programs, which could create an uneven implementation of the law and leave vulnerabilities unaddressed. The final bill should establish standard components that each vulnerability assessment and security plan must contain at a minimum. The bill should make clear that assessments from alternative programs will be evaluated against these standards to ensure this baseline of safety and security is met.

Accountability
Collins' draft bill fails to establish any public accountability safeguards to ensure that security plans meet surrounding communities' high standards and are being implemented properly. Obviously, the bill should not allow specific security plans or information directly taken from them to be publicly disclosed; it should contain, however, provisions ensuring that the public remains adequately informed. First, the bill should include a savings clause that explicitly states that information currently collected and made public under other laws will not become secret under this new law. Second, the bill should include two proactive requirements to inform the public. On the facility-specific level, without disclosing any of the details of the actual plans, DHS should make public the certification status of all facilities required to report under this law. On the aggregate level, DHS should be required to release an annual report on the overall status of the nation's chemical security. Such an aggregate report would provide a method to assess the law's efficacy in addressing security problems, while avoiding disclosure of any particulars that could leave individual plants more vulnerable. Third, the bill should include a mechanism for officials, workers, first responders and others outside the company to notify DHS about problems they learn about at a particular plant. Finally, the bill should clearly explain that official whistleblowers will be protected from any criminal or civil penalties.

Floor, Not Ceiling
The most troubling aspect of the draft chemical security bill, however, is not what it's missing, but rather what it's included: a new provision that allows preemption of state laws. The draft bill would prevent states from establishing laws that provide greater security and safety

requirements. Interestingly, this provision appeared, seemingly out of nowhere, shortly after New Jersey passed a bill that would require best practices at chemical facilities and would require 43 exceptionally dangerous sites in the state to implement safer practices. The federal legislation should provide a floor, *not a ceiling*, for chemical security, thereby allowing states to enact stronger chemical security protections as they see fit. This dangerous provision should be dropped from the draft bill and replaced with a clause that clearly states that the federal law does not preempt states from enacting their own chemical security legislation.

A series of discussions have taken place regarding the Collin's bill since the draft version was leaked. Collins reportedly is intent on introducing the bill, which would be referred to the Senate Committee on Homeland Security and Government Affairs, a committee Collins chairs, before Congress breaks for the holidays. It is unclear how many of the above concerns can be addressed in such a short timeframe. What is clear is that this legislation needs significant improvement in all these areas if it is to carry out its intended purpose of addressing the shortcomings in U.S. chemical security pointed out by the 9/11 Commission that undermine national security and the safety of communities nationwide.

Year in Review: More Poor Budgetary Stewardship

When it came to tax and budget issues, 2005 was an overwhelmingly disappointing year in the nation's capital. Facing long-term challenges and numerous obstacles, both President Bush and the U.S. Congress seemed to suffer from a severe case of disconnectedness from the fiscal and economic realities that should have moved them toward more rational, healthy tax and budget policies.

The country is on an unsustainable economic path, largely due to tax cuts aimed at benefiting the wealthy and corporate elites, combined with the long-term concerns of an aging population and shamelessly exorbitant spending on defense and homeland security. The federal budget, a blueprint for our national priorities, sends the wrong message and will have the wrong results. We now have an economy that is chugging along while creating a chasm between the rich and the rest. While Congress finagles more tax cuts, people continue to suffer in the economic aftermath of Hurricane Katrina. Long-term investments in our people, environment and infrastructure go largely ignored.

Below is a summary of the year's continued misguided priorities, irresponsible and failed policies, and far-too-frequent missed opportunities. The American people should expect more from its elected officials, and those leaders should be able to deliver better ideas, more principled leadership, and more tangible results than that have this year. Let's hope 2006 brings these things and along with them a more promising future for America.

Budget/Appropriations

A Radical and Irresponsible Budget
President Bush sent his proposed Fiscal Year 2006 (FY 06) budget to Congress on Monday, Feb. 7, in a package that was one of the most special-interest-driven and fiscally bleak budgets presented in recent memory. The budget called 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 proposed cutting a variety of programs serving low- and middle-income Americans. The budget called for a trade-off that would be both unfair and unwise, and many of his proposals were adopted by Congress with little informed debate, inclusion of alternative views, or compromise.

Negative Reactions to Budget Come From Both Sides of the Aisle
President Bush's FY 06 Budget: An Overview
Service Cuts for the Poor to Finance Tax Cuts for the Rich
The Ultimate Special Interest

Congress' Continued Failure To Do Its Job
Congress failed to completing the Fiscal Year 2006 appropriations bills before the start of the fiscal year on Oct. 1, causing the government to be funded through a stark continuing resolution (see below) that under-funds many government programs. The consistent inability of Congress to complete its most core duties in a timely fashion points to larger problems not only with the political environment in Washington, but also to the day-to-day choices and priorities identified by the leaders of the House and Senate.

Senate Needs to Follow House's Lead On Appropriations to Avoid Omnibus
Congress' Reconciliation Work Crowds Out Appropriations

Budget Process

One-Sided PAY-GO
The administration proposed and Congress adopted 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 one another. No comparable fiscal restraints were adopted for tax cuts, and Congress continued to cut taxes primarily for the most wealthy, even after Hurricane Katrina laid bare entrenched, dehumanizing poverty that remains far-too-common in America today. The Senate voted twice to reinstate true PAYGO rules and failed both times by a single vote.

PAY-GO Narrowly Defeated in Senate Reconciliation Bill

High-Jacked Reconciliation Process Expands Deficits
In its budget resolution, Congress called for a bill that would allow for special fast-track protections for $34 billion in cuts to mandatory programs and more than twice that amount in additional tax cuts. Not only would this bill increase the deficit contrary to the original purpose of the reconciliation process, but also showcase the cruel combination of program cuts for low- and middle-income Americans and tax break handouts to the wealthy.

Congress Passes Irresponsible Budget Resolution
Tax Cut Measure Guarantees Increasing Deficits

Crafty Continuing Resolution Furthers Spending Reduction
The continuing resolution (CR) still in place for part of the government as constructed by Congress funds government programs at the lowest conscionable level. Because of its unusual

structure, the CR has resulted in the dramatic under-funding of programs, setting spending levels at the lowest of three possible levels: the enacted totals for Fiscal Year 2005 (FY05), or either of the completed levels of the House or Senate FY06 spending bills. The structure also resulted in funding levels and policies being enacted that had only been debated in and passed by one chamber of Congress, thereby bypassing part of the constitutional process by which money is appropriated from the Treasury and leaving less opportunity for stakeholder input. At the time the CR was passed, only two appropriations bills had been signed into law.

Congress Passes Stark Continuing Resolution; Many Programs Will See Funding Cuts

Dishonest Budgeting and Deceptive Analysis

The Bush administration has continued to promote dishonest, and manipulative budget practices that have decreased the transparency of the federal budget and altered the debate about important long-term policies. This includes skewing budget analysis in order to reinforce and support political goals, omitting certain costs of proposed policies and actual war costs from budget analysis, and assuming the extension of the president's tax cuts. In doing so, the White House has mislead Congress and the American people about the fiscal health of our country and our capacity to meet current and future financial obligations.

Bush, Congress Hide True Cost of Permanent Tax Cuts
OMB Continues to Manipulate Budget Projections
Analysis of Misleading OMB Mid-Session Review
Bush Criticized for 'Dishonest' War Budgeting

Economy and Jobs

Congress Fails to Increase Minimum Wage For Eighth Straight Year

Despite numerous efforts to do so in the Senate this year, Congress will close out its eighth straight year without passing an increase to the federal minimum wage. Many states, tired of waiting for leadership from the federal level, have instituted their own minimum wage increases.

Congress Rejects Competing Minimum Wage Amendments
Florida, Nevada Vote to Raise Minimum Wage by $1
New York Joins States Raising Minimum Wage

Economy Improves, Fails to Benefit Most Americans

Despite better job growth, stronger economic indicators, and a positive year for the stock market, most Americans families continued to see little improvement in their household financial situations and prospects. The government reported more Americans living in poverty (over 1.1 million more), more Americans lacking health insurance (over 800,000 more), still more households experiencing food insecurity (over 2 million more), and an unprecedented fifth straight year of stagnant wages. While benefiting those already well off, current economic policies have left the vast majority of American households spinning their wheels or moving backward.

Despite Recovering Economy, Poverty on the Rise for Fourth Straight Year
Service Cuts for the Poor to Finance Tax Cuts for the Rich

Estate Tax

House Continues to Undermine Common Good

For the third time in four years the House of Representatives passed a bill to permanently repeal the estate tax. The irresponsible and dangerous bill will undermine the public sector's ability to create and sustain opportunity for generations to come.

House Again Passes Irresponsible Estate Tax Repeal

Fate of Estate Tax Rested With Senate

Once again, the fate of the estate tax was left up to the Senate where a House-passed repeal bill had died in 2003. Despite a vigorous push by pro-repeal corporate interests, Senate GOP leaders was unable to bring the estate tax issue forward for a vote. With a vote scheduled on full repeal in September, Hurricane Katrina struck, knocking the issue off the Senate agenda for the remainder of 2005.

Circumstances Force Frist to Postpone Estate Tax Vote

Government Performance

PART Enters Third Year of Futility in Rating Federal Programs

The Program Assessment Rating Tool, the White House's tool for evaluating federal programs, entered its third year of incorporation by the Office of Management and Budget. Unfortunately, PART has thus far failed as an unbiased, useful mechanism to grade programs across the federal government, instead proving itself to be but a thin veneer of accountability and good government, thrown up to deflect attention and criticism from controversial, politically biased judgments. In this sense, the PART mechanism itself, ironically, continues to fail to demonstrate results and has not garnered the amount or breadth of support necessary for it to impact the makeup of the federal government.

All PART of the Game

PART Backgrounder

Results/Sunset Commissions Proposals Introduced in Congress

The White House submitted a legislative proposal to Congress that would imperil the balance between the executive and legislative branches, by concentrating power in the White House free of democratic accountability, and expose long-standing public protections to powerful special interests and industry insiders. The proposal would jeopardize future program funding and give the executive branch the power to reorganize federal offices and departments.

White House Power Grab Puts Public at Risk

Federal Tax Policy

President's Tax Reform Panel Spends Year Producing Recommendations

The President's Advisory Panel on Tax Reform submitted its report to Treasury Secretary John Snow recommending ways to make the tax code simpler, fairer, and more pro-growth. The recommendations had been in the works since January, when President Bush established the panel through an executive order. Fortunately, the long-awaited recommendations turned out not to be the rubber stamp for conservative regressive tax policies many observers expected, but instead represent a mix of ideas that confront the difficulty of enacting tax reform, not only in a harshly divided political environment, but also with a deeply unhealthy federal budget. Unfortunately, however, the recommendations are unlikely to be enacted as proposed, as the administration is expected to cherry-pick the aspects of the proposals it prefers for its Treasury recommendations to be released in early 2006.

Tax Panel Offers "Tough Love" Tax Reform Recommendations

Congress and Administration Continue Obsession with Tax Cuts

From reconciliation instructions to Social Security overhaul proposals, all the way to hurricane

relief and recovery efforts, the administration and Congress remain focused, to the point of mania, on budget-busting tax cuts. No matter the challenge faced, our national leadership appears to have found the answer: a tax cut. Yet most of their proposals give extraordinarily disproportionate benefits to the wealthy and will fundamentally erode what little security the government can give its citizens, by exacerbating the long-term fiscal imbalance currently in place in our federal budget.

Federal Tax Policy Resources

State Fiscal Policy

Amid Misguided Efforts to Shrink State Governments, Colorado Rebels
With over 20 other states considering proposals to severely limit state spending and institute automatic tax cuts, the citizens of Colorado voted to overturn its "Taxpayers Bill of Rights" this year because of the detrimental impact the law has had on public structures and Coloradans' quality of life. This victory for common sense fiscal policies has already influenced efforts underway in other states and, with luck, will continue to stall the efforts of anti-government ideologues to institute similar laws in other states in 2006.

Despite Colorado's Disaster, More States Consider Restrictive Budget Rules
TABOR: A Losing Proposition For Colorado

Tax Cuts: The Final Melee

Continuing its trend of bucking compassion and fiscal responsibility in lieu of tax cuts for the wealthy, the House of Representatives voted last week to pass the $56 billion reconciliation tax bill. This vote, which came on the heels of the vote to *save money* by slashing mandatory spending, culminated what seemed to be a month of illogical, hypocritical voting. Unlike the Senate tax bill, which centered on extending Alternative Minimum Tax relief (which is increasingly hitting upper middle-income taxpayers), the House tax bill was centered on a two-year extension of low tax rates on capital gains and dividends, the benefits of which will go predominately to the super wealthy. It is no wonder Rep. David Obey (D-WI) said that House actions "makes Mr. Scrooge look like Mother Teresa."

The House voted mainly along party lines, 234-197 in passing this bill. Nine Democrats took the plunge and voted to increase the deficit while providing tax breaks for the wealthy, along with all but three Republicans. Those Democrats were Reps. John Barrow (GA), Melissa Bean (IL), Dan Boren (OK), Robert Cramer (AL), Henry Cuellar (TX), Lincoln Davis (TN), Bart Gordon (TN), Jim Marshall (GA), and Mike McIntyre (NC). The three Republicans voting against the tax cuts were Reps. Sherwood Bohlert (NY), Jim Leach (IA), and Fred Upton (MI).

This bill, according to the Joint Committee on Taxation, will extend through 2010 the 15 percent capital gains and dividends tax rate at a cost to the federal government of $20.6 billion. Robert Reich, former Secretary of Labor under President Clinton, pointed out in his recent article Class Warfare With Taxes that the House's actions speak volumes on where the loyalties of its members lie, particularly in light of their choice to cut taxes on capital gains while the Senate used the reconciliation process to extend AMT relief. Reich says:

Most of the benefits of the House's proposed extension of the dividend and capital gains tax cuts would go to the top one percent of taxpayers, with average annual incomes of more than $1 million. Most of the benefits of the Senate's cut in the AMT would go to households earning between $75,000 and $100,000 a year, who would otherwise get slammed.

Reich goes on to point out that most likely, capital gains and dividends tax cuts *as well as* an extension of AMT relief will end up as part of final bill negotiations. He calls this skilled political maneuver an "elegant compromise" by Congress to pass both measures while exploding the deficit. Congressional Republicans say the costly tax cuts are needed to "grow the economy" and thus indirectly help people in need, but at the same time they slash mandatory spending on proactive programs that *directly* help people in the name of deficit reduction. National budget deficits need to be dealt with, but by a combination of reducing spending and rolling back irresponsible tax cuts--not the reverse Robin Hood tactics of this Congress.

House Passes Additional Tax Cuts

On Dec. 7, the day before the House passed the tax reconciliation bill, its members voted on three other tax cuts, bringing the total amount of tax cuts passed during these two days to $94.5 billion. As Concord Coalition executive director Robert Bixby aptly stated:

I don't think it makes any sense to go through all the difficulty they just went through with the budget-cutting bill, then give it all back in tax cuts. If they want to cut taxes, fine, but they are going to have to cut spending by at least that much to help the deficit, and clearly they are not willing to do that. They have to start looking reality in the face.

The bills passed were:

- H.R. 4096, which passed by a vote of 414-4
  This bill extends AMT relief by one year at a cost of $31.2 billion. It was passed outside of the reconciliation process so that House GOP leaders would have enough room in the reconciliation tax bill to extend the costly capital gains and dividends tax cuts.

- H.R. 4440, which passed the House by a similarly large margin: 415-4.
  The bill, which will cost $7.1 billion over five years, will provide tax breaks for businesses in the "Gulf Opportunity Zone." Because of the work of Frank Wolf (R-VA) and other House members, GOP leaders exempted casinos, country clubs, hot tub facilities, liquor stores, massage parlors, golf courses, racetracks and tanning salons from the tax breaks.

- H.R. 4388 , which will extend a provision allowing members of the military to use their combat pay to claim their earned income credit
  The bill will cost $153 million.

Each of the bills passed with broad bipartisan support and little discussion of how the deficit will be impacted. The budget deficit is projected to reach between $331 billion and $350 billion in Fiscal year 2006 and remain above $300 billion each year through 2010, when most of Bush's tax cuts are set to expire. If the tax cuts are extended, these projected deficits will undoubtedly skyrocket above that figure. (In related news, the Treasury Department announced that

November's deficit of $83.1 billion was the largest ever for that month.) When Congress will begin to face reality and enacting tax policies that will put the country back on track is unclear, what is not is that such a policy realignment is becoming increasingly imperative to face the difficult long-term fiscal challenges looming in the not-so-distant future.

Budget Cuts: The Final Showdown

The Senate's return to Washington this week means that conferees have begun final negotiations on the budget reconciliation bill. The two versions of this bill, which aims to cut entitlement spending over five years, contain vast differences, particularly with respect to cuts to Medicaid, student loans, and food stamps. Legislative work on the drafting and passage of the reconciliation bill not only proved to be an obstacle to Congress' appropriations work, but has already extended the congressional session as members have engaged in a showdown over certain contentious provisions, including exploratory drilling in the Arctic National Wildlife Refuge (ANWR), funding cuts to Medicare, Medicaid and popular social welfare programs such as food stamps.

Although Rep. Roy Blunt (R-MO), the Majority Whip who is currently acting as House Majority leader, mentioned last week that the House might finish its work as early as this Thursday, House aides were told to keep their schedules open through Dec. 23. This unusually long extension would, at least in part, be due to what promises to be a serious face off over ANWR language in the final budget bill.

The House only narrowly passed its version of the budget bill, 217-215 last month. GOP leaders struggled for weeks before they were able to muster enough votes to pass the bill and ultimately needed to remove the ANWR language to appease House moderates.

While a number of these House moderates will not support a final conference report that includes ANWR language, Senate negotiators are applying pressure to have it included. Sen. Ted Stevens (R-AK) is leading this fight, as he and other proponents view the filibuster-proof reconciliation bill as their best chance politically to move forward with what has been a 25-year attempt to open the refuge for drilling.

Stevens has used his position as Defense Appropriations Subcommittee Chairman as leverage by refusing to move forward with the Pentagon budget until he receives assurances that ANWR will be included in the final budget reconciliation bill. He is also touting the recent CBO estimates that have doubled potential revenues from Artic drilling to $10 billion. Half of these "savings" would benefit the federal government, which Stevens claims could mean more sweeteners, in the form of either rebuilding projects for Gulf Coast lawmakers or more than $1 billion in low-income heating subsidies.

In addition to ANWR, lawmakers and Hill staff have been haggling over proposed cuts to Medicare, Medicaid, and foods stamps. Reports indicate that negotiators are moving toward dropping the House's nearly $700 million in food stamp cuts as well as language reauthorizing the nation's welfare programs, but details on cuts to Medicare and Medicaid are still unavailable. While the House proposed no cuts to Medicare and over $11 billion in cuts to Medicaid, the

Senate bill proposed $5 billion in cuts to Medicare and $4.3 billion in cuts to Medicaid. Unlike the House version, the Senate bill spared beneficiaries from feeling the impact of the cuts by aiming them solely at administrative changes. It is still unclear how these differences will be reconciled.

While the House budget bill cuts $50 billion from mandatory programs over five years and the Senate version cuts $35 billion, reports have indicated that the final budget bill will cut around $45 billion from these programs over five years. This figure, ironically, is exactly one-fifth of the amount that President Bush's 2001 and 2003 tax cuts cost the Treasury **this year alone** ($225 billion). These "savings" unfortunately amount to little more than cuts to services for low-income Americans that Congress is turning around and putting into the pockets of the wealthiest taxpayers in the form of tax cuts. Despite congressional rhetoric, these bills will *increase* deficits.

A number of advocacy, community, human needs, labor and watchdog groups have joined together to form the Emergency Campaign for America's Priorities (ECAP), which is dedicated both to fighting the passage of both the tax and budget reconciliation bills, and to holding politicians accountable for voting against the interests of their constituents.

ECAP is holding a number of events both nationwide and in Washington this week, including a prayer circle with Jim Wallis of the Christian social justice group Sojourners. Wallis has frequently referred to the budget as a "moral document" and is staging a rally at the Capitol to protest budget decisions that reward the rich at the expense of the poor. More information can be found at the websites of Sojourners and ECAP.

Congress Staggers Toward End-of-Session Finish Line

To the amazement of many and the pleasure of none, Congress is still in Washington this week trying to wrap up the 2005 legislative session. Only two must-pass bills remain incomplete (the Labor/Health & Human Services and Defense appropriations bills), yet both the House and Senate seem preoccupied with other matters--namely, the spending and tax reconciliation bills, immigration reform, pension overhaul, and reauthorization of the USA Patriot Act, which some consider another must-pass (at least temporarily as it expires at the end of this year). That Congress is still working to complete appropriations bills that should have been finished in September is indicative of a legislature that has struggled to focus on its logical priorities throughout the coarse of the year.

The two remaining appropriations bills have been delayed for a variety of reasons, some foreseen and some not. The House unexpectedly rejected the Labor-HHS bill by a vote of 209 - 224 on Nov. 17. Twenty-two Republicans voted against the bill, citing numerous problems, including the removal of spending earmarks for specific districts.

GOP leaders were initially divided about whether to return to the conference and negotiate changes that would allow the bill to pass the House on its own or combine it with the Defense bill in a year-end "minibus." But the conferees for the Labor bill met the night of Dec. 12 and made small changes and minor modifications to the bill that are believed to ensure its passage.

House negotiators increased funding for rural health care programs by $90 million and removed a provision barring Medicare coverage for erectile dysfunction drugs such as Viagra. Seven House Republicans cited the rural health care cuts as the primary reason they voted against the bill in November.

Rep. David Obey (D-WI) criticized the amended conference report for continuing to under-fund priorities within the bill and simply reshuffling the configuration of funds to win the necessary number of votes. Obey released a statement maintaining, "This new version simply moves around a small amount money to make modest restorations in a few health programs by making deeper cuts elsewhere. The new bill retains most of the fatal flaws of the first. It is still a bad bill." The House is expected to vote as early as Wednesday to approve the revised conference agreement.

The Defense bill has had its own challenges to passage, the most visible being a provision to put restrictions on treatment of detainees overseas. Sen. John McCain (R-AZ) sponsored an amendment to the Defense bill that would prohibit "cruel, inhumane, or degrading" treatment of detainees by U.S. military personnel. Both the White House and top-ranking House Republicans oppose McCain's language, but GOP congressional leaders are optimistic about reaching a compromise on the language by the end of this week.

Aside from the detainee provision, it is still unclear whether an across-the-board cut of between 1 and 2 percent to all discretionary spending will be included on the Defense bill. House conservatives are seeking the cut to help offset the cost of Hurricane Katrina emergency spending, but others in the GOP caucus want to exclude defense accounts from the cut, thereby reducing the savings by approximately 50 percent.

Still more troubling, these cuts are being used as a bargaining chip with conservatives in the House. In order to reach consensus with the more moderate Senate and hold House conservatives in line on budget reconciliation cuts, House leaders are holding off on setting the level of an across-the-board cut until negotiations are complete. This gives them the flexibility to lower the mandatory cuts in reconciliation to appease moderate Republican Senators, but still hold on to conservatives in the House by promising to "make it up" to them with a larger across-the-board cut in discretionary spending. This is federal policy making at its most manipulative and cynical.

Moreover, across-the-board cuts are counterproductive. Not only are they too small to make a significant difference for the long-term fiscal problems the country now faces, but they will scale back some of the very same programs and priorities Congress has recognized an increased need for in the aftermath of Hurricane Katrina--especially those providing housing, health care, and nutritional assistance for the most vulnerable.

Congress needs to act on both the Labor and Defense bills before the current continuing resolution expires on Dec. 17, leaving little time for an open and honest debate about the impact of the proposals now being throw around inside the Capitol.

A Year of Attacks on Advocacy, Autonomy

According to a survey of Louisiana residents released last month by Louisiana State University, faith-based organizations and nonprofits got higher marks than government for their hurricane recovery efforts. While not surprising given the abysmal government response, the findings raise larger questions about the role of the federal government in providing resources to the nonprofit sector. Nonprofits face major long-term budget challenges at the federal level that will continue to make it more difficult to serve the people and missions they exist to serve.

Even as tax and budget cuts are starting to have an impact on nonprofits, we see efforts to limit the advocacy voice of groups. This has come in the form of restrictions on the federal grantees' use of private funds, and slippage of election reforms into nonprofit issue advocacy. Moreover, as Congress begins to tackle allegations of corruption, particularly among lobbyists and elected officials, nonprofit advocacy rights may also wind up curtailed.

One bill in the House that included a new affordable housing fund created enormous anxiety and action within the sector. Reminiscent of the 1990s Istook amendments that silenced the advocacy voice of nonprofits, this bill would have restricted nonprofits from receiving affordable housing funds if they engaged in voter registration and other nonpartisan voter activities, lobbying, or produced "electioneering communications" with their private funds. Broader than the Istook amendments, the bill's language would have cut off grants to nonprofits that "affiliated" with any other entity doing such activities. The definition of affiliation contained in the affordable housing provision was so broad as to implicate board members, coalition partners, and those giving certain amounts of money--including state government grants. The provision passed the House in a closely contested vote. Now it is up to the Senate.

While attacks on advocacy such as the affordable housing fund provision took place, Congress stepped up efforts to investigate the governance and oversight of charities. At the encouragement of the Senate Finance Committee, Independent Sector formed a panel to propose recommendations for improving governance and oversight of the sector. Other groups, such as the National Committee for Responsive Philanthropy (NCRP) and the Philanthropy Roundtable, developed recommendations of their own. The NCRP recommendations targeted foundations, and the Philanthropy Roundtable raised concerns about developing new requirements when existing requirements are inadequately enforced. Many groups raised concerns about the impact of such proposals on small nonprofits. As the year draws to a close, congressional proposals for reform will likely be pushed into 2006.

A new area of concern emerged for the nonprofit sector this year: anti-terrorism financing. The Combined Federal Campaign (CFC), the government's workplace charitable giving program, had earlier told applicants that they must check their employees and others they give money to against a variety of terrorist watch lists. In addition to the civil liberties issues involved, major concerns were raised about the accuracy of these lists. The ACLU and 12 other organizations, including OMB Watch, challenged the CFC requirement.

This year, the CFC concluded that eligibility was not contingent on checking terrorist watch lists, but on certifying compliance with anti-terrorist financing laws. The CFC also suggested nonprofit participants follow guidelines developed by the Treasury Department. These guidelines, *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* have faced widespread opposition since their introduction in 2002.

A number of nonprofits and foundations worked with the Treasury Department during 2005 to revise the guidelines. Last week, the Treasury Department issued a new revision that in many respects moves in the wrong direction. The overall effect is to place charities in the role of government investigators and informers, diverting resources from charitable activity to what may prove to be useless information collection and reporting. The revised guidelines reflect a larger problem with the federal government's approach to anti-terrorist financing issues: instead of focusing resources on following investigative leads, the government is collecting vast amounts of information in the hope that something will turn up--in essence, looking for the proverbial needle in a haystack. This does not effectively prevent diversion of funds to terrorist networks.

Many policy developments in 2005 had implications for the nonprofit sector. To follow is an overview of the most influential developments related to OMB Watch's work.

A New Attack on Advocacy: Private Fund Encroachment

- **Legal Services:** Litigation challenging the constitutionality of limitations on the advocacy rights of government-funded nonprofit legal services groups advanced recently with oral arguments before a federal appeals court. On Nov. 2, the U.S. Court of Appeals for the Second Circuit heard oral argument in *Velazquez v. Legal Services Corporation* (LSC), a lawsuit brought on behalf of a coalition of lawyers, indigent clients and New York City officeholders, arguing the government has no business regulating the privately funded, constitutionally protected activities of legal service programs. The attorney for the Justice Department argued that the government had an important interest in having legal services programs focus exclusively on the categories of case the government chooses to fund. This statement cuts to the heart of why the outcome of this case is important to the nonprofit sector. If the federal court upholds the LSC restrictions on the use of the private funds of nonprofit legal services programs, the *Velazquez* case could open the door for an attempt by Congress to limit the use of the private funds of a wide variety of federal grantees, restricting whatever it deems threatening or out of line with its intentions.
- **Affordable Housing Fund Anti-Advocacy Provision:** Restrictions on the use of private funds were not exclusive to the courts. On Oct. 26, H.R. 1461, the Housing Finance Reform Act, passed the House 331-90, despite a provision that disqualifies nonprofits from receiving affordable housing grants if they have engaged in voter registration and other nonpartisan voter activities, lobbying, or produced "electioneering communications." Organizations applying for the funds are barred from participating in such activities up to 12 months prior to their application, and during the period of the grant even if they use non-federal funds to pay for them. Most troubling, affiliation with an entity that has engaged in any of the restricted activities also disqualifies a nonprofit from receiving affordable housing funds under the bill.

  Led by the affordable housing community, nonprofit groups rallied against the appalling anti-advocacy provisions. After losing a close House fight by five votes, the nonprofit sector continues to work to ensure the language is not included in the Senate version. The Senate bill, S. 190, currently does not contain an affordable housing fund provision, to which the anti-advocacy language could be attached.

- **Head Start:** Language in the Head Start Improvements for School Readiness Act, S. 1107, creates new barriers to voter registration by expanding the current prohibition on use of program (i.e., federal and matching) funds to private funds. Moreover, the provision appears to expand the reach of the prohibition from specific Head Start programs to the program's sponsoring agency. This revision has significant implications for how Head Start grantees may use their private funds; as such funds might be considered part of the program. Head Start grantees are already prohibited from using Head Start program funds for any type of political activity, including voter registration.

  A coalition of nonprofit organizations sent a letter to the sponsors of the legislation, Sens. Michael Enzi (R-WY), Edward Kennedy (D-MA), Lamar Alexander (R-TN) and Chris Dodd (D-CT), asking for clarification that the provision only pertains to federal Head Start funds.

Elections and Issue Advocacy

- **IRS Audits:** Recent audits by the IRS as part of its Political Intervention Program (PIP) have led to growing concern and legal confusion about the difference between statements by individuals and statements attributed to organizations, and what constitutes genuine issue advocacy, as opposed to partisan electioneering. In 2004, the IRS initiated the new PIP process to review cases of potential violations on the ban on partisan activities by 501(c)(3) organizations. The process came under fire when the National Association for the Advancement of Colored People (NAACP) was audited because its chair criticized President Bush during a July 2004 convention speech. The concern about muzzling charities picked up steam this year as the pastor of All Saints Episcopal Church in Pasadena, CA announced in November that the IRS was conducting a formal examination of the church's tax-exempt status, due to an anti-war, anti-poverty sermon delivered two days before the 2004 presidential election. (http://www.ombwatch.org/article/articleview/3167/1/403)
- **Federal Election Commission Regulations:** A diverse coalition of charities filed an amicus brief on Nov. 14 in the Supreme Court case *Wisconsin Right to Life v. Federal Election Commission* urging the court to protect the right of nonprofits to broadcast grassroots lobbying communications. The multi-party amicus brief was filed on behalf of 35 conservative and progressive charities (exempt under 501(c)(3) of the federal tax code). The brief argued that the electioneering communications restrictions deny charities the right to petition the government for redress of grievances, which is protected by the First Amendment and that the Bipartisan Campaign Reform Act cannot be constitutionally applied to 501(c)(3) charities because such organizations cannot engage in partisan electioneering.

  The FEC also began a rulemaking proceeding to review the "electioneering communication" exemption for 501(c)(3) organizations, after it was the subject of a court challenge by BCRA's sponsors. The outcome of this rulemaking may have a direct impact on whether charities can engage in issue advocacy 30 days before a primary and 60 days before a general election.

Lobbying Reform

- In response to recent scandals involving congressional travel paid for by a nonprofit serving as a conduit for a registered lobbyist, Congress may be stepping up lobbying reform legislation. Legislation introduced in the House and Senate is aimed at lobbyists in general but may result in changes for charities, particularly in regard to reporting of grassroots lobbying and disclosure of donors.

Anti-Terrorist Financing Issues

- **Combined Federal Campaign:** The Office of Personnel Management's Combined Federal Campaign (CFC), the federal government's workplace charitable giving program, finalized a rule change on Nov. 7 that moved away from its previous requirement that all participating charities check their employees' names and those entities they contribute to against government watch lists.

  The American Civil Liberties Union joined forces with 12 national nonprofit organizations, including OMB Watch, in challenging the requirement to check terrorist watch lists. The suit was put on hold when the Office of Personnel Management (OPM) proposed in March to change the requirement. OPM proposed that participating charities certify that they are in compliance with existing anti-terrorist financing laws. The final rule was consistent with the March proposal: "OPM does not mandate that applicants check the Specially Designated Nationals (SDN) list or the Terrorist Exclusion List (TEL)." Unfortunately, the OPM rule encourages charities to follow the Treasury Department's anti-terrorist financing guidelines (see below).

- **Treasury Department Anti-Terrorist Financing Guidelines:** On Dec. 5, the Treasury Department released a revised version of its November 2002 *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities*. The Treasury Department announcement requested public comment on the revisions by Feb. 1, although the revised guidelines immediately replace the 2002 version.

  The Treasury Guidelines have been the focus of criticism from a number of nonprofits, and a working group of nonprofits and foundations worked with the Treasury Department, in an effort to improve the guidelines. In addition, the Georgetown University Public Policy Institute hosted an event discussing the impact of the guidelines and other anti-terrorism financing requirements on the charitable sector.

  Unfortunately, the new guidelines move in the wrong direction calling on nonprofits to check a terrorist watch list for employees, recipients they give money or in-kind support to, and employees of recipient entities. The guidelines also call on nonprofits to report anyone on the list, as well as "any suspicious activity" by individuals or groups, to the government.

In the wake of Katrina, charities and foundations scrambled to figure out how to aid the victims of Hurricane Katrina, helping them get housing, jobs, transportation, health care, education for their children, post-trauma counseling, and other services. Charities also focused on long-term outcomes, the work of nonprofits can help prevent the massive devastation wrought by Hurricane Katrina. Good charitable giving legislation should only be Congress' first step in aiding charities in getting the resources they need when Congress and the nation is asking so much of them.

Congress also must do more than rely on the nonprofit sector's disaster preparedness and relief programs.

Congress cannot expect a vibrant nonprofit sector to provide services in the face of disaster or step in when there are budget cuts, and in the same breath not allow the sector to speak out on issues without the fear of retribution. When government seeks to limit free expression under the very programs it deems beneficial to underserved communities and individuals--whether it involves legal representation for the poor or civic engagement for affordable housing recipients--government exerts a level of control antithetic to our democracy.

Revised Anti-Terrorist Financing Guidelines for Charities

On Dec. 5 the U.S. Department of the Treasury released a revised version of its November 2002 *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities*. The Treasury Department announcement requested public comment on the revisions by Feb. 1, but stated the revised guidelines are now operational. The 2005 version not only does not incorporate the *Principles of International Charity*, a proposed alternative to the earlier guidelines developed by a working group of nonprofit organizations and released in late 2004, but moves in the wrong direction by adding new and onerous requirements on nonprofits.

The revised guidelines apply to all charities, including foundations and grantees, both foreign and domestic. An expanded introduction notes that adherence to the guidelines provides no legal protection from government sanctions, including the freezing and/or seizing of assets, and makes three new points: 1) the guidelines are voluntary, 2) they are intended to assist the sector in avoiding the risk of diversion of funds, and 3) they are a response to what the Treasury Department perceives as a widespread problem of terrorist abuse of charities.

The introduction states, "Investigations have revealed terrorist abuse of charitable organizations, both in the United States and worldwide, often through the diversion of donations intended for humanitarian purposes but funneled instead to terrorists...This abuse threatens to undermine donor confidence and jeopardizes the integrity of the charitable sector, whose services are indispensable to both national and world communities." No facts are presented or referenced to support this sweeping claim.

Four very general Fundamental Principles are listed: that charities should 1) follow the law, 2) exercise due care in performing their duties, 3) maintain fiscal responsibility, and 4) consider precautions that are above and beyond legal requirements. The guidelines then address general governance and accountability measures in a detailed and expanded section on anti-terrorist financing "best practices."

The revised guidelines drop some of the overly specific provisions in the 2002 version's Governance section, such as the number of board meetings that should be held in a year and definitions of conflicts of interest that were inconsistent with IRS rules. The revised guidelines add two new recommendations for Boards of Directors, stating each member is responsible for ensuring the charity complies with all laws, and records of organizational decisions "should immediately be made available for inspection by the appropriate regulatory/supervisory and law

enforcement authorities," without any reference to normal standards for regulatory investigative thresholds or search warrants.

The section on financial accountability calls on groups with budgets over $250,000 to conduct audits and make these audits public, and also limit cash distributions to small amounts in short timeframes. The transparency and disclosure provisions continue to at times duplicate and at times contradict IRS and state regulatory requirements in this area, expanding beyond the 2002 version, exceeding what is required in the IRS Form 990, the information return filed annually by charities and foundations.

The section on anti-terrorist financing best practices encourages charities to "apply a risk-based approach, particularly with respect of foreign recipients" but does not explain what factors indicate increased risk or what types of responses are appropriate to different levels of risk. In addition, it does not distinguish between foundation grants to charities and charitable aid, including services, provided to individuals. It recommends extensive information collection on board members, key employees, and recipients of funds or in-kind contributions. This includes searches of public information to determine if recipients, board members, key employees or senior management have been *suspected* of terrorist-related activities if they received funds or in-kind contributions.

The new guidelines say charities should comply with programs administered by the Office of Foreign Assets Control (OFAC) and assure themselves recipients and their own board members, key employees and senior management at all business locations do not appear on the Specially Designated Nationals (SDN) terrorist watch list. Footnotes encourage checking other lists, including those of other countries. This raises obvious ethical problems in countries that use terrorist watch lists to suppress dissent.

If a match is found with the SDN list, the charity should "immediately" report it to OFAC. The guidelines also indicate that the charity "can provide" information on "any suspicious activity" to OFAC and the FBI. No definition of what constitutes suspicious activity is given, but the guidelines instead encourage charities to check publicly available information.

The guidelines also call on charities to require recipients of funds and in-kind contributions to certify that they do not employ, transact with, provide services to or deal with groups or people listed or known to support terrorism. For recipients to complete this certification, they will likely need to certify all the people and groups they provide services to, as well as all the vendors they deal with. The call for certifications goes beyond what is required by the Combined Federal Campaign's new rule for charities participating in the federal workplace giving program. Obvious questions also arise about the value of obtaining such certifications. After all, will a terrorist refuse to sign a certification? The overall effect of the new guidelines is to place charities in the role of government investigators and informers, diverting resources from charitable activity to what may prove to be useless information collection and reporting. It reflects a larger problem with the federal government's approach to anti-terrorist financing: instead of focusing resources on following investigative leads, the government is collecting vast amounts of information in the hope that something will turn up - in essence, looking for the proverbial needle in a hay stack - a wholly ineffective method of preventing the diversion of funds to terrorist networks.

The larger legal context governing federal anti-terrorist financing programs and the prohibition on providing "material support" to terrorists in the USA PATRIOT Act give these so-called "voluntary" guidelines more legal weight than they merit. Unchecked powers to freeze and seize charitable assets based on secret evidence, with no meaningful recourse, make the voluntariness of these guidelines questionable. However, by calling them voluntary, the Treasury Department avoids the rigors of the formal rulemaking process that governs creation of enforceable regulations.

A more detailed summary of the guidelines is available, as well as a side-by-side comparison of the 2002 and the 2005 revised version.

Comment on Proposed IRS Exemption from Privacy Act

The Internal Revenue Service is proposing a new Privacy Act system of records exempt from release for Tax Exempt and Government Entities (TE/GE) case management, which could have implications for audited 501(c)(3) organizations.

The system would contain records emanating from investigations into individuals and other taxpayers involving money laundering, statutory compliance violations, and other areas of non-compliance. The records may contain information about individuals that describe TE/GE's methods of investigating exempt organizations, as well as information regarding informants in investigations.

The IRS is proposing to exempt this system of records from release under the Privacy Act. Specifically, it allows the IRS to:

- refuse release of records pertaining to an individual
- refuse to acknowledge the existence of records pertaining to an individual
- refuse to disclose the agency procedures relating to accessing records
- refuse to inform the requester of civil remedies available to the individual in the event of an adverse determination by an agency concerning access to information contained within the record systems

The IRS argues that the release or acknowledgement of these records would provide an individual or entity subject to an investigation with significant information concerning the nature of the investigation, and could result in the altering or destruction of documentary evidence, or the influencing of witnesses.

While the IRS' concerns may be valid as applied to the investigatory period, the notice does not allow for the release of records once an investigation has been concluded, even with redaction of informant-identifying information. The Federal Register notice also does not provide for the release of records during the determination period of an audit, even if the investigation is over.

Nonprofits are urged to comment, in order to retain their rights to view the records of allegations made against them. Nonprofits' rights under the Privacy Act could prove particularly beneficial

in understanding IRS interpretation of 501(c)(3) issue advocacy in cases such as the audits of the NAACP or All Saints Episcopal Church. **Comments are due by Jan. 6.**

Cartoon: The Purpose of Government is...