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In This Issue

Stalled Lobby Reform Bills to be Resolved Before August Recess

The House and Senate have now overwhelmingly passed their respective pieces of lobbying and ethics reform legislation, but a partisan impasse in the Senate has stalled progress. Before the Independence Day recess, Senate Majority Leader Harry Reid (D-NV) was unable to reach an agreement with Republicans to go to conference. The House

and Senate bills both increase current disclosure requirements for paid lobbying activities under the Lobbying Disclosure Act, but a few discrepancies between the two have to be worked out in conference. Reid promised to complete work on the lobbying and ethics bill before the August recess.

On May 24, the House adopted H.R. 2316, the Honest Leadership and Open Government Act of 2007, on a 396-22 vote, and the Senate passed its own version, S. 1, on Jan. 18, 96-2. For weeks, aides from both chambers have been negotiating a final bill in pre-conference meetings.

On June 26, Reid tried to name conferees on the lobbying bill, but Senate Minority Leader Mitch McConnell (R-KY) blocked the appointment of any Senate conferees. Reid tried again, and Republicans objected at McConnell's request, saying they would allow action on the measure only if promised a vote on a separate bill that would require electronic filing of campaign finance reports, S. 223, as well as an unnamed amendment. Republicans did not disclose the details of their amendment, but Sen. Bob Bennett (R-UT) said it relates to election transparency. BNA reported that it likely deals with eliminating the caps on the amount parties can spend in coordination with candidates. Because Democrats had not seen the amendment, they would not agree to vote on it. According to *Congressional Quarterly* ($), McConnell's first objection was given because Reid moved to go to conference before the GOP was ready to sign off on the motion; McConnell actually has no objections to beginning negotiations with the House.

Two days later, McConnell was getting ready to sign off on the creation of a conference committee without any conditions about the electronic filing bill, when Sen. Jim DeMint (R-SC) told McConnell he objected to S.1 moving forward until he secures a guarantee that new earmark disclosure rules will remain in the legislation; DeMint renewed his objection July 9. DeMint's action delayed any progress to move to conference. Unlike in the House, which passed a House rule that required disclosure of earmarks, the Senate put its earmark disclosure measures in S.1. Until the bill becomes law, the Senate has no disclosure rules on earmarks.

In the meantime, work is going forward to resolve differences between the two bills. One major obstacle is the "revolving door" provision aimed at preventing members of Congress and senior staff from quickly moving into lobbying jobs after they leave Capitol Hill. Under the Senate bill, senators would be prohibited from engaging in lobbying for two years and senior aides for one year, but the House bill made no changes to the law's current one-year rule. Another contentious issue is a House-passed provision that would extend gift and travel rules to lobbyists for state and local institutions such as universities.

According to *Congressional Quarterly* ($), a provision that would prohibit law firms that have contracted out services to congressional offices from doing any lobbying will also be controversial. The provision would prohibit the attorney's firm from lobbying Congress

while the lawyer is also working for a congressional office.

Both the House and Senate bills would require lobbyists to reveal whether they bundled political contributions, and it would create a new electronic disclosure system for lobbying expenditures and activities. The Senate bill would prohibit lobbyists from sponsoring parties at national conventions, but the House legislation removed that measure. For a more in-depth breakdown of the differences between the chambers' bills, see this comparison chart prepared by the Campaign Legal Center.

With so much deliberation occurring behind the scenes in pre-conference meetings, advocates of reform worry that strong provisions could be weakened. The Campaign Legal Center, Common Cause, Democracy 21, the League of Women Voters, Public Citizen and U.S. PIRG sent a letter to House Speaker Nancy Pelosi (D-CA) and Reid calling on them to keep the strong provisions in each of the bills intact. The groups expressed special support for the bundling provision and maintaining lobbyist disclosure of their fundraising events. The letters stated, "Our organizations urge you to ensure that the final conference report on lobbying reform legislation includes strong and effective provisions to provide for the disclosure by lobbyists of the fundraising events they hold and the contributions they 'bundle' for Members. We also urge you to ensure that the strong Senate ethics reforms and earmark reforms passed by the Senate are included in the final conference report."

The lack of action on lobby reform is quite striking. The House and Senate bills passed decisively. The public, in the aftermath of the Jack Abramoff and other scandals, sent a strong message in the last election that reform is necessary. Yet final action has been slow — and it is beginning to take its toll. Just as the president's popularity has plummeted, congressional approval ratings have also decreased significantly. The Democrats are beginning to feel the heat for not getting laws like lobby reform sent to the president for his signature.

Acknowledging the situation, Reid has threatened to take time away from the August recess to force final action. Reid said he was not going to offer any more motions to go to conference on the lobbying bill. Instead, he intends to wait for Republicans to say they want a deal. On the Senate floor June 29, Reid warned, "Everyone should understand that prior to the August recess, we are going to complete ethics and lobbying reform. We are going to do it if we have to spend nights, weekends, take days out of our August recess." If that is true, the promise of acting on lobby and ethics reform will have only taken seven months to complete.

Aftermath of Supreme Court's Ruling Exempting Grassroots Lobbying from Campaign Finance Restrictions

Reactions to the U.S. Supreme Court's ruling in *Federal Election Commission v. Wisconsin Right to Life* (WRTL) include dire predictions of massive amounts of soft

money spent on sham issue ads before the 2008 elections, and even the end of the entire campaign finance regulatory regime. But the actual impact of the decision, which exempts grassroots lobbying broadcasts from the "electioneering communications" ban on corporate funded broadcasts that refer to federal candidates within 60 days of a general election or 30 days of a primary, is likely to be much more limited. The Federal Election Commission (FEC) must decide whether or not it will establish a rule implementing the decision, while a similar case has been sent back to a lower court for a ruling consistent with the Supreme Court's opinion.

FEC Rule or Case-by-Case Enforcement?

At its June 28 meeting, the FEC made no decision about how it will respond to the ruling in the WRTL case. The day before, FEC spokesperson Bob Biersack told *Roll Call* ($) that the FEC's options are to:

- conduct a full rulemaking process, taking about one month to draft a proposed rule, allowing 30 days for public comment, and possibly holding a public hearing. The final rule, including any revisions, would then be published. Biersack said the process could be a "special interest slugfest."
- use the emergency rulemaking process to put a rule in place quickly, without public comment. Such a move would likely draw strong criticism from stakeholders that want input on the rule.
- proceed with no rule, implementing the exemption on a case-by-case basis. This approach would leave the public with no clear standards and could have a chilling effect on nonprofits unwilling to risk enforcement action by the FEC.

Former FEC Commissioner Michael Toner suggested that the Supreme Court's opinion in *WRTL* provides a useful framework for a rule. As a commissioner, Toner supported a 2006 proposal from Commissioner Hans von Spakovsky and supported by OMB Watch and other nonprofits that would have exempted grassroots lobbying broadcasts similar to the test set by the Court. The Democrats on the FEC blocked the rule, saying they preferred to wait for guidance from the courts.

The Supreme Court's Definition of a Genuine Issue Ad Should Guide FEC

The WRTL case makes a significant contribution to the evolving definition of what constitutes issue advocacy as opposed to partisan electoral messages. These factors suggest that a case-by-case approach to future enforcement of the electioneering communications rule would not provide a sufficiently objective standard. Chief Justice John Roberts' majority opinion said the standard "must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." In other words, the rule must be limited to content of the broadcast, and the context, including the subjective intent of the speaker, is irrelevant. By removing these vague and contentious factors from consideration, the Court has made the job of drafting

a rule much easier.

The FEC can look to pages 16 and 21 (footnote 7) of the Court's opinion for the major factors in any proposed rule. These identify a genuine issue ad as follows:

- The focus of the broadcast is on a legislative issue, takes a position on the issue, urges a federal officeholder to support that position, and calls on the public to contact the officeholder. This is essentially the same as the IRS regulation defining grassroots lobbying.
- There is no reference to the "election, candidacy, political party, or challenger"
- Takes no position on a candidate's character, fitness for office or qualifications

The Court also made it clear that the fact that issue advocacy occurs close to the time of the election does not weaken constitutional protections. Similarly, the relevance of the issue to election debates cannot be considered. The bottom line is that any FEC rule or other action must give the benefit of the doubt to the speaker.

In addition, enforcement of the electioneering communications rule cannot unduly burden nonprofit or corporate speakers, since the Court said it must "entail minimal if any discovery to allow the parties to resolve disputes quickly without chilling speech..."

Maine Case Revived

Within days of its decision in *WRTL*, the Supreme Court sent a similar case, the *Christian Civic League of Maine, Inc. v. Federal Election Commission* back to a lower court for a new ruling consistent with its decision in *WRTL*. The Christian Civic League (CCL) appealed to the Supreme Court after the lower court ruling dismissed its challenge to the electioneering communications rule.

The facts in the CCL case are similar to those in *WRTL*. CCL wished to broadcast ads referring to Sen. Olympia Snow (R-ME) during her re-election campaign last year. A three-judge panel dismissed the CCL lawsuit in September 2006 because the ads were about legislation that had already been voted on by the time the case came before the court, making it moot. In its WRTL decision, the Supreme Court held that this situation fits an exception to the general rule against judicial consideration of moot cases, since it is a dispute capable of repetition, and the timing of the event is so short, it cannot be litigated prior to the conclusion of an event, in this case a legislative vote. Without the exception, the issue would evade judicial review.

U.S. Attorney Firings Expose Political Nature of Attack on ACORN's Voter Mobilization Efforts

Current congressional investigations into the Bush administration's 2006 firing of nine U.S. attorneys have revealed that one motivation behind the firings may have been the

attorneys' refusal to pursue allegations of voter fraud as aggressively as the administration would have liked. Unfortunately, the attorneys were not the only casualty of the hunt for voter fraud. ACORN — an organization dedicated to empowering low-income communities across the country — also became a victim in what appears to be a politically motivated assault on its voter registration efforts.

One of ACORN's central strategies in working for social justice for low-income people and families is increasing civic participation among these citizens. According to a report by the U.S. Census Bureau, the voting rate in the 2002 elections among citizens living in families with annual incomes of $50,000 or more was 57 percent, compared with 25 percent for citizens living in families with incomes under $10,000. To address this imbalance, in 2004, ACORN registered more than 1.1 million voters across the country. During the 2006 election cycle, ACORN reported that it ran the largest voter registration drive in the country, registering over 540,000 citizens. ACORN workers in fifteen states contacted 1.5 million households to encourage citizens to vote.

One of the places ACORN conducted voter registration and get-out-the vote campaigns in 2006 was the Kansas City, MO, metro area, where the electoral stakes were high. A tight race for Senate was heating up between Republican incumbent Jim Talent and Democrat Claire McCaskill, with the outcome potentially deciding the balance of power in the Senate.

According to a May 2007 press release, ACORN notified law enforcement authorities after its quality control program discovered that four of their temporary workers had submitted registration cards with falsified information. The faulty registrations were invalidated by state authorities prior to Election Day, so there was no potential impact on the election results.

However, just five days before the election, the interim U.S. Attorney for western Missouri — Bradley J. Schlozman — filed indictments against four employees of ACORN, accusing them of voter fraud. Schlozman further asserted that "this national investigation is very much ongoing." He pressed charges despite Justice Department regulations which discourage "overt" pre-election action established to protect against the appearance or the effect of electoral intervention.

In reaction to the indictments, conservative leaders and some media asserted ACORN purposefully committed voter fraud. An example of the attacks that followed included the words of Paul Sloca, who was then serving as the communications director for the Missouri Republican Party. Sloca criticized ACORN, saying, "It is very disturbing that members of this left leaning group have been indicted for engaging in serious voter fraud designed to cause chaos and controversy at the polls in order to help Democrats try to steal next week's elections." Sloca and many commentators failed to mention the fact that ACORN had aided the investigation and that ACORN itself was the primary victim of fraud, not voters.

As it turns out, Schlozman only came to the interim U.S. Attorney position after his predecessor — Todd Graves — was asked to step down, possibly for the same reasons the other nine U.S. attorneys were dismissed. According to the *Boston Globe*, Graves was asked to leave in March 2006 after refusing to pursue voter fraud prosecutions as aggressively as the Bush administration wanted. Graves was then replaced by Schlozman, despite the fact that Schlozman had no prosecutorial experience. Prior to stepping down, National Public Radio reported that Graves acknowledged he and Schlozman had disagreements about a lawsuit Schlozman wanted to pursue involving allegations of falsified voter registrations.

The court cases against the four former ACORN employees are mostly resolved, with ACORN's cooperation. Charges against one defendant were dropped. After pleading guilty in February to filing false registration forms, a second defendant recently received probation. Another of the four also pleaded guilty to similar charges and is awaiting sentencing. The final person who was indicted is scheduled to go on trial in July.

In testament to their dedication to social justice, ACORN is continuing to press ahead with its voter engagement activities, actively preparing for the 2008 elections, despite the unwarranted criticism its organization received for its registration activities in the fall of 2006.

States Failing to Implement National Voter Registration Act

In its biennial report to Congress on the status of the National Voter Registration Act (NVRA), the Election Assistance Commission (EAC) provided data showing that states have failed to fully implement the 1993 law.

The primary goal of the NVRA was to increase the number of people who vote in federal elections. To do so, the law required that public agencies — such as those which distribute welfare benefits — take steps to increase voter registration among low-income Americans. A coalition of nonprofits — Project Vote, DEMOS and the Lawyers' Committee for Civil Rights Under the Law — released a joint statement July 3 calling attention to the failure of the states to enforce Section 7 of the NVRA and called for the Department of Justice (DOJ) to take action to force states to do so.

The EAC report to Congress was based significantly on data from the 2006 Election Administration and Voting Survey, which was completed by states in accordance with the requirements of the NVRA. Forty-four states completed the survey. Some of the key results:

- From the 2004 to 2006 elections, most states have experienced a decrease in the absolute number of registered voters and the percentage of voting age citizens registered to vote
- Among the registration applications received by states in the last two years,

motor vehicle agencies were the most frequent recipient — collecting 45.7 percent of all applications
- Registrations by public agencies have decreased by 80 percent from 1995-1996 (when the NVRA went into effect) to 2005-2006
- Only 59 percent of citizens in households making less than $15,000 registered to vote in 2005-2006 — compared to 85 percent in households making $75,000 or more
- Only six states provide training at least every two years to public agencies on conducting voter registrations, indicating that untrained individuals may be conducting voter registration efforts, where they are occurring

With the lack of apparent voter registration training, the EAC recommended that all states conduct in-person trainings with all agencies conducting voter registration activities. Other recommendations in the report included 1) modernization of electronic reporting and list maintenance systems, 2) development of statewide voter registration databases to enable states to track citizens' voting patterns over time, and 3) establishment of data collection systems within each state to track the data required by the NVRA. In commenting on this third recommendation, the EAC report states that the value of the biennial Election Administration and Voting Survey is "limited when States and jurisdictions report data in an inconsistent and noncomparable fashion or do not collect relevant data, even when required to do so by the NVRA."

In their press release, Project Vote, DEMOS and the Lawyers' Committee highlighted the fact that the DOJ has only brought one lawsuit to enforce the NVRA, despite solid evidence that there is widespread under-compliance. The nonprofits argue that DOJ intervention is important because when the DOJ has taken action, the impact has been significant. The one lawsuit DOJ filed was against the state of Tennessee. After taking steps to rectify their poor record of voter registration, Tennessee has seen a dramatic increase in the number of voter registrations completed by public agencies. In 2006, almost a quarter of all registrations filed by public agencies were in Tennessee.

This is not the first time that this coalition of nonprofits has pressed the DOJ to enforce the NVRA. In 2004 and 2005, in an effort to assess the state of implementation of the NVRA, Project Vote, DEMOS and ACORN conducted site visits with public agencies across several states, reviewed available evidence from the EAC and the Federal Election Commission and interviewed state officials. Through this investigation, they confirmed that in nearly all fifty states, the NVRA had not been implemented. The groups subsequently published a report documenting their findings.

In its report, the coalition called for state agencies to incorporate voter registration more comprehensively into their daily activities. To ensure that agencies do so, the coalition made a similar demand as the EAC report does, recommending that states maintain more comprehensive and efficient databases on voter registration records. Without this type of accountability, the nonprofit coalition argued, state agencies will be unlikely to fulfill their tremendous potential as channels of voter engagement for low-income

Americans as was envisioned by the NVRA legislation.

SIDEBAR

House Passes Deceptive Practices and Voter Intimidation Prevention Act

In other election news, the House passed the Deceptive Practices and Voter Intimidation Prevention Act of 2007 (H.R. 1281) on June 25. The bill would make it a felony to knowingly communicate false information during a federal election with the intention of preventing a person from voting. If the bill becomes law, those who violate the prohibition could face up to five years in prison. No one expressed opposition to the bill during the voice vote.

The bill was sponsored by Rep. Rahm Emanuel ☼ (D-IL) and garnered 60 cosponsors in the House. Emanuel was quoted in a *USA Today* article on the bill's passage and said, "This reform will put an end to campaign practices that disenfranchise thousands of American voters and will give citizens the right to cast a ballot free from intimidation and misinformation."

The bill was widely supported by House Democrats, who raised objections during the 2006 elections about campaign tactics used by Republicans. Republicans, on the other hand, have asserted that voter fraud is the most pressing issue related to elections. H.R. 1281, however, makes no mention of voter fraud.

A companion bill (S. 453) has been introduced in the Senate by Sen. Barack Obama ☼ (D-IL) and 15 cosponsors. On June 7, the Senate Judiciary Committee held a hearing on the bill, but the full Senate has not taken action.

House Votes to Stop Funding for Bush's Regulatory Changes

The House passed an appropriations bill June 28 that prevents parts of the executive branch from spending Fiscal Year 2008 funds on the implementation of President George W. Bush's controversial executive order amending the regulatory process. The Financial Services and General Government Appropriations Act, FY 2008, (H.R. 2829) was amended by voice vote late on the night of June 27 and was passed the next day. The bill provides funding for everything from the Treasury Department and the Executive Office of the President to the Federal Election Commission and the U.S. Tax Court.

Among a series of amendments to the appropriations bill offered on the House floor was an amendment sponsored by Reps. Brad Miller (D-NC) and Linda Sanchez (D-CA). The amendment prohibits the Office of Management and Budget (OMB) from spending money to implement any part of Executive Order 13422, which was signed Jan. 18. The Miller-Sanchez amendment reads:

> *Sec.* 901. None of the funds made available by this Act may be used to implement Executive Order 13422.

The Senate is expected to take up its general government appropriations legislation in July. It is not clear whether the Senate will address this issue, and, if it does, whether it will use the same language as the House. If the language is the same as the House, then the item will not be debated during a House-Senate conference. If the Senate language is different than the House or is absent, then it will the subject of a conference. Even before the defunding language was inserted in the House appropriations bill, Bush's senior advisors indicated in a Statement of Administration Policy they will recommend a veto of the legislation because of other provisions in the bill.

Miller, the chair of the Science Committee's Subcommittee on Investigations and Oversight, and Sanchez, the chair of the Judiciary Committee's Subcommittee on Commercial and Administrative Law, through their respective subcommittees, held hearings on the E.O. to investigate the potential impacts of Bush's amendments. Hearing witnesses and other critics of the E.O., including OMB Watch, argued the changes will further centralize regulatory power in the White House and shift power away from agencies to which Congress gives the power to enact public health and safety protections.

E.O. 13422 amended a Clinton-era executive order governing how the regulatory process works within federal agencies and OMB's Office of Information and Regulatory Affairs (OIRA). E.O. 13422:

- shifts the criterion for promulgating regulations from the identification of a problem like public health or environmental protection to the identification of a "specific market failure";
- makes the agencies' Regulatory Policy Officer a presidential appointee and gives that person the authority to commence an agency rulemaking and to decide what is included in the Regulatory Plan, unless specifically otherwise authorized by the agency head;
- requires each agency to estimate the "combined aggregate costs and benefits of all its regulations planned for that calendar year to assist with the identification of priorities"; and
- requires "significant" and "economically significant" (those that are estimated to have at least a $100 million effect on the economy, among other criteria) guidance documents to go through the same OMB review process as proposed regulations before agencies can issue them.

On the same day that E.O. 13422 was issued, OMB issued its *Final Bulletin for Agency Good Guidance Practices* which further explains how agencies are to comply with the new requirements governing guidance documents. Agencies issue guidance documents to clarify regulatory obligations of regulated industries and to explain complicated technical issues to those agency employees overseeing regulatory issues and to regulated industries. The E.O. and the Guidance Bulletin take effect July 24. The appropriations bill covers government spending for the fiscal year beginning Oct. 1, 2007.

U.S. Ability to Regulate Chinese Imports in Question

The United States government is struggling to ensure the safety of consumer products and food imported from China, as evidenced by a recent spate of controversies involving dangerous Chinese-made products. While America's consumer product safety net is relatively strong, China's young market economy is largely unchecked by government regulators. Subsequently, dangerous Chinese products are finding their way to American shores where federal agency officials are unable to monitor the volume of imports.

In March and April, contaminated pet food sickened and killed pets across the country. The pet food contained ingredients, imported from China, tainted by the chemical melamine. A pet food recall was organized, but the melamine was detected in animal feed which led to human exposure. Federal scientists concluded the human risk to be low.

In May, the U.S. Food and Drug Administration (FDA) began to warn of Chinese-made toothpaste contaminated with diethylene glycol, which is commonly found in antifreeze. FDA is still not fully certain of the details and has been forced to warn consumers to avoid using any dental products made in China.

An even more recent surge of incidents has kept the issue in the national spotlight. On June 13, the Consumer Product Safety Commission (CPSC) announced a recall of 1.5 million Thomas & Friends toy trains. The toys, imported from China, had been coated with lead-based paint.

On June 26, the National Highway and Traffic Safety Administration (NHTSA) ordered a New Jersey tire importer to recall 450,000 defective Chinese-made tires. The importer, Foreign Tire Sales, complained of potential bankruptcy, but NHTSA threatened to levy millions of dollars in fines if the importer did not comply. Foreign Tire Sales has initiated the recall and will continue until it is forced to declare bankruptcy, according to CNN.

On June 28, FDA announced an import ban on five different types of Chinese farm-raised seafood products. While no illnesses have been reported, the agency "repeatedly found that farm-raised seafood imported from China were contaminated with antimicrobial agents that are not approved for this use in the United States."

A lack of transparency and accountability within China has complicated the matter. Chinese manufacturers have repeatedly denied product flaws. The response of Chinese government officials has been slow and at times peculiar. In June, Chinese officials closed 180 manufacturers after finding rampant food safety violations.

However, China has not taken full responsibility for its regulatory failings. Government officials have attempted to downplay Chinese culpability by accusing the American media of exaggerating coverage of dangerous imports. More importantly, officials are not aggressively addressing problems.

China's most widely publicized move to take responsibility for product safety came in May when a court sentenced to death former head of the State Food and Drug Administration Zheng Xiaoyu. Zheng was convicted of taking bribes that ultimately led to the approval of pharmaceuticals with deadly side effects. He was executed July 10. Another former senior official from the agency, Cao Wenzhuang, was also sentenced to death for corruption. Cao's sentence comes with a two-year reprieve.

On the American side, a patchwork of federal regulations is partially to blame. A number of federal agencies monitor imports with little coordination between them. In addition to FDA, NHTSA, and CPSC, the United States Department of Agriculture, U.S. Customs and Border Patrol and others are responsible for a variety of imported products.

Vigilance by American importers is also necessary. Recognizing the need for a safe product, American fireworks importers created the American Fireworks Standards Laboratory. The laboratory is able to monitor and inspect approximately 75 percent of the Chinese fireworks imported into the United States, according to *The Washington Post*.

The issue has drawn the attention of lawmakers on Capitol Hill. Sen. Charles Schumer ☼ (D-NY) has unveiled a plan that would address the safety of Chinese imports. Schumer's plan would create a federal office to oversee and coordinate the efforts of the numerous entities currently monitoring imports. It would also toughen federal inspection measures by requiring FDA to conduct more surprise inspections of foreign manufacturing facilities and requiring other agencies to initiate foreign inspection programs.

Schumer's plan has not yet taken the form of a legislative proposal. According to a statement, Schumer hopes to clear up the "maze of federal oversight." Schumer claims the current system "prevents the government from effectively stopping dangerous goods from getting through to American consumers."

EPA Suspends Fish Kill Rule

The U.S. Environmental Protection Agency (EPA) has suspended a fish protection rule in response to a January court decision. The decision vacated parts of the rule, which White

House officials had edited and weakened. EPA will now have to begin a new round of rulemaking in order to address the ecological problem.

Electric power plants withdraw water from natural sources in order to cool their equipment. Larger fish and shellfish are often trapped on a plant's intake screen and die there from lack of oxygen and movement. A single plant may kill millions of fish in a year.

Closed-cycle cooling systems operate differently. Plants using a closed-cycle system recirculate or reuse water, withdrawing only 2 percent to 28 percent of the water used by the other systems. Closed-cycle systems can save a substantial number of fish and other organisms.

The Clean Water Act requires EPA to set standards protecting fish from power plants by requiring those plants to use the "best technology available." The closed-cycle system, used by 69 facilities in 2002, is widely believed to be the best technology available.

EPA sent a draft rule, which would have complied with the Clean Water Act, to the White House Office of Information and Regulatory Affairs (OIRA) in January 2002. As originally prepared, EPA's proposed rule sought to require the 59 largest plants in the most ecologically sensitive areas of the country to meet the performance achievable by a closed-cycle cooling system. EPA sought less stringent requirements for the roughly 500 remaining plants subject to the rule.

Under Executive Order 12866, Regulatory Planning and Review, EPA's draft rule was subject to review by OIRA. After the OIRA review, the rule appeared markedly different. OIRA stripped EPA's proposal to require any plant to use a closed-cycle system and instead required only minor upgrades. Plants would be able to avoid even these minor changes if costs were found to exceed benefits. This version of the rule was finalized in 2004.

In January 2007, the U.S. Court of Appeals for the Second Circuit decided large portions of EPA's rule did not comply with the Clean Water Act. The court ruled EPA's determination of minor upgrades as the best technology available was not adequate. The court also ruled EPA could not use cost-benefit analysis in developing the rule or in defining exceptions as it had done at OIRA's behest.

The decision in the case, *Riverkeeper v. EPA*, effectively nullified the rule. Since then, EPA has been weighing its options about how to proceed.

On July 9, EPA published a notice in the *Federal Register* suspending most of the requirements of the rule. "This suspension responds to the Second Circuit's decision, while the Agency considers how to address the remanded issues," EPA stated in the notice.

With the suspension in effect, the fish protection issue has effectively made no progress since EPA proposed its rule in 2002. EPA will initiate a new round of rulemaking in October, according to BNA news service ($).

Two questions remain. First, in light of the Second Circuit's decision, what definition of best available technology will EPA pursue? In the *Riverkeeper* decision, the court found the definition in the published rule to be inadequate. EPA may pursue the same definition it originally proposed before OIRA's interference. However, the current EPA administrator, Stephen Johnson, was not the head of EPA at that time and has not publicly indicated how he would like to see the agency move forward.

Second, how will OIRA revise or edit the next draft rule when it is once again submitted for review? Even after the *Riverkeeper* decision, OIRA may attempt to weaken the rule. Because the review process lacks full transparency, it will be difficult for the public to determine OIRA's exact impact. In the end, though, the courts will hold EPA accountable, not OIRA's hidden hand.

Coal Miners Experience Unusual Occurrences of Black Lung Disease

The Centers for Disease Control and Prevention (CDC) released July 6 the results of studies prompted by reports that underground coal miners are still experiencing unusual occurrences of black lung disease despite federal regulations to prevent exposure to coal dust. The "clusters of rapidly progressing and potentially disabling pneumoconiosis," or black lung disease, were found in 2005 and 2006 in some eastern Kentucky and southern Virginia miners, according to CDC's *Morbidity and Mortality Weekly Report* (*MMWR*).

In response to the 2005 and 2006 reports, the CDC's National Institute for Occupational Health and Safety (NIOSH) conducted surveys of miners in three Kentucky counties and in four Virginia counties. The results of the NIOSH testing of 975 miners indicated that four percent (37 miners) of those tested had advanced cases of black lung disease.

According to MMWR, the 37 miners with advanced cases of pneumoconiosis were categorized into two groups of workers — those who worked in jobs exposing them to silica dust (roofbolters) and those who were exposed to coal dust (coal-face workers). Both groups of miners had worked in these jobs an average of nearly 30 years.

The results, according to NIOSH, were unusual. Sixty-four percent of the coal dust workers and 42 percent of the roofbolters developed black lung. What was unexpected was the rapid advancement, in less than 10 years, of the disease among the workers exposed to coal dust. There were more cases of advanced black lung disease among these workers than among the roofbolters who were exposed to silica dust. Silica is more toxic

to the lungs, and silicosis, one type of black lung disease, develops more quickly.

NIOSH proposed several possible explanations for the unexpected results. There might be inadequacies in the dust exposure standards, failures to comply with existing regulations and missed opportunities for miners to be screened for early disease detection through voluntary chest radiographs (a type of x-ray). The NIOSH study, however, made no attempt to determine why these unusual disease results occurred.

Ellen Smith, Owner and Managing Editor of *Mine Safety and Health News*, wondered why the NIOSH team that conducted the surveys did not include an examination of the working conditions in the mines they visited. "Did anyone look at the history in these mines of ventilation, dust control, and water spray violations?" she asked in a telephone interview.

Federal laws have regulated exposure to coal mine dust since 1969, with amendments in 1977, and are credited with a reduction of black lung among underground coal miners. According to *MMWR*, the "prevalence of all pneumoconiosis...among underground miners with [at least 25] years on the job dropped from approximately 30% in the early 1970s to [less than] 5% in the late 1990s."

Legislation introduced in the House (H.R. 2769) in June would revise the 1977 standards for respirable coal dust to those NIOSH recommended in 1995. (See the *Watcher* article on the legislation.) In addition, according to *MMWR*, NIOSH is examining mining environments to evaluate current exposure levels and conducting investigations to gather more data on disease clusters.

GAO Issues Report on EPA Mishandling of Katrina

On the heels of a congressional hearing blasting the handling of public information about air quality after 9/11, a June 25 Government Accountability Office (GAO) report indicates the U.S. Environment Protection Agency (EPA) similarly failed the public post-Katrina.

The GAO report, *Hurricane Katrina: EPA's Current and Future Environmental Protection Efforts Could Be Enhanced by Addressing Issues and Challenges Faced on the Gulf Coast*, found inadequate monitoring for asbestos around demolition and renovation sites. Additionally, the GAO investigation uncovered that "key" information released to the public about environmental contamination was neither timely nor adequate, and in some cases, easily misinterpreted to the public's detriment.

Hurricane Katrina was the first implementation of the National Response Plan (NRP), created in 2004 as result of the difficulties responding to the 9/11 disaster. Under the NRP, EPA is the federal emergency support coordinator for collecting, monitoring and effectively dealing with hazardous materials, specifically authorized to regulate asbestos

emissions and maintain the National Priorities List of Superfund sites. By the time Katrina made landfall on August 29, 2005, EPA had already put air monitoring stations in those prioritized sites and coordinated state efforts to double their air quality sampling elsewhere.

However, according to the report, EPA failed to effectively monitor the air quality around New Orleans neighborhoods as they engaged in demolition and renovation, most notably the Ninth Ward. Merely conceiving of the agency's role to assist state and local officials to do the actual work, EPA only maintained the expanded air monitoring program for the first few months, shrinking back to its pre-Katrina scope by July 2006.

EPA also used its authority to suspend certain air quality laws via "no action assurance letters" to allow a faster building demolition process without requiring asbestos testing and removal. Though the regulation relaxation to speed demolition may have been reasonable, the failure to aggressively test for asbestos with known heightened risks was not. More worrisome, the July 2006 program reduction was due, in part, to not having found asbestos sampling concerns, but these lack of findings may have been due to the lack of aggressive testing.

While EPA made a significant effort to inform the public about environmental health risks, the report showed that it failed to do enough in this area. The first environmental assessment took three months to complete and contained information with confusing and sometimes contradictory messages. The GAO report details one instance in which the most common flyer stated that only buildings built prior to 1970 were an asbestos risk, while EPA's website used 1975 as the cutoff year, with the disclaimer that more recent buildings could also contain asbestos.

Echoing the 9/11 situation, EPA subtly manipulated information to portray New Orleans' air quality more positively than people might have concluded from the complete facts. For example, EPA's December 2005 assessment stated the "majority" of sediment exposure was safe. But eight months later, the agency revealed that this measure was for "short-term" visits, such as to assess immediate exposure damage, not to live near or in the area. Additionally, the 2005 assessment used data from outside sediment to generalize the safety of both outdoor and indoor areas, a dangerous assumption as buildings can act as traps collecting contaminants.

In the aftermath of Hurricane Katrina, EPA was presented with an enormous task, and limitations imposed upon it by the National Response Plan made its job even more difficult. Disturbing parallels with 9/11, however, are apparent: misleading the public through over-generalized and insufficient information and avoiding responsibility by blaming other agencies or local governments. In her response to the president about lessons learned from Katrina, Homeland Security Advisor Frances Townsend wrote, "The response to Hurricane Katrina fell far short of the seamless, coordinated effort that had been envisioned by President Bush when he ordered the creation of a National

Response Plan."

Lawsuit Frees OSHA Toxic Exposure Data

A June 29 U.S. District Court decision ordered the Department of Labor (DOL) to disclose its Worker Exposure to Toxic Substances Database, the largest known compilation of workplace toxic chemical sampling data.

Adam Finkel, former Occupational Health and Safety Administration (OSHA) chief regulator and regional administrator, filed two Freedom of Information Act (FOIA) requests with OSHA for the exposure data in June 2005. After failing to receive any response to his requests or administrative appeals, Finkel filed a lawsuit against OSHA for the data in November 2005. The database contains worker exposure data critical to Finkel's research to evaluate the outdated beryllium standards and current industry and OSHA practices.

Beryllium is a naturally occurring metal mined mostly for its use in electronic parts, nuclear and medical technology. Potentially carcinogenic, beryllium is directly linked to pulmonary conditions called Acute and Chronic Beryllium Disease. General scientific consensus is that the sixty-year-old OSHA exposure limit (2 micrograms per cubic meter) is unsafe. EPA, for instance, estimates that a lifetime exposure of 0.00004 micrograms per cubic meter can result in a one-in-one thousand chance of cancer.

In court, OSHA claimed that the database should be withheld because disclosure of the information would reveal trade secrets and compromise inspector privacy. However, the agency received no support from industry to support the claims of trade secret threats. After OSHA appealed to companies for examples, not a single company claimed it asked for sample result protection. Finkel explained, "Industry knows it has nothing to fear from a scholarly analysis of trends in workplace exposure." Judge Mary Cooper found DOL's claims of trade secrecy and privacy insubstantial and ordered the agency to release the database.

Finkel's work on beryllium exposure began in 2002. As regional administrator in the Rocky Mountain states, he revealed OSHA's refusal to provide basic follow-up and screening for workers likely exposed to beryllium in their inspections. After being fired for trying to protect active and retired inspectors at risk from beryllium exposure, Finkel sued OSHA for whistleblower retaliation and successfully negotiated a settlement. He then returned to academia, where he has continued research about beryllium hazards in the workplace.

Results from OSHA's own medical monitoring program, initiated primarily due to Finkel's whistleblowing, support the need for expanded research. Four percent of the inspectors tested positive for sensitization, an unexpectedly high incidence.

It may be that OSHA sought to withhold the data for self-serving purposes. If the data reveals a vastly flawed system for analyzing and appropriately responding to occupational toxic exposure, as researchers suspect it will, then OSHA would be held accountable.

Federal Appeals Court Dismisses NSA Spying Case

On July 6, a divided Sixth Circuit Court of Appeals vacated a 2006 federal district court finding that the National Security Agency's (NSA) Terrorist Surveillance Program (TSP) violated the Foreign Intelligence Surveillance Act (FISA), the Fourth Amendment's protection against unreasonable searches and seizures and the First Amendment's protection of free speech. Without ruling on the constitutionality of the TSP, the judges dismissed the case based on the plaintiffs' lack of standing.

The TSP was first revealed by the *New York Times* in December 2005. The *Times* reported that President Bush authorized NSA to eavesdrop on domestic phone calls and e-mails without a wiretapping warrant.

The American Civil Liberties Union (ACLU) brought a suit on behalf of several journalists, lawyers and academics who stated they were unable to continue freely communicating with people in the Middle East due to the chilling effect caused by the TSP. In August 2006, Judge Anna Diggs Taylor of the U.S. Court for the Eastern District of Michigan ruled that the TSP violated the First Amendment because of the program's restricting effect on communications between U.S. citizens and people in Middle Eastern countries. Taylor also found the program to be in violation of the Fourth Amendment because Internet and telephone communications were seized without a warrant or court approval. This was also in violation of FISA.

The government immediately appealed the decision and received a stay from the Sixth Circuit on Judge Taylor's decision to shut down the program. The White House, however, shut the program down in January 2007 after repeated calls from Congress for additional oversight and amidst multiple lawsuits making headway in the courts.

The Sixth Circuit decided 2-1 that the plaintiffs could not demonstrate that they were harmed by the program. Because the government invoked state secrets privilege, the court and the plaintiffs were unable to access details about the program, which may have more clearly demonstrated harm to the plaintiffs in the form of monitored communications.

Judge Alice Batchelder wrote in the majority opinion, "None of the plaintiffs in the present case is able to establish standing for any of the asserted claims. ... But even to the extent that additional evidence may exist, which might establish standing for one or more of the plaintiffs claims, discovery of such evidence would, under the circumstances of this case, be prevented by the State Secrets Doctrine." Hence, the court ruled that

since the plaintiffs could not demonstrate harm from the program, the lower court's decision had to be dismissed.

In a dissenting opinion, Judge Ronald Lee Gilman argued that the attorney-plaintiffs had satisfied the requirements for standing in that the TSP interfered with the relations with their clients in the Middle East. "The closest question, in my opinion, is whether the plaintiffs have the standing to sue. Once past that hurdle, however, the rest gets progressively easier." Gilman stated that he would have upheld the conclusions of the federal district court on the constitutionality of the TSP.

In response, ACLU Legal Director Steven Shapiro stated, "We are deeply disappointed by today's decision that insulates the Bush administration's warrantless surveillance program from judicial review." Shapiro went on to note, "It is important to emphasize that the court today did not uphold the legality of the government's warrantless surveillance activity."

Shapiro stated the plaintiffs are considering appealing the case to the U.S. Supreme Court but that no final decision has been made. There are several other cases making their way through the legal system. In particular, the Sixth Circuit decision is expected to have little impact on a consolidated Ninth Circuit case, in part because specific evidence of surveillance in that case may buttress the plaintiffs' claims.

Federal Government Kept Nuclear Accident Secret

Details on an accidental release of highly-enriched uranium at a nuclear fuel processing plant in Tennessee were kept secret from the public and Congress by the Nuclear Regulatory Commission (NRC) for thirteen months.

On March 6, 2006, Nuclear Fuel Services (NFS) in Erwin, TN, spilled approximately nine gallons of highly-enriched uranium. The yellow solution was noticed escaping under a doorway and into a hallway within the plant. Initially, the highly-enriched uranium accidentally spilled into a glove box, which had a well-functioning drain, and came within four feet of falling down an elevator shaft. If the solution had pooled and achieved a depth of a few inches, a self-sustaining chain reaction would have resulted, endangering the lives of those in the vicinity.

After NRC became aware of the NFS event, the agency changed the terms of its license and concealed all information regarding the event from Congress and the public. The agency marked information regarding the incident as Official Use Only (OUO), a sensitive but unclassified (SBU) category intended to keep truly sensitive information secret. Federal agencies have dramatically increased use of SBU categories since 9/11, but the rise of SBU has been accompanied by the unnecessary restriction of important

health and safety information.

The OUO policy was developed in August 2004 in response to a request from the Department of Energy's Office of Naval Research to restrict public access to sensitive security information. In addition to the highly-enriched uranium spill, the OUO policy motivated the removal of 1,740 previously public documents regarding the NFS plant. In a July 3 letter to the chairman of the NRC, Reps. John Dingell (D-MI), chairman of the House Energy and Commerce Committee, and Bart Stupak (D-MI), chairman of the House Energy and Commerce Subcommittee on Oversight and Investigation, wrote, "NRC went far beyond this narrow objective [from the Department of Energy] when it acceded to the Naval Reactor's request to withhold all information that is neither classified nor safeguards related. As a result, NRC has removed hundreds of otherwise innocuous documents relating to the NFS plant from public view" (emphasis original).

Modification of NFS's Special Nuclear Material License is supposed to require public notice and allowance for public comment. "Due to the August 2004 OUO policy, the NRC inspection reports, changes to license conditions, and the Confirmatory Order are all marked 'OUO' and withheld from the public," said Dingell and Stupak. Hence, public participation was preempted by the failure to provide notice. The OUO policy itself is marked OUO and withheld from public view.

The *New York Times* recently reported that the issue came to light in part due to the efforts of one of the five commissioners of the NRC, Gregory B. Jackzo. Jackzo said, "Ultimately, we regulate on behalf of the public, and it's important for them to have a role."

With the unnecessary restriction of safety information under SBU categories, it is impossible for the public to play such a role. The *Times* reported that NRC's OUO policy is under review. Dingell and Stupak reported that NRC has agreed to reissue the Confirmatory Order and allow public participation.

EPA Holds off Industry Attack on Health, Safety and Environmental Data

The U.S. Environmental Protection Agency (EPA) has rejected the U.S. Chamber of Commerce's Data Quality Act (DQA) challenge and appeal of supposed inconsistencies across several EPA databases. While agreeing to make a few changes, the agency refused the Chamber's demands that all variations between the EPA databases on chemicals be eliminated, stating that they were not errors but acceptable differences based on different scientific models.

Dating back to May 2004, the Chamber has argued that the variations in information across sixteen EPA databases on characteristics of chemicals should be resolved, because "use of this erroneous information leads, for example, to widely varying — and hence

unreliable or ambiguous — determinations of human health risk impacts."

EPA rejected this claim in January 2005 and stated, "There are valid and specific reasons why databases may contain differing values for physical or chemical parameters. A specific property value for some chemical may differ due to site-specific circumstances, as your letter acknowledges, and will also depend on the source of the information and the methodologies used."

Finding this response unacceptable, the Chamber appealed the decision in April 2005. The Chamber claimed, "[EPA's response] rejects a requested review of erroneous data, largely disclaims or ignores the fact that problems exist, and blatantly fails to address the public need for quality information, thereby placing the onus for examining and assuring data quality upon the users of such information and leaving them to employ such information at their own risk."

An executive panel composed of senior EPA officials reviewed the appeal and on June 22 responded to the Chamber. EPA said, "There are valid reasons why databases may contain differing values of physical or chemical parameters." EPA also noted in its response to the Chamber that "slight variations in assessments values noted between tools do not reflect errors in the predictions or databases, but rather reflect differences in the structures chosen by the scientific development staff. To further clarify, there is currently no harmonized, universal set of procedures ... Inevitably, variations in decision points will occur and it is not uncommon for these small variances to be observed when reviewing multiple databases, or when making quantitative predictions..."

EPA has otherwise taken a number of actions to resolve the concerns raised by the Chamber. The executive panel noted, "There would be potential benefit to the Agency from participation in an interagency workgroup that evaluates the quality of data being used across the federal government." The agency has investigated current opportunities for such engagement. EPA also posted information on its website which "describe data limitations, suggest appropriate uses for the data, and, where appropriate, offer a range of values instead of one value." Finally, EPA conveyed the concerns of the Chamber to a private sector company, Syracuse Research Company (SRC), which owns two databases identified by the Chamber in its challenge because they are linked to on EPA's website. SRC reportedly made changes to their databases pursuant to EPA's request.

EPA's response to the appeal has not satisfied the Chamber. Bill Kovacs, vice president for environment, technology, and regulatory affairs for the Chamber, issued a statement on July 3 and stated, "EPA has publicly declined to assume responsibility for the integrity for the data it provides, disseminates or sponsors."

In an interview with BNA, Kovacs also noted his frustration with the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget in handling the matter. Stating that, "OIRA is officially dead," Kovacs reportedly tried to meet with OIRA administrators concerning variations across EPA databases but was

apparently rebuffed.

The DQA tasked OIRA with overseeing implementation of information quality guidelines at executive agencies. OIRA issued the initial guidelines that shaped how agencies established DQA procedures and has issued several memos on DQA providing additional advice to agencies on implementation. One such memo included a request that agencies involve OIRA in negotiations with data quality challengers — a provision that seemed potentially inappropriate as it would insert a political office with little or no expertise into complex debates of highly scientific information. There has been no evidence that OIRA has gotten directly involved in any DQA challenges, but as the office's activities are difficult at best to monitor, its role in individual challenges has always been a mystery.

The DQA process has been used by industry associations and companies attempting to stymie the release of environmental and health information and slow down health, safety and environmental regulations. EPA's rejection of the Chamber's request may serve as a statement that the DQA should not be used in such a manner. Perhaps Kovacs' reaction is indicative of a realization that the DQA is not always effective as a tool to slow down regulations.

House Misses Opportunity to End IRS Private Tax Collection Program

On June 28, the Internal Revenue Service's (IRS) private tax debt collection program survived an effort by the House to bring it to a halt. House legislators struck language in the Financial Services and General Government Appropriations Act (H.R. 2829) that would have put a tight cap on how much funding could have been used to administer the program.

The private tax collection program lets private companies track down taxpayers who have not paid a small amount of outstanding taxes (see a summary of the program here). If IRS did the same work in-house, it could bring in nearly three times as much money as the private debt collectors. Additionally, letting profit-motivated companies handle sensitive tax matters has raised concerns regarding privacy and taxpayer rights.

The House passed the Financial Services and General Government appropriations bill by a vote of 240 to 179 (roll call). It would appropriate over $21 billion for an assortment of programs, including the Treasury Department, General Services Administration and the federal courts system. Before coming to the House floor, the bill included language that would have curtailed the debt collection program by limiting the amount of money IRS could spend administering it to less than $1 million in FY 2008. Such a low figure could have effectively killed the program. The IRS spent over $70 million administering it as of May 23, the last time IRS gave a public accounting of program's finances. At the time, private debt collectors had only raised $19 million — a net loss.

The language to limit funding was taken out of the bill on procedural grounds. By a House rule, tax or tariff measures have to be reported by the House Ways and Means Committee, the tax writing committee. The debt collection language could have violated the rule, because it would have, in effect, prevented the IRS from executing a tax measure, and it was reported by the House Appropriations Committee, not the tax writing committee.

Rep. Jim McCrery (R-LA) challenged the provision, and Rep. Jose Serrano ☼ (D-NY) assented, striking the language. The House Rules committee could have made a special rule to protect the language from procedural challenges, but no rule was issued.

The fight over the program's funding, however, is not over. The Senate's equivalent of the Financial Services and General Government bill has not been approved by its subcommittee or the full Appropriations Committee. A similar provision could be included in this version and ultimately in the bill that becomes law. Furthermore, the White House has only said that it opposes the appropriations-limiting language; it has not indicated that it intends to veto the bill if it includes the language.

Congress may take action on other bills, as well. Two popular bills in Congress — H.R. 695 (Taxpayer Abuse and Harassment Prevention Act of 2007) and S. 335 (A bill to prohibit the Internal Revenue Service from using private debt collection companies, and for other purposes) — would also end the private debt collection program. S. 335, introduced by Sens. Patty Murray (D-WA) and Byron Dorgan (D-ND), currently has 21 cosponsors, and H.R. 695, introduced by Reps. Steve Rothman (D-NJ) and Chris Van Hollen (D-MD), has 140 cosponsors, including 16 Republicans.

Wall Street Tax Break Comes under Scrutiny

After decades of flying below the radar screen, a tax policy allowing private equity fund managers to claim their fee-based income as capital gains rather than ordinary income has suddenly become the subject of media scrutiny, congressional hearings and legislation. In June, the Blackstone Group, a large private equity firm, went public with an initial public offering, which resulted in billion-dollar profits for the principals. This triggered House Ways & Means Committee and Senate Finance Committee chairs Rep. Charles Rangel ☼ (D-NY) and Sen. Max Baucus ☼ (D-MT) to question the tax breaks that helped enable the billion-dollar profits. They announced their intention to examine tax policy regarding so-called "carried interest," a type of performance fee that is a major source of compensation for fund managers. Rep. Sander Levin ☼ (D-MI) has introduced a bill to eliminate the carried interest tax loophole altogether. In response, high-powered lobbyists have gathered to fight back. A classic confrontation between industry and taxpayer interests may be looming.

The policy question concerns part of the fee that fund managers usually collect for their services. They typically negotiate a percentage of any profits on their fund's investments,

called "carried interest" because, oftentimes, funds do not produce profits for several years. Because the income comes, when it does, following the sale of the fund's security assets, the argument is made that this income is like dividends or capital gains and so should be taxed at a maximum rate of 15 percent.

However, some tax experts have argued that carried interest is no different from ordinary income, which is taxed at rates of up to 35 percent. The risk element in fund managers' compensation for services is quite different from investors' risk. The latter may lose every penny they have invested in the funds; they may also reap capital gains if fund assets are sold at a profit. Fund managers may not be personally invested in the funds they manage at all — in this case, they have no "downside" risk of financial loss; they may simply fail to be due compensation if the fund does not perform well enough. It is a form of contingency fee.

Advocates of current policy, such as Lisa McGreevy, executive vice president of the Managed Funds Association, say that "the whole issue is fundamental to entrepreneurship in the United States and the ability to use sweat equity to build long-term investments." Victor Fleischer, a University of Illinois tax professor, believes that perhaps private equity funds, hedge funds and others benefiting from the tax treatment have total assets under management of up to $1 trillion. It is unclear whether taxes on fund managers relate at all to investor activity.

Advocates of closing the carried interest tax loophole question the equity of current policy, which, Fleischer estimates, reduces fund managers' taxes by $4-6 billion a year. Rep. Peter Welch ☼ (D-VT) says that "there is absolutely no reason some of the richest partnerships in the world should be able to rip off American taxpayers because of a tax loophole." On the other side, the lobbyists are trying to convince Congress that such legislation would hurt the average citizen. Rep. Eric Cantor ☼ (R-VA) was quoted in the July 10 *Washington Post* as saying, "This is a tax increase not only on those working on Wall Street, but also on all blue-jean-wearing Americans because of its effect on their retirement funds."

A key moment in the debate came on June 12, when former Treasury Secretary Robert Rubin, speaking to a tax reform conference run by Brookings' Hamilton Project said,

> It seems to me what is happening is people are performing a service, managing people's money in a private equity form and fees for that service would ordinarily be thought of as ordinary income.

A week and a half later, Levin introduced his bill to end the tax treatment of these fees as capital gains. A dozen other House members have now co-sponsored the bill, including Rangel and House Financial Services Committee Chair Barney Frank (D-MA). Rangel subsequently announced that he would hold a hearing on the legislation in July. Baucus has scheduled the first of two hearings by the Senate Finance Committee, to be held July

11.

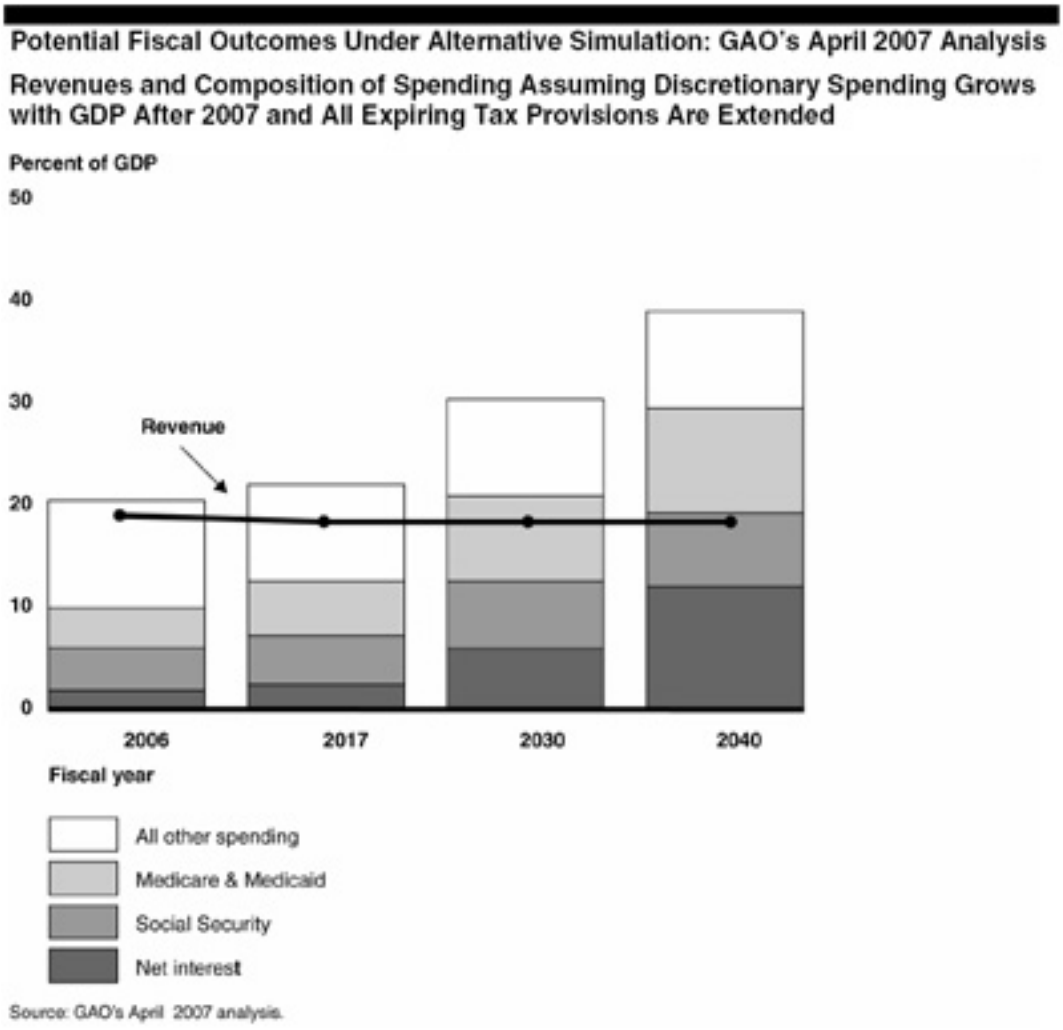
The prospects for the Levin legislation in the House seem favorable, given the heft of those who have endorsed it. However, the Cantor-led forces include some of the most powerful lobbyists in town. In the Senate, Baucus and Finance Committee ranking member Charles Grassley (R-IA) have not taken a position on the issue. But in his most direct statement on it to date, Grassley, who has strongly supported tax breaks for business in the past, implied that the carried interest tax preference is

> failing to maintain the integrity of the 15% capital-gains rate... What I'm doing is an effort to ward off the demagogues on Capitol Hill that can say this is just a way for the rich to get richer, and the middle class to be stung... I would ask my Republican colleagues to look at it from that standpoint, that we want to make sure we aren't feeding the demagoguery of class warfare that the other party is always getting blue ribbons for doing.

Whatever Congress decides, it is possible that President Bush will declare that ending this tax loophole is a tax increase and veto it on those grounds.

CBO Director Emphasizes Role of Health Care Costs in Long-Term Fiscal Imbalance

Congressional Budget Office (CBO) Director Peter R. Orszag is the latest policy thinker to highlight the underlying cause of the long-term fiscal imbalance. Testifying before the Senate Budget Committee on June 21, Orszag emphasized the centrality of health care costs in long-term fiscal imbalances, the reasons for the exploding cost of health care and health care policies that could restrain those costs.



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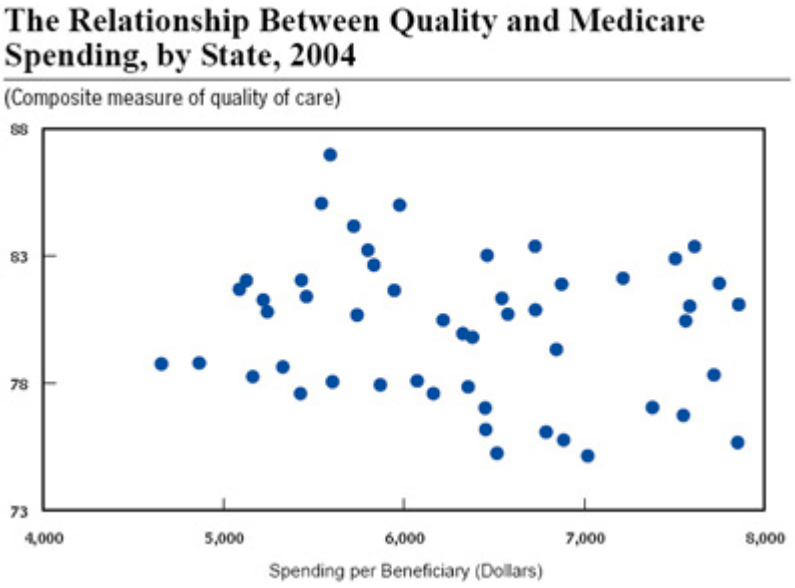
Since the 1960s, Medicare and Medicaid costs have outpaced the growth of the economy by 2.5 percent annually. At that rate, spending on these federal programs will increase from 4.5 percent of GDP today to 20 percent of GDP in 2050. Today, the entire federal budget, including all discretionary and mandatory spending, represents roughly 20 percent of the economy. Medicare and Medicaid compose about one-fifth of the entire federal budget. Should federal health care spending increase as projected, the Government Accountability Office predicts that total federal spending will be 40 percent of GDP by 2040, resulting in "a federal debt burden that ultimately spirals out of control." But, as Orszag testified, the rapid growth in federal health care program costs are not inherent in their designs; rather, it is a symptom of a much larger problem:

> Many analysts believe that significantly constraining the growth of costs for Medicare and Medicaid over long periods of time, while maintaining broad access to health providers under those programs, can occur only in conjunction with slowing cost growth in the health care sector as a whole.

Medicare and Medicaid reform that does not address the rapidly rising cost of health

care will merely shift the burden of health care expenditures to individuals and private companies. The same worrisome percentage of GDP dedicated to health care spending will persist regardless of who pays for it. Indeed, the outlook is similar for private health care providers, as the growth of health care spending nationwide has paralleled per-beneficiary expenses in Medicare and Medicaid. In 1975, total U.S. health care expenditures represented 8 percent of economic output; by 2016, that number will total almost 20 percent. However, Orszag noted there are several opportunities that will enable health care cost reductions without sacrificing health outcomes.

Available evidence suggests that health outcomes in the United States do not track with health care expenditures, indicating outcomes are not directly dependent on expenditures: more money does not buy more health. As the figure below shows, a region-to-region comparison of health care expenditures and quality of health care does not reveal a correlation between the two. Orszag believes further study is necessary to determine the reasons for this disparity.



(click image to enlarge)

Orszag cited evidence that overall health care cost increases are driven by several factors. The first is the method by which insurers reimburse beneficiaries. As health care costs spiked in the late 1980s, enrollment in managed care plans (HMOs) increased. The shift from fee-for-service plans to HMOs contained cost increases in much of the 1990s, but as consumers complained about restrictions on treatments and other health care constraints, HMOs adopted less aggressive cost-control measures, and health care costs began accelerating again.

The second factor that has been pushing up the cost of health care is a decline in out-of-pocket payments by beneficiaries. From 1975 to 2005, the percent of out-of-pocket costs to beneficiaries declined from 33 percent to 15 percent. This disconnect of health care delivery from patient costs increased demand for health care, thereby prompting

beneficiaries to consume more health care, which exacerbated cost acceleration.

Another explanation is that higher-cost, high-technology treatments have become widely available in the past 30 years. As a result, there are many conditions for which several treatment options exist, all with varying costs, but there is a dearth of information regarding what treatments work best for which patients. Access to data on the effectiveness of the multitude of treatment options, in Orszag's opinion, could carry significant weight in restraining the growth of health care costs.

Orszag believes that research on so-called "comparative effectiveness" shows promise in revealing the most effective treatments. Allowing doctors and patients to "use fewer services or less intensive and less expensive services than are currently projected," via comparative effectiveness analysis, Orszag suggests, could be the basis for a range of solutions.

Insurers, Medicare and Medicaid could use the data simply as informational guidelines. Citing a health insurance experiment by RAND, Orszag indicated that increased cost sharing results in reduced spending with "little or no evidence of adverse effects on health." The data could therefore be a cornerstone of a financial incentive scheme in which patients may opt for less efficient treatments, but they would pay increased out-of-pocket expenses. Alternatively, Medicare and Medicaid could use the information to tie payments to physicians to the cost of the most effective or most efficient treatment.

Orszag's inventory of causes and remedies represents only a subset of the work of the health policy community that analyzes the cost of health care. But more than a comprehensive policy prescription, Orszag's testimony shines a light on where policymakers can look for restraining increases in health care costs, and subsequently for solutions to long-term fiscal challenges.

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In This Issue

Pressure to Pass Lobby Reform Grows

No one is certain when Congress will leave for its summer recess. Senate Majority Leader Harry Reid (D-NV) has said the Senate will recess only when it has passed several high profile bills, including lobby reform. Progress on this legislation has stalled because Sen. Jim DeMint (R-SC) has used parliamentary procedure to stop Reid from appointing the Senate conferees. One solution to the problem may be that the House and Senate pass identical bills to avoid a conference. However, reform groups have raised concerns about

this process, since it may result in weakened legislation.

DeMint wants assurances that the conference between the House and Senate will keep strong earmark disclosure provisions. However, Reid cannot guarantee specific outcomes. As a result, DeMint has not budged. The Senate bill has strong earmark provisions, but the House bill does not address the issue. Instead, the House addressed the issue through rules changes. DeMint wants both Houses to lock down the rules in legislation.

Democratic leaders want to pass the lobby reform legislation, which also contains ethics changes. It was the first piece of legislation Democrats undertook in the Senate when they took over as the majority party, passing the bill 96-2. A similar measure passed overwhelmingly in the House by a 396-22 margin on May 24.

Since the bill passed the House, staff from the House and Senate have been meeting to iron out differences between the two bills — a sort of pre-conference. Roll Call ($) reports rumors that Reid and House Speaker Nancy Pelosi (D-CA) have worked out a plan to use the staff work in creating a unified bill and have each house pass the new legislation. Because the new legislation would be identical, there would be no need for a conference, and upon passage, the bill could be sent directly to the president for his signature.

This rumor has made groups monitoring the legislation very nervous. There are numerous technical issues that were different between the Senate and House bills. Additionally, there are at least two major issues that need to be resolved. One issue deals with bundling of campaign contributions and the other with slowing down the revolving door. The House bill requires registered lobbyists to disclose their bundled campaign contributions, but the Senate bill does not. The Senate bill requires a two-year cooling off period before legislators and key staff can lobby Congress, but the House leaves it at the current one-year cooling off period.

On July 17, reform groups wrote a letter to Reid and Pelosi expressing concern that the legislation will be further watered down, reducing the importance of the reforms. In particular, the groups said any effort to gut the bundling provisions by dropping a requirement for lobbyists to report bundled campaign contributions as part of lobby disclosure, and simply require candidates and political committees to report to the Federal Election Commission, is not productive. It is not clear what new information this would produce, and the reform groups said it would result in a "complicated, time-consuming and ineffectual approach that is in fundamental conflict with the goals and purposes of the lobbying disclosure reforms."

Some Republicans have already started to complain about this strategy, arguing that bypassing a conference would be cause for trying to slow down the legislation. Senate Minority Leader Mitch McConnell (R-KY) said in a July 20 news conference that he prefers the conference committee process because it will give the minority party more

influence over the content of the final bill. However, he said he has not been able to convince DeMint to change his position, and will not attempt to block the identical bill strategy, saying "I'd rather have the Republicans at the table than not. But I do think it's time to act." For his part, Reid has said that the Senate will not leave for recess until the lobbying reform legislation is addressed.

New Executive Order on Iraq Expands Problems for Charities

President Bush issued an executive order on July 16 that expands the government's authority to block the U.S.-based financial assets of individuals or groups in Iraq beyond those it designates as supporters of terrorism, to include those who act, or assist those who act, against peace and stability in Iraq. The order, titled Blocking Property of Certain Persons Who Threaten Stabilization Efforts in Iraq, directs the U.S. Treasury Department to freeze assets of those who impede "efforts to promote economic reconstruction and political reform in Iraq or to provide humanitarian assistance to the Iraqi people." Experts both in and out of the charitable sector have expressed concern about the potential impact on civil liberties and provision of aid in the region. As the *Washington Post* warns, "Be careful what you say and whom you help -- especially when it comes to the Iraq war and the Iraqi government."

For years, charities have protested the lack of clear standards and due process in Executive Order 13224, signed by Bush in 2001. It prohibits the donation of money or humanitarian articles, such as food, to people and groups the Department of Treasury designates as being associated with terrorists and terrorist organizations. The new executive order (E.O.) raises many of the same issues but could have an even broader impact on charities operating in Iraq, since assets can be seized without any finding of a link to terrorism. All that is required is that Treasury, in consultation with the Departments of State and Defense, finds that any individual or group "committed, or to pose a significant risk of committing, an act or acts of violence that have the purpose or effect of: (A) threatening the peace or stability of Iraq or the Government of Iraq; or (B) undermining efforts to promote economic reconstruction and political reform in Iraq or to provide humanitarian assistance to the Iraqi people."

No clear standards are outlined to define what criteria will be used to determine when an entity poses a significant risk or what constitutes a threat to the peace or security of the Iraqi government. Ken Mayer, a University of Wisconsin expert on executive orders, told the blog TPMMuckraker.com that a threat to the stability of Iraq "could be anything. Think of the possibilities: it could be charities that send a small amount of money (to groups linked to) the insurgency, or it could be the government of Iran that has assets in the U.S...."

The E.O. also allows assets to be frozen without notice. Bruce Fein, a Justice Department official in the Reagan administration, told TPMMuckraker, "I've never seen anything so

broad that it expands beyond terrorism, beyond seeking to use violence or the threat of violence to cower or intimidate a population. This covers stabilization in Iraq. . . . And it goes beyond even attempting violence, to cover those who pose 'a significant risk' of violence. Suppose Congress passed a law saying you've committed a crime if there's significant risk that you might commit a crime."

The E.O. prohibits charitable donations to any group listed under its authority. No listings were included in the E.O. when it was published, but a Treasury spokesperson said the department is in the process of making its list. Any person or organization that aids someone else whose assets have been blocked, knowingly or not, will be subject to being listed as well.

Michael German, the ACLU's chief national security lawyer, was also quoted in a TPMMuckraker blog post, citing the possibility of "a chilling effect on humanitarian donations in Iraq . . . a lot of these provisions where charities are being demonized, to a certain extent, would cause a chilling effect, and that's what's so counterproductive with this type of policy."

FEC Will Draft Rule Allowing Issue Advocacy Broadcasts

Following the June U.S. Supreme Court ruling in *Federal Election Commission vs. Wisconsin Right to Life, Inc.*, which found the federal electioneering communications ban unconstitutional when applied to genuine issue ads, there has been a fast-paced effort to tie up loose ends in related cases and set the stage for the 2008 election. The Federal Election Commission (FEC) announced that it will issue a proposed rule in August to incorporate the decision into its regulations. In two related court cases, the FEC conceded that certain ads in question were genuine issue ads, including one that was critical of a senator's position on a bill. The "electioneering communications" provision of the Bipartisan Campaign Reform Act of 2002 (BCRA) prohibits corporations, including nonprofits, from paying for broadcasts that refer to a candidate for federal office within 30 days of a primary and 60 days of a general election.

FEC Rulemaking

The next major step in protecting grassroots lobbying communications is establishing a rule in FEC regulations, rather than requiring each nonprofit to guess at whether its broadcast qualifies for the exemption under the Supreme Court's ruling. On July 18, Wisconsin Right to Life (WRTL) lawyer James Bopp filed a petition at the FEC on behalf of the James Madison Center for Free Speech asking the FEC to write the definition of protected issue ads into its rules using the Court's language. Bopp said, "Promulgating such a rule should be neither complex nor time-consuming because the Commission should simply adopt the Court's own statement of the test for communications that are subject to the 'electioneering communication' prohibition . . ." The petition also asks for safe harbor examples. Bopp commented, "Groups should not have to hire a lawyer and

go to court to get government permission to engage in speech that the Supreme Court has already held to be protected by the First Amendment."

The same day, the FEC announced it will work on a rulemaking to implement the Supreme Court's decision. The FEC press release said the agency plans to issue a proposed regulation in August, request comments in September and hold a public hearing in October. A vote on a final rule is set for the end of November. FEC Chairman Robert Lenhard said, "We believe it is critical to have a clear rule in place in time for the Presidential primaries and caucuses in early 2008." Because of the early presidential primaries, the first 30-day blackout period will begin in December and will occur during times in 2008 while Congress is considering legislation.

Resolving Related Litigation: Criticism of Officeholder's Policy Position Allowed

In a related case, the Christian Civic League of Maine (CCL) settled its 2006 as-applied challenge when the FEC joined its motion asking the D.C. district court to rule in its favor. In 2006, the court denied CCL's request for a preliminary injunction barring application of the electioneering communications rule to its grassroots lobbying ads. The ads went further than those in the *WRTL* case because they urged people in Maine to contact Sens. Olympia Snowe (R-ME) and Susan Collins (R-ME) and ask them to change their position on the Marriage Protection Amendment. This difference is significant because it sets a broader framework for defining genuine issue ads that are exempt from the electioneering communications ban. As a result, an ad that states the position of the officeholder/candidate on an issue and either criticizes or praises his or her position is recognized as protected issue advocacy.

WRTL's 2006 Challenge Settled

On July 12, WRTL asked for summary judgment briefing schedule for a 2006 ad about the Child Custody Protection Act in a challenge that was not specifically resolved in the Supreme Court case. In 2006, the FEC argued the district court could not rule on the ad without more discovery proceedings allowing the commission to get background information about WRTL's ad campaign. The Supreme Court ruling said such extensive discovery is too burdensome and is no longer allowed. WRTL also asked the court to block Sen. John McCain ☼ (R-AZ) and other members of Congress from intervening in the case any further. According to the motion, McCain and others could no longer assert that they would be injured if similar ads were to be broadcast, so they had no standing under Article III of the U.S. Constitution and must be removed from the case. Bopp stated, "Allowing the rich campaign finance 'reform' gang to pile on in cases where nonprofit citizen groups are trying to vindicate their liberties is wrong, unconstitutional, and inconsistent with the Supreme Court's mandate as to how these cases are to be conducted."

On July 18, the FEC filed a joint motion along with WRTL and the interveners, McCain

et al., asking the court to rule in favor of WRTL. The FEC and the congressional reformers acknowledged that WRTL's ad is constitutionally protected as a genuine issue ad.

Trial Testing Humanitarian Aid Standards Begins

The jury has been sworn in for the criminal trial of the Holy Land Foundation (HLF) and five of its leaders, who are charged with indirectly aiding Hamas by providing charitable aid to grassroots organizations in the West Bank and Gaza. The case is focusing public attention on two issues important to the charitable sector. First, some of the secret evidence used to shut down HLF and freeze its assets in 2001 will come to light, and its reliability and veracity will be challenged. Secondly, the case raises the question of whether it is a crime to provide humanitarian aid through organizations that are not designated as supporters of terrorism. The trial in the U.S. District Court in Dallas, TX, is expected to take three to five months.

The prosecution argues that HLF leaders knew the local groups they were working with to deliver aid were controlled by Hamas, a designated terrorist organization. But defense attorneys argue that it was legal to work with these groups, and at least one, Al Razi Hospital, received funds from the U.S. Agency for International Development during the same time period.

HLF was shut down by the Department of Treasury in late 2001 when it was designated as a supporter of terrorism under the U.S. Patriot Act. The group challenged the designation but lost in a process that used secret evidence and did not allow the group to present the court with evidence on its own behalf. (For details, see the March 2006 OMB Watch report *Muslim Charities and the War on Terror*.) In 2004, HLF was charged in a 42-count indictment, which alleges HLF gave over $12 million to local zakat committees controlled by Hamas and gave priority aid to families of suicide bombers. ("Zakat" is an Islamic concept of tithing or giving of alms. Muslims are obligated to give 2.5 percent of their wealth when their wealth is above a specified level.) The charges were announced on the same day HLF asked the Department of Justice Inspector General to investigate Federal Bureau of Investigation (FBI) use of Israeli intelligence reports that an independent expert found was riddled with translation errors.

Pre-trial proceedings in the case have unearthed troubling problems with evidence. In February, the *Los Angeles Times* reported that declassified government documents show summaries of surveillance of Holy Land's former executive director erroneously claim he made explicit anti-Semitic comments. However, none of the quotes included in the summary were in the 13-page transcript of the conversation. Under the federal Classified Information Procedures Act, the defense attorneys are prohibited from sharing the material with their clients and thus unable to prove that the statements were never said or misunderstood. In March, the trial judge denied a defense request to declassify additional pages of FBI evidence so they could look for other such discrepancies. The

defense attorneys have said they only have summaries for about ten percent of ten years worth of surveillance.

In June, the prosecution took the unusual step of publishing a list of over 300 unindicted co-conspirators in the case, including established Muslim organizations such as the Islamic Society of North America and the Council on American Islamic Relations (CAIR). In a July 23 *Los Angeles Times* story, Ibrahim Hooper of CAIR called the move "McCarthyite tactics" and an "attempt to marginalize and disenfranchise mainstream Muslim groups." The law does not allow unindicted co-conspirators to challenge their designation.

Jury selection in the trial took one week. Three potential jurors were dismissed because they said they feared retaliation from Hamas if there is a conviction. The prosecution asked the judge to cut a juror who said she might have problem convicting the defendants as supporters of terrorism if the support was humanitarian aid. The prosecution is arguing that even though the zakat committees were not designated as supporters of terrorism, the defendants knew or should have known that they had connections to Hamas, and that the aid made it possible for Hamas to spend funds on terrorist activities. If the government's position prevails, it will create a new, expanded definition of what constitutes illegal support that could leave many charities guessing about what groups they can and cannot work with. Given the drastic sanctions involved, and the possibility of criminal charges, many charities may pull back from providing humanitarian aid in conflict areas such as the Middle East.

While HLF has strong supporters, such as Hungry for Justice website, and strong detractors, such as the CounterTerrorism Blog, the central question for charities is not the specific facts of the HLF case. Instead, the question is whether humanitarian aid should be blocked because one or more persons involved in some stage of aid delivery has ties to a designated terrorist group.

Bush's Regulatory Changes Set to Go into Effect

As of today, July 24, federal agencies are to be in full compliance with all the provisions of Executive Order 13422 (E.O. 13422), which amends the regulatory process for agencies, and the *Final Bulletin for Agency Good Guidance Practices*. Both documents were issued Jan. 18 and work in concert to bring significant changes to the way agencies develop and enforce public protections.

President George W. Bush issued the E.O. to amend a Clinton-era executive order in effect since 1993. The Bush E.O.:

- shifts the criterion for promulgating regulations from the identification of a problem like public health or environmental protection to the identification of "...the specific market failure (such as externalities, market power, lack of

information)...that warrant new agency action";
- makes the agencies' Regulatory Policy Officer (RPO) a presidential appointment and gives that person the approval authority for any rulemaking commencement or inclusion of any rulemaking in the Regulatory Plan unless specifically authorized by the agency head;
- requires guidance documents to go through the same OMB review process as proposed regulations before agencies can issue them;
- requires "significant" guidance documents (those that are estimated to have at least a $100 million effect on the economy, among other criteria) to go through the same OMB review process as "significant" regulations; and
- requires each agency to estimate the "combined aggregate costs and benefits of all its regulations planned for that calendar year to assist with the identification of priorities," which will be overseen by the RPO.

Agencies were required to designate their RPOs by March 19. In late July, OMB released a list of RPOs for each agency. Of the 29 on the list, 27 have been confirmed by the Senate in their agency roles but not in their role as RPOs. The remaining two are political appointees who did not require any Senate confirmation.

The White House Office of Management and Budget (OMB) issued the good guidance bulletin the same day to provide directions to agencies as they develop and issue guidance documents. Agencies issue guidance documents in order to clarify regulatory obligations to industry, explain complex technical issues or otherwise offer clarification or guidance on agency policies. Agencies produce thousands of guidance documents every year.

The *Final Bulletin* requires internal review of significant guidance documents by senior agency officials as well as public notice-and-comment on guidance documents deemed "economically significant." These guidance documents are those judged to exceed the $100 million economic impact threshold stated in the E.O.

The OMB office with review authority is the Office of Information and Regulatory Affairs (OIRA). OIRA may review any guidance document it wishes to review. The E.O. and the *Final Bulletin* require OIRA to review significant guidance documents and gives the administrator the authority to define which documents are "significant."

These regulatory changes are controversial for more reasons than their timing, coming in the seventh year of the Bush presidency. OMB Watch issued a report July 24 summarizing the potential impacts of these changes on agencies' ability to issue regulations protecting public health, workplace safety, the environment and civil rights. (We issued a more comprehensive report in March entitled *A Failure to Govern.*) We believe the changes have real potential to further delay the issuance of regulations, distort the balance of power between Congress and the executive branch, and remove considerable discretion from agencies to implement legislative mandates to respond to

public needs.

Congress has also expressed dismay at the potential harm these changes might inflict. In a series of hearings (see the links on the right), Congress heard from supporters of these amendments — the U.S. Chamber of Commerce, for example — who claimed the changes represent good government and help reign in federal agencies. Congress also heard from a range of advocacy groups (including OMB Watch), former government officials and administrative law experts who said these changes may be unconstitutional, usurp both agency and congressional responsibilities, add more delay to an ossified process and further centralize authority in the executive branch.

On June 28, the House passed the Financial Services and General Government Appropriations Act, FY 2008 (H.R. 2829). The bill contains an amendment that prevents the White House from expending any funds in implementing the E.O. and the *Final Bulletin*.

The Senate also considered defunding language for its version of the FY 2008 appropriations bill. Language that would have prevented the use of funds in implementing both the E.O. and the *Final Bulletin* was included when an appropriations subcommittee considered the bill. However, the language was later removed when it reached the full Appropriations Committee.

When the House and Senate meet in conference to resolve differences in the two appropriations bills, the House language preventing implementation of the E.O. and the *Final Bulletin* will be addressed. Bush has threatened a veto over other spending issues in the bill.

Amidst Increased Scrutiny, FDA Wants to Shut Testing Labs

Amidst increased scrutiny by the public and Congress of the problems with food imports and instances of bacterial outbreaks in the domestic food supply, the U.S. Food and Drug Administration (FDA) plans to close 7 of 13 laboratories that test for food safety.

Testifying July 17 before the House Energy and Commerce Committee's subcommittee on Oversight and Investigations, FDA commissioner Andrew C. von Eschenbach said that the closings will enhance FDA's capabilities. "Consolidating our work into six laboratories whose capacity will meet and even exceed the capacity of FDA's 13 existing field laboratories will strengthen and increase ORA's [Office of Regulatory Affairs] analytical capabilities to meet the challenges of the 21st Century," he wrote in his formal testimony.

But an investigation by the subcommittee's staff this year and other witnesses appearing before the subcommittee brought that conclusion into question. According to findings presented to the subcommittee by David Nelson, the subcommittee staff's lead

investigator, the restructuring proposal and food safety approaches have several flaws. His testimony countered von Eschenbach's statements about the strides FDA has made in food safety protections. Nelson found:

- that FDA lacks sufficient resources and authority to adequately protect food safety;
- that FDA's proposal to change the structure of the labs exacerbates the food safety problem; and
- that "FDA's current regulatory approach, that relies on voluntary guidelines for most domestic and imported foods, appears inadequate in responding to the changing food industry."

During the investigation, subcommittee staff visited ports of entry and FDA labs and interviewed field personnel involved in food safety inspections. According to these interviews, FDA allows private labs, over which it has no oversight authority, to do food safety testing of imports. FDA allows food suspected of being unsafe to be returned to importers, and the importers have the food tested by private labs.

One FDA deputy lab director described the work of the private labs as "spooky" and "scary." Another FDA official concurred with this conclusion saying the labs are not adequately performing because they are driven by financial considerations and not safety considerations.

According to Nelson's testimony, FDA has failed to provide any analysis justifying the "radical reorganization." Labs in Detroit, San Francisco, Denver, Kansas City, San Juan, Puerto Rico, Philadelphia and Winchester, MA are proposed for closing. At a time when food safety issues have created a public health "crisis," the rationale for the closings seems to rest on little other than expected retirements and vacancies.

House Energy and Commerce Committee chairman John Dingell (D-MI) has stopped the labs from closing pending a report from the Government Accountability Office (GAO) analyzing the agency's reorganizational plans, according to a *New York Times* article. Additionally, the Senate and House Appropriations Committees passed Agriculture spending bills July 19 that prohibit FDA from implementing its plans.

Additional witnesses testified before the subcommittee about other flaws in the food safety net. For example, Caroline Smith DeWaal, food safety director at the Center for Science in the Public Interest, testified that FDA is poorly funded and jurisdiction over food safety is split primarily between FDA and the Department of Agriculture (USDA).

She also called for Congress to dramatically increase FDA's funding, update food safety laws which are over a century old, and create one food safety agency to overcome the jurisdictional splits among FDA, USDA and other agencies with some food safety responsibilities.

Also testifying was William K. Hubbard, former FDA associate commissioner who retired in 2005. He detailed the lack of funds and lost personnel the agency has experienced in recent years:

...the food program, in particular, has undergone steady budget cuts: the staff of FDA's headquarters food program has been reduced from almost a 1000 scientists to fewer than 800 in just five years; and FDA's field force, which includes its inspectors and import staff, has dropped during that period from over 4000 to about 3300 today. Of course, this is at a time in which the problems are growing and food imports are skyrocketing. The current budget request for Fiscal Year 2008 is a good example of the recent trends. Although the official budget request states that it includes an "additional" $10 million for food safety, the food program's inflation needs are not covered by the request, so the practical effect of that budget is a 3% (or $14 million) decrease (even with the $10 million "increase").

The subcommittee heard from nine witnesses in all, several of whom are or were FDA district officials. There are several legislative proposals pending in Congress to address the problems at FDA in light of the rapid increase in food imports and the fractured jurisdictional responsibilities among federal agencies.

White House Delays Whale Protection Rule

The White House is currently delaying the completion of a final rule intended to protect a critically endangered whale species. Critics are concerned the Bush administration is giving special access to business interests and overemphasizing economic considerations in its review of the rule. The delay of the whale protection rule is indicative of a larger problem in the White House regulatory review process.

The North Atlantic right whale is a large species native to the waters off the coast of America's eastern seaboard. According to the National Oceanic and Atmospheric Administration (NOAA), "The population is believed to be at or less than 300 individuals, making it one of the most critically endangered large whale species in the world." The species is protected under both the Endangered Species Act and the Marine Mammal Protection Act.

Although the species has benefited from federal protections for years, it is still having difficulty recovering. Human activity is the primary impediment to species recovery. Collisions between whales and shipping vessels are a particularly serious problem. According to NOAA, "One of the greatest known causes of deaths of North Atlantic right whales from human activities is ship strikes."

In response, NOAA began working in 1999 on a federal rule to limit the speed of large shipping vessels traveling along the eastern seaboard. The speed limits would vary based

on geographic location and season.

NOAA submitted a draft proposed rule to the White House Office of Information and Regulatory Affairs (OIRA) in March 2006. In June 2006, NOAA published the proposed rule in the *Federal Register* and opened the rule for a public comment period which lasted until October.

On Feb. 20, 2007, NOAA submitted a draft final rule to OIRA. Under Executive Order 12866, Regulatory Planning and Review, agencies are required to submit significant rules to the White House in order to give OIRA an opportunity to review and edit the rule. Agencies must submit the rule at least twice — once as a draft proposed rule and once as a draft final rule.

E.O. 12866 also prescribes a time limit for the OIRA review period. OIRA is to complete its review within 90 days of receiving the rule from the agency. In consultation with the agency, OIRA may extend the review period once for 30 days.

Because NOAA submitted the whale protection rule on Feb. 20, the OIRA review period has expired, even after use of its 30-day extension. Neither OIRA nor NOAA has given word as to when the review period will end. Although OIRA is to consult with agencies during the review process, NOAA has been kept in the dark as to the status of the rule, according to Public Employees for Environmental Responsibility (PEER), a public interest organization closely following the issue.

Delay of agency rules during the OIRA review process is not uncommon — nine percent of rules currently under review have exceeded OIRA's time limit. As of July 20, OIRA was reviewing 124 rules, according to RegInfo.gov. Of those 124 rules, OIRA has extended the review period of 13. Ten of those rules, including the whale protection rule, have exceeded the maximum 120-day review period. One additional rule has surpassed the initial 90-day window and has not officially had its review period extended. The most egregious case of delay is an EPA proposed rule on radiation exposure. The rule was submitted to OIRA in October 2005.

The exact nature of the OIRA review is also unclear because of a lack of transparency in the review process. RegInfo.gov, the federal government's regulatory review database, lists only dates of submission and identifies the results of OIRA's review in one of three ways: "consistent without change," "consistent with change," or "withdrawn" by the agency.

During the review period of the whale protection rule, OIRA has consulted with outside interests groups at least once. On March 28, officials from OIRA and NOAA met with representatives from the International Fund for Animal Welfare, a nonprofit organization dedicated to animal rights issues.

The World Shipping Council has also lobbied OIRA on the whale protection rule. In a

May 3 letter to OIRA Administrator Susan Dudley, the World Shipping Council expressed opposition to the rule citing economic costs and questioning the validity of NOAA's research. The World Shipping Council represents some domestic but mostly foreign shippers.

PEER is concerned about the influence of industry during the review. New England PEER Director Kyla Bennett said in a statement, "Foreign shippers want no environmental restrictions on how they use and sometimes abuse American waters but our government is supposed to be protecting our national interests, which include our endangered wildlife." She added, "The Bush administration should listen to our own experts rather than corporate lobbyists representing largely foreign interests."

In another unusual development, OIRA has involved the White House Council of Economic Advisors (CEA) in reviewing the rule, according to PEER. NOAA has already conducted extensive economic analysis in order to determine the rule's impact on the shipping industry and small businesses. NOAA has concluded the biological benefits of the rule far exceed any economic impact levied against shipping interests.

It is rare for the OIRA administrator to seek consultation with the Council of Economic Advisors on regulations. Rick Melberth, Director of Federal Regulatory Policy for OMB Watch, called it "a case example of OIRA overemphasizing economic considerations and protecting special interests instead of public need."

Questions, Concerns Surround Start of Nussle Confirmation Hearings

On June 19, Office of Management and Budget (OMB) Director Rob Portman announced his resignation, effective in August. The same day, President Bush nominated former House Budget Committee chairman Jim Nussle (R-IA) to be the next OMB director. Today, July 24, the Senate Homeland Security and Governmental Affairs Committee (HSGAC) held the first confirmation hearing for Nussle; on July 26, the Senate Budget Committee, which also has jurisdiction over the nomination, will hold its own hearings.

Before the hearing, Sen. Barack Obama ☼ (D-IL) submitted a statement for the record with additional topic areas he sought to have Nussle address concerning his nomination, including the next executive order on regulatory oversight, significant delays in release of Census Bureau reports on government spending, the administration's (and Nussle's) confrontational style, particularly related to the FY 08 appropriations bills, and important tax policy questions. Overall, Obama advised to move cautiously with this nomination.

Members of the HSGAC panel were generally deferential toward Nussle at today's hearing. The only aggressive questioning Nussle faced was from freshman Sen. Claire McCaskill ☼ (D-MO), on the subject of executive earmarks. Nussle fully admitted he

spent time while in the House pursuing and successfully winning earmarks for his district, but also agreed with McCaskill that the real problem with earmarking was not the process itself, but the secrecy surrounding the process and lack of information on who makes earmark requests. Nussle pledged to continue to work to bring transparency and disclosure of information to the earmarking process.

At the conclusion of the hearing, Committee Chairman Joe Lieberman (I-CT) questioned Nussle closely about whether Nussle believed tax cuts pay for themselves — a position Nussle said he had been quoted in a "heat of the argument" moment — and why he advocated one-sided PAYGO. Nussle said PAYGO rules that apply to both spending and tax cuts miss the focus of the country's fiscal problem — one he believed to be a spending problem and not a revenue problem. Based on the tenor and substance of today's hearing, it is likely the committee will report Nussle favorably when it reconvenes later this week.

Most of the focus during the Budget Committee hearing on Thursday will be on Nussle himself, his experience as former chair of the House Budget Committee and his substantial record on budget policy and procedural issues. But the hearings could prove contentious, as some members, such as Committee chair Kent Conrad (D-ND), may use the hearings to challenge the administration's approach to negotiations over the FY 2008 appropriations.

Chief among the predominant issues to watch for during the second Nussle hearing will be:

The Nussle Record I — Performance as House Budget Committee chair: As a Budget Committee chairman, Nussle failed to usher through a budget resolution three out of the six years of his tenure. In 2006, his final year chairing the committee, Congress failed entirely to adopt a budget. Strikingly, during his time as committee chair, Nussle's party was in control of both houses of Congress and the White House. The burden will be on Nussle to demonstrate how, with Democrats now running Congress, his approach to completing budgets will reflect the new political reality that confronts him and what plans he has to be more effective at producing a workable budget with Congress.

The Nussle Record II — Apostle of Tax Cuts, not Fiscal Restraint: Over his six-year tenure as Budget Committee chair, Nussle saw the national debt increase from about $5.5 trillion to nearly $9 trillion, an increase of roughly 64 percent — suggesting a less-than-dedicated focus on fiscal restraint. Nussle was cheerleader in the House for the administration's massive tax cuts in 2001, 2003, 2004 and 2005, helping to usher those bills through that chamber. He went so far as to declare in 2004,"Tax cuts don't need to be paid for [with offsets] - they pay for themselves" — a degree of policy orthodoxy since repudiated by the Bush administration. Nussle should be questioned closely about his adherence to this inaccurate belief especially in light of a recent nonpartisan Congressional Budget Office report that found the 2001 and 2003 tax cuts have cost $211

billion to the Treasury in 2007 alone — a far cry from paying for themselves. Nussle's strict adherence to tax cuts at any cost and mistaken belief that they will reap more revenues for the Treasury than they cost need to be carefully examined during the hearings.

The FY 2008 Budget Process: After six years of stewardship over steady, significant annual federal budget spending increases, the administration has demonstrated a sudden interest in espousing the rhetoric of fiscal restraint — pushing hard to hold to the $932 billion limit the president has set on discretionary spending by issuing formal veto threats for the first time ever on "excessive" spending bills. Should the president carry through on these threats, the FY 2008 budget could be in jeopardy; a government shutdown — at least for parts of government — is possible this fall if no accommodation with Congress is made.

At the Budget Committee confirmation hearing on Thursday, Nussle will almost certainly be questioned about whether President Bush's FY 2008 discretionary spending limits are "non-negotiable" and how he would break the current budget stalemate between the White House and Congress in order to help enact the appropriations bills on time.

To a certain extent, some of the antagonism that Nussle may encounter from Congress stems from the sense among Democrats such as Sen. Kent Conrad (D-ND) that Nussle was "an intense partisan more given to confrontation than cooperation" during his time as House Budget chairman. This certainly raises questions of whether he can negotiate in a constructive manner the difficult issues involved in the FY 2008 budget in a difficult environment. But it may also be more about the administration's policies and approach to the new Democratic controlled Congress than about Nussle himself.

It is both his previous aggressive record and style, plus the hard line being taken by the administration, that will likely be key issues as the Senate considers his confirmation as director of OMB. Conrad reported rumors of a "hold" in the Senate regarding his confirmation, but said he had no further information. In the end, the confirmation process will likely raise a welter of federal budget issues, but none sufficiently damaging to Nussle to imperil prospects for Senate approval of his nomination.

Sustaining Presidential Vetoes May Become More Difficult

As Congress continues making progress on appropriations legislation, and as details of its spending priorities are revealed in each of the twelve FY 2008 appropriations bills, signs of waning enthusiasm for sustaining presidential vetoes are appearing within a group of 147 House Republicans. While this group vowed to support any presidential veto of appropriations bills, eight of the appropriations bills passed thus far by the House have garnered significant bipartisan support, defraying the solidarity of that coalition.

In May, 147 Republican representatives pledged to vote to sustain presidential vetoes of

spending bills that exceeded the president's initial budget request. So far, 62 of those signatories have voted for an appropriations bill the president has threatened to veto. Of the eight bills approved by the House, four have been met with veto threats from the president, and four representatives out of the 147 promised veto-sustainers have voted for each of those threatened bills, while three voted for three out of four bills. Although a vote in favor of a given bill does not preclude a vote to sustain a veto, it is consistent with support of the substance of the bill and makes it more difficult for the legislator to change his or her vote later in the process.

The Senate has also made progress on the appropriations bills, with its Appropriations Committee having passed 11 of the 12. However, the full Senate has yet to take any action on annual spending legislation.

Despite the veto threats from the White House, Congress has stuck firmly to the budget resolution it passed in May. And although Congress's proposed FY 2008 spending levels are nine percent above those enacted in FY 2007, when those levels are adjusted for inflation and population growth, the next fiscal year's non-defense discretionary spending will be lower than it was in FY 2005.

	House			*Senate*		
	SubCmte	Cmte	Floor	SubCmte	Cmte	Floor
Agriculture	17	18.8		18.7	18.7	
Commerce-Justice-Science	53.6	53.6		54.4	54.4	
Defense	459					
Energy & Water	31.6	31.6	31.6	32.3	32.3	
Financial Services	21.43	21.4	21.4	21.8	21.8	
Homeland Security	36.3	36.3	36.3	37.6	37.6	
Interior & Environment	27.6	27.6	27.6	27.2	27.2	
Labor-HHS-Education	151.5	151.5	151.4	149.2	149.2	
Legislative Branch	3.1	3.1	3.1	4	4	
Military Construction-VA	64.7	64.7	64.7	64.7	64.7	
State-Foreign Operations	34.2	34.2	34.2	34.2	34.2	
Transportation-HUD	50.7	50.7		51.1	51.1	

Numbers are billions of dollars. Green boxes indicate approval. Black boxes next to bill titles are bills which the president has issued a veto threat.

At $151.4 billion, the House **Labor-HHS-Education** appropriations bill is the largest of the non-defense measures. It allocates $10 billion (7.5 percent) more than the president's request and $2.2 billion (1.65 percent) more than the Senate's bill to health, education and worker programs. In addition to the bill's funding level, the president has threatened to veto it because of language regarding female reproductive health. Included in the bill is:

Program/Line Item *(chart in millions)*	**FY 2008 Appropriations**	**Amount Above President's Request**
dislocated worker assistance	1,115	357
job training	1,552	252

community health centers	2,188	200
rural health programs	145	120
Centers for Disease Control to fund terrorism preparedness and response programs	1,589	85
Low Income Home Energy Assistance (LIHEAP)	2,662	880
No Child Left Behind-authorized programs	25,641	975

Representing the largest boost in Veterans Affairs spending since the agency's inception, the **Military Construction-Veterans Affairs** spending bill was overwhelmingly approved by the House on June 15 by a vote of 409-2. The measure is $4 billion more than the president's request, but the president has declined to veto it, issuing instead a demand that Congress find spending offsets in other appropriations bills. Among others, the bill would set spending levels for the following programs:

Program/Line Item *(chart in millions)*	**FY 2008 Appropriations**	**Amount Above President's Request**
programs to treat post-traumatic stress disorder for veterans returning home from the wars in Iraq and Afghanistan	600	600
assistance for homeless veterans	130	23
medical and prosthetic research	480	69
maintenance and renovation of existing medical facilities	4,100	508

In June, the House also approved the FY 2008 **Homeland Security** appropriations bill. Providing $36.3 billion in funding for securing the nation's borders, airspace, Coast Guard and infrastructure, the bill provides over $2 billion more for homeland security than the president's request. Some details of the bill include:

Program/Line Item *(chart in millions)*	**FY 2008 Appropriations**	**Amount Above President's Request**
first responder and port security grants	4,620	700
Transportation Safety Administration	6,640	234
border security	8,900	139

FEMA management	685	17

Republican support in the House for sustaining a spate of vetoes has already begun to waver. By emphasizing spending on human needs, and placing vital social programs above unnecessary discretionary spending cuts, the Democratic leadership has been able to attract strong support from both sides of the aisle to FY 2008 appropriations legislation. In so doing, Congress may be able to eschew attempts by the White House to bully into law insufficient spending levels.

Reauthorization of Children's Health Insurance Program Gains Momentum

On July 19, the Senate Finance Committee approved a proposal to expand coverage of the State Children's Health Insurance Program (SCHIP) to four million additional children who would otherwise not have health insurance. The entire Senate is expected to vote on the proposal this week (July 24-27), while the House is expected to act soon to approve legislation providing insurance for even more children than the Senate's version. The president has threatened to veto the Senate Finance Committee-approved version, even though it cleared the committee with strong bipartisan support, 17-4.

SCHIP, which is administered by the states and relies on a block-grant funding formula, provides health insurance for children in families who earn a low income but do not qualify for assistance under Medicaid. It was created in 1997 on a bipartisan basis and has wide support in both chambers. Its authorization must be renewed before the end of September or the program will expire.

The National Governors Association (NGA) is strongly supportive of a SCHIP authorization, writing numerous letters to the House and Senate, as well as the president — the most recent being sent on July 22. In that letter, the NGA again urged the Congress and president to reauthorize the program and stated they are encouraged by the efforts of the Senate to pass a bipartisan proposal that "increase[s] funding and reflects the general philosophy that state flexibility and options and incentives for states are preferable to mandates."

The draft approved by the Senate Finance Committee — crafted by Sens. Max Baucus (D-MT), Chuck Grassley (R-IA), Jay Rockefeller (D-WV), and Orrin Hatch (R-UT) — would add $35 billion to the program over five years. This extra funding would enable states to provide coverage to four million more children, according to the Congressional Budget Office (CBO). The Center on Budget and Policy Priorities has found the vast majority of the four million children who would get insurance under the proposed expansion are already eligible for SCHIP, but, for lack of funding, have not been covered. About nine million American children are currently believed to be uninsured.

President Bush has threatened to veto the Senate proposal, which exceeds his $5 billion request by $30 billion. CBO has estimated that it would take $13.4 billion just to maintain the level of coverage currently provided, so the president's request represents a real cut in services. For context, the entire FY 2008 budget stands at $2.9 trillion, more than 400 times the size of the Senate proposal.

The House is considering a larger expansion than the Senate. Although a proposal has not yet been approved, media reports show the House will most likely consider a $50 billion expansion. Under the expected proposal, the House would find savings to pay for their proposal in the Medicare Advantage program, a privatization program that has been shown to cost 12 percent more than regular Medicare. Both the Senate and the House would pay for most of the expanded cost of the SCHIP reauthorization with a 61-cent increase in the federal cigarette tax.

Some lawmakers oppose the increase, arguing that the program covers too many adults rather than children, and that an expansion will encourage people who already have private insurance to sign up for SCHIP. An analysis by the Center on Budget and Policy Priorities acknowledges that about a third of the new enrollees will have had private insurance, but all expansions of government-run health insurance have this "crowd-out" effect, and one-third of enrollees is a relatively low percentage compared to previous expansions. For comparison, under a Bush proposal to subsidize private health insurance, 77 percent of the benefits would go to people who already have health insurance. Furthermore, the bill approved by the Senate Finance Committee would shift non-pregnant, childless adults on SCHIP to Medicaid and prevent states from using SCHIP funds to sign up more non-pregnant, childless adults.

The House hopes to move its SCHIP legislation out of committee to the floor the week of July 30, while the Senate is expected to begin debating its reauthorization bill on the floor this week. It is possible both chambers will pass their reauthorization proposals before the start of the August recess.

Another Attempt at Ending IRS Privatization Program Moves Forward

Both the House and Senate have taken important steps toward ending the wasteful and risky Internal Revenue Service (IRS) private tax collection program. The House Ways and Means Committee approved a bill (H.R. 3056) that would repeal the program, and the Senate Appropriations Committee cleared a bill (H.R. 2829) that would tightly limit the funding available at the IRS to administer the program.

Both committees reached approval by slim margins. H.R. 3056, the Ways and Means bill, was approved on a party line by 23-18, and H.R. 2829, the bill with spending restrictions, by 15-14. The White House has threatened to veto H.R. 2829, but on grounds not related to the debt collection program. It has not issued a statement

regarding H.R. 3056.

The private tax collection program lets private companies track down taxpayers who have not paid a small amount of outstanding taxes (see an OMB Watch summary of the program). If the IRS did the same work in-house, it could bring in nearly three times as much money as the private debt collectors. Additionally, letting profit-motivated companies handle sensitive tax matters has raised concerns both inside and out of Congress regarding privacy and taxpayer rights.

H.R. 3056 contains nearly the same language regarding the private collection program as H.R. 695, a bill co-sponsored by Reps. Steven Rothman (D-NJ) and Chris Van Hollen (D-MD). The primary difference between the two bills is that H.R. 3056 would not abrogate contracts that have already been issued to private debt collectors. This difference may dampen the opposition to the legislation from companies who have already won contracts from the government, as they would no longer stand to lose money if the contracts were not left intact.

During the debate over H.R. 3056, defenders of the debt collection program argued that using private debt collectors is a way to avoid the opportunity cost of pursuing small tax debts. The IRS, program supporters claim, does not have enough funding to pursue the cases that have been handed over the private agencies, and even if more funding were given to IRS, it would use it to pursue cases yielding a higher rate of return. However, as several legislators pointed out, the IRS has already spent $71 million to set up and administer the program. If spent elsewhere, this money could have brought in $1.4 billion in two years, while the program has only brought in $20 million over that same time period.

Ending the program would cost $1.1 billion over 10 years, according to the Congressional Budget Office. H.R. 3056 offsets this cost by increasing taxes on people who have renounced their citizenship, as well as reinstating and increasing certain penalties and interest regarding taxes (see a full list of offsets). The bill also contains a few other minor changes in tax law, including a one-year delay on a withholding requirement for government goods and services and language ensuring residents of the Virgin Islands are entitled to the same taxpayer rights as residents of the United States.

No plans have yet been made for either bill to be considered by the full House or Senate. The House has approved its companion to the Senate's draft of H.R. 2829, though language that would have limited funding for the debt collection program was removed on a point of order challenge on the floor. A Senate companion to H.R. 695 — S. 335 — has gained 21 co-sponsors but has not yet been considered by the Senate Finance Committee. While it is still unclear which mechanism will be used to end the program, there has been significant momentum to find a workable solution.

OMB Releases Flawed Mid-Session Budget Review

On July 11, the Office of Management and Budget (OMB) released its annual Mid-Session Review, which contains updated estimates of the budget deficit, receipts, outlays and budget authority for fiscal years 2007 through 2012. While the administration trumpeted the decrease in the projected deficit, several aspects of the review cast doubt on the accuracy of these claims. In addition, the projections for years 2008-2012 were less noted and far more sobering.

The Mid-Session Review's narrowed budget deficit projection this year follows a pattern repeated by the administration, predating its promise early in the 2004 presidential campaign to cut the budget deficit in half. Each year since then, the president's budget proposal has included an inflated deficit projection, to establish a benchmark against which revised projections were calculated to make it look like the deficit was being reduced, or reduced by more than had been expected.

To see this pattern clearly established, look at OMB Watch's assessments over last few years of the Mid-Session Review:

- In 2005, we wrote that the Review "predicted an improvement in the current fiscal year 2005 (FY05) deficit by $94 billion from its February projections... 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.

- The refrain was similar in 2006: The Bush administration announced last week its revised figure for this year's budget deficit: $445 billion. This, or so the spin goes, is good news, because the original forecast was even higher -- $521 billion. But outside budget experts had warned that the forecast was inflated, which tarnishes any celebration of the new number.

- Overall, according to a 2006 Bloomberg report: "Bush's budget-forecast misses in the past six years averaged $111.5 billion, according to figures from the White House Office of Management and Budget. That ranks him behind the Reagan administration's $98.1 billion average gap, George H.W. Bush's average of $69.9 billion, and about twice the Clinton administration's $58 billion average.

What makes this Mid-Session Review even worse is the administration continues to ignore the deterioration of the country's long-term fiscal health. The OMB review fails to mention the $137 billion *increase* in the deficit over fiscal years 2008-2012. While this is not good news, the figure may, in fact, be optimistic, based as it is on White House assumptions that the Iraq war will cost nothing after 2008 and that the Alternative Minimum Tax (AMT) will neither be patched nor reformed, let alone repealed. The estimated cost for a one-year patch of the AMT is $50 billion, and more comprehensive

reform may cost even more.

Sadly, or perhaps fortunately — for the sake of the reliability of claims relating to the nation's fiscal condition — to say nothing of the credibility of the federal government as a source of information generally, the OMB Mid-Session Review barely garnered attention. It was released quietly by the administration almost two weeks ago, and despite the administration's best efforts to focus attention on the artificial short-term good news, it had difficultly convincing even its former advisors, such as Greg Mankiw, Bush's former chair of the Council of Economic Advisers, that the looming fiscal problems on the horizon could be considered good news.

The budget projections produced over the last few years by the administration have continued to lose credibility as they have been used to further President Bush's political agenda. The release of the Mid-Session Review no longer serves as an important budgetary marker and has little or no effect on the formation on the debate over the federal budget.

FEMA Ignores Toxic Trailers of Hurricane Victims

The Federal Emergency Management Agency (FEMA) turned a blind eye to Katrina victims who became ill while living in FEMA-provided trailers, according to testimony given at a hearing of the House Committee on Oversight and Government Reform on July 19. Trailer tenants and experts described how FEMA, with evidence of toxic levels of formaldehyde in the trailers from construction materials, refused to substantively evaluate the extent of the problem, respond to known instances of formaldehyde poisoning or take adequate precautionary action.

Committee Chair Henry Waxman (D-CA) offered a scorching review of FEMA's inaction: "Senior FEMA officials in Washington didn't want to know what they already knew because they didn't want the moral and legal responsibility to do what they knew had to be done. So they did their best not to know." In a memo reviewing over 5,000 documents subpoenaed from FEMA, committee staff outlined a pattern of agency officials ignoring warnings about hazardous formaldehyde levels in the trailers from field staff and other government agencies such as the U.S. Environmental Protection Agency (EPA) and the Centers for Disease Control and Prevention (CDC).

Even after reports of formaldehyde poisoning in March 2006, FEMA refused to test occupied trailers and ignored testing that tenants had conducted independently. The agency implemented a testing program only for unused trailers six months later. The limited program, which indicated the trailers to have enough ventilation to reduce formaldehyde levels below the "level of concern," was explained by FEMA Administrator R. David Paulison as a data quality effort, "to eliminate any effects from human activities that might cause formaldehyde levels to rise."

However, hearing testimony revealed that there are several different "levels of concern" for formaldehyde. FEMA's testing placed the formaldehyde levels in the unoccupied trailers below an Occupational Safety and Health Administration standard, which allows exposure to 0.75 parts per million (ppm) over an eight-hour period. In contrast, both the National Institute for Occupational Safety and Health (NIOSH) and EPA claim that much lower levels of formaldehyde can cause acute health effects. The NIOSH eight-hour standard for formaldehyde exposure is just 0.016 ppm, more than 46 times lower than the standard used by FEMA.

Medical personnel also reported a strong correlation between respiratory infections and living in the FEMA trailers. Sierra Club conducted its own investigation and found that 83 percent of the trailers they tested were above 0.10 ppm. This level of formaldehyde, coupled with the long exposure that resulted from the trailers being used as residences, meant that by many health and safety standards, the trailers were and continue to be extremely unhealthy places to live.

It appears FEMA was more worried about protecting itself from possible future litigation than protecting the health of Katrina victims. Messages uncovered by Waxman's subpoena reveal that the agency's Office of General Counsel (OGC) directed FEMA staff not to test formaldehyde levels without OGC's approval, since that, as one staff person explained, would "imply FEMA's ownership of this issue," and FEMA must be "fully prepared to respond to the results."

FEMA is only now testing occupied trailers for air contaminants at levels hazardous to human health. Hopefully, this effort is not too late for the residents still living in 67,000 trailers across the Gulf Coast region.

Energy Task Force Advisors Revealed, Six Years after Meetings

In the long-standing struggle to gain access to details regarding Vice President Dick Cheney's energy task force meetings in 2000 and 2001, the *Washington Post* reported last week some of the many players who influenced the vice president's policy recommendations. An undisclosed former White House official gave the *Post* a list of approximately 300 names, companies and organizations who met with White House staff.

With the release of the task force's May 2001 report urging the adoption of energy policies geared toward the expansion of drilling opportunities and increased oil and gas supplies, public interest groups and the General Accounting Office (now called the Government Accountability Office (GAO)) tried to review the process surrounding the vice president's energy task force, including the substance and logistics of various meetings between the White House and industry representatives. At every turn, the administration rebuffed their efforts. As previously reported by the *Watcher*, the courts

found that the vice president is not required to release details on whom he or his staff met with, let alone the substance of the meetings.

The *Post*, however, gained access to a few of the details regarding whom Cheney and his staff met with. Documents turned over to the *Post* disclosed a list of oil and gas companies and industry groups that met with White House staff. The list includes executives at approximately 20 oil and gas companies including Exxon Mobil and British Petroleum; electric companies such as Enron, Duke Energy and Constellation Energy Group; and approximately 36 trade associations, such as the American Petroleum Institute and the National Mining Association. It was reported that many of these companies and trade associations submitted detailed policy recommendations to White House officials.

Interestingly, many of the people and companies listed were contributors to the Bush-Cheney 2000 presidential campaign. The *New York Times* reports that those on this list contributed more than $570,000.

The fact that it took a leak six years after the fact to reveal who attended White House meetings in the development of national energy policy is an indication of this administration's disdain towards government openness and accountability. Even nonpartisan, investigative federal agencies like the GAO were prevented from accessing any details regarding the meetings. The Office of the Vice President continues to maintain that White House officials have a right to receive candid and confidential advice, even though meetings of advisory groups, under the Federal Advisory Committee Act, are required to be open with advance public notice.

Baltimore Calls on Congress for More Chemical Security

On July 16, the Baltimore City Council unanimously passed a resolution supporting federal chemical security legislation that would require, when feasible, the use of safer chemicals and technologies.

As the resolution does not create any new security standards for Baltimore nor require any action by chemical companies, it is largely an effort to send a message to Congress about the perceived missed opportunity to make communities safer. By explicitly urging the use of safer and more secure technologies in the manufacture, transport, storage or use of chemicals, the resolution essentially urges Congress to go beyond the compromise legislation passed last year as part the Department of Homeland Security Appropriations Act of 2007.

The program developed by the Department of Homeland Security under those provisions has received criticism for creating the possibility that the program may preempt stronger state and local efforts and for failing to adequately minimize chemical risks by either

requiring or encouraging the use of safer substitute chemicals.

The resolution was introduced by Robert Curran, vice president of the council. Curran reportedly explained the resolution saying, "Here are substitutes that they can use instead of those toxic materials for the folks who work at these plants."

Surgeon General Warning: Manipulated Science

At a July 10 hearing of the House Committee on Oversight and Government Reform, former Bush administration Surgeon General Richard Carmona joined a growing list of officials to disclose the executive branch's political manipulation of science. Carmona's claims that agency science is being distorted for political purposes echoes charges leveled by recent whistleblowers from the Department of the Interior, the U.S. Food and Drug Administration, the U.S. Environmental Protection Agency (EPA) and the National Aeronautics and Space Administration.

Carmona provided examples of repression and manipulation such as "stem cell research, emergency contraception, and sex education." He noted that several reports were prohibited from publication, and he said he was instructed to mention President Bush at least three times in every page of a speech. Carmona asserted that the administration even went so far as to discourage his attendance at a Special Olympics event because of its relationship with a "prominent family" unfriendly toward the current administration, the Kennedys.

Some political pressure is inevitable on a prominent appointee. However, Carmona and former surgeons general C. Everett Koop and David Satcher concurred that the current administration interfered with the surgeon general's office more than previous ones. Koop described the growing pressure in the years since he was surgeon general under President Reagan and questioned why Carmona hadn't been allowed to have more of a role in Hurricane Katrina recovery efforts, given his experience in emergency services.

The Office of the Surgeon General's mission is to educate the American public with "the best scientific information available." As Satcher emphasized in his testimony, "The role of trust and credibility is critical...if that is compromised, then the vital mission of the office is compromised." Adequate resources and independence are vital to fulfill that mission, particularly in the face of conflicting agendas held by other agencies.

Considering the recommendations presented at the hearing, Rep. Henry Waxman ☼ (D-CA) announced plans to introduce the Surgeon General Independence Act to bolster the surgeon general's ability to be "the doctor of the nation, not the doctor of a political party."

The Senate is currently considering the nomination of Dr. James Holsinger to be the new surgeon general. Controversial because of his views on homosexuality, Holsinger may be

more to the ideological leanings of the president but may have trouble getting confirmed.

An Examination of Government Openness

OpenTheGovernment.org and People For the American Way recently released *Government Secrecy: Decisions Without Democracy*, which gives a comprehensive examination of the importance of government transparency and the various legislative and policy means for promoting and curtailing open government.

The report covers the last seven years of scaling back public access to important health, safety, national security and environmental information. According to the report, the Bush administration has systematically reduced public access to essential information. Homeland security has played a major role in the restriction of information through the reclassification of thousands of previously publicly available documents, use of the state secrets privilege to prevent the courts from accessing supposedly sensitive national security information, and creating over one hundred new sensitive but unclassified information categories. Other changes seem to address basic government efficiency and accountability, including increased use of executive privilege to prevent effective oversight, slowing down and scaling back public access under the Freedom of Information Act and limiting the rights of whistleblowers.

The report, written by David Banisar, lays the necessary groundwork for understanding the importance of an open and transparent government, for realizing the shortcomings of the current state of information and access, and for working toward the policies of the 21st century right-to-know era.

In the preface of the report, Bob Barr and John Podesta write that the report "provides ammunition to reclaim the open and balanced system of government set forth in our Constitution and Bill of Rights. It is now up to all of us to make our voices heard."

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In This Issue

Congress Passes Sweeping Lobbying and Ethics Reforms

After a year-long debate and negotiations over enacting lobbying and ethics reforms, Congress finally passed the Honest Leadership and Open Government Act of 2007 (S. 1). While not an ideal set of reforms, the new law is the most significant lobbying and ethics reform in a decade and should make important strides in increasing accountability and transparency in Washington.

The reform package, which overwhelmingly passed the House on July 31 (411-8) and the Senate on Aug. 2 (83-14), strengthens the Lobbying Disclosure Act and includes

important earmark disclosure provisions that will allow the public to view the sponsors of congressional earmarks on the Internet. The legislation also requires the disclosure of coalitions that control lobbying efforts but protects the identity of donors and members, bans lobbyists from paying for travel or gifts for members of Congress and staff, strips pensions of members convicted of certain felonies, and contains a cooling-off period for staff and members of Congress before they can lobby their old offices again.

This bill was the top priority for Democratic leaders this year in Congress. After winning a majority in both the House and Senate in the wake of numerous bribery, earmarking and lobbying scandals in 2006, the Democrats made these reforms the first piece of legislation they undertook in the Senate, passing it 96-2 in January. A similar measure passed overwhelmingly in the House by a 396-22 margin on May 24.

Yet the momentum to pass the law stalled during the summer as the issues of bundling campaign contributions and the cooling off period for members and staff before moving into the private sector became highly contentious. Further complicating the negotiations, Sen. Jim DeMint (R-SC) wanted assurances that the conference between the House and Senate would keep strong earmark disclosure provisions, and when he did not receive them, he blocked appointment of conferees, effectively stalling, if not killing, the legislation.

While the Senate's earmark disclosure language was stronger than previously passed House rules, DeMint's actions forced Majority Leader Harry Reid (D-NV) and Speaker of the House Nancy Pelosi (D-CA) to compile a compromise bill outside of the conference committee structure and pass it again in both chambers. By passing identical bills, Congress did not need a conference and could send the legislation directly to the president for his signature. While this strategy ultimately succeeded, it removed some transparency from the drafting process and led to minor changes in legislative language in the bill that weakened it slightly.

The provision to have lobbyists disclose bundling of campaign contributions was softened by raising the dollar threshold and by reporting every six months instead of quarterly. The Senate agreed to have a two-year cooling off period from lobbying Congress when moving to the private sector; the House kept the current one-year period. There was also some additional controversy with DeMint and Sen. Tom Coburn (R-OK) claiming that the secret bill writing process resulted in weakening the earmarks provision.

Nonetheless, the final bill is a major step forward in reducing the "culture of corruption" that the Democrats talked about in last year's election. The bundling provision and two other provisions — a new database providing public access to data about lobbying and ethics, and an elimination of secret holds in the Senate — could have a significant impact on the way Washington operates.

At the same time, the new law is not perfect. One of the most glaring omissions from the

lobbying and ethics reforms are provisions to require reporting of big money grassroots lobbying expenditures from lobbying campaigns. These disclosure rules would have revealed not only large spending campaigns seeking to influence legislation, but also the identity of groups or individuals who were behind the campaigns. Despite attempts in both the House and the Senate to pass tough grassroots lobbying provisions, neither chamber included the disclosure of this valuable information due in part to a misinformation campaign about the impact of the proposals.

Below are short descriptions of the major reforms in the legislation.

Stealth Coalitions
The new law addresses the problem of "stealth coalitions" — front groups with sympathetic sounding names that do not actually represent grassroots, community-based activism — by requiring registered lobbyists to disclose who is behind groups that:

- contribute more than $5,000 to the registrant or their client in a quarterly period, and

- "actively participates in the planning, supervision, or control of such lobbying activities".

The information disclosed includes the name, address and principal place of business of the organization behind the coalition. No disclosure of members or donors is required. In addition, if the organization being identified as affiliated with the client a registered lobbyist represents is publicly identified on the client's website, only the Internet address with that information needs to be disclosed, unless the affiliated group "in whole or in major part plans, supervises, or controls such lobbying activities."

Secret Holds
Ends the use of extended secret holds in the Senate by requiring a senator wishing to block a piece of legislation from going forward to identify him/herself within six session days.

Earmarks
One of the new reforms enacted with this law concerns earmark transparency and disclosure. All earmarked spending items and tax expenditures in bills, resolutions, conference reports and managers' statements must be identified and posted on the Internet at least 48 hours before a vote on the underlying legislation. Legislators must also certify that they and their immediate family will not financially benefit from any earmarks they've requested. Earmarks that suddenly appear in a conference report — i.e., not approved by either chamber — are now subject to a 60-vote point of order in the Senate. The new point of order rules are critical because they allow for the underlying bill to continue to be considered even when striking a specific provision. This is a vast improvement over the old rules where attempting to strike one small provision would

send the entire legislation back to the conference committee.

Lobby Disclosure/Bundling of Campaign Contributions
Strengthens the Lobbying Disclosure Act by requiring quarterly rather than semi-annual filing of lobby disclosure reports, disclosure of contributions from lobbyists to federal candidates and leadership PACs, and increasing civil and criminal penalties for failure to comply with disclosure requirements and the Lobbying Disclosure Act. Lobbyists are required to file reports electronically.

The new law creates a searchable website containing all registrations and reports required by the Lobbying Disclosure Act with the data being downloadable. The searchable website must also provide links or "other appropriate mechanisms" to have users obtain data from the Federal Election Commission on campaign contributions. (The Attorney General is required to develop a similar searchable database for information collected from lobbyists for foreign governments.)

One of the most controversial provisions requires congressional and presidential candidates to report when lobbyists arrange donations and deliver them as bundled contributions. The reports are required when the bundles reach $15,000 during a six-month period, thresholds that are weaker than earlier versions of the House bill.

Revolving Door
The bill extends from one to two years the "cooling off" period during which senators must wait before they can lobby their colleagues (the House will retain a one-year moratorium on such activities). It also requires all members to publicly disclose any job negotiations while serving in Congress and requires senior staff to disclose to the Ethics Committee any employment negotiations. The bill would also ban senior House and Senate staff (anyone making 75 percent of their boss's salary) from lobbying anyone in Congress for one year, not just his/her former office or committee.

Gifts and Travel
Senators, House members and presidential candidates would have to start paying the equivalent of charter fares for rides on private planes (and require pre-approval of privately funded travel), and representatives, senators and staff members would be barred from accepting gifts and meals from lobbyists. Further, the legislation bans lobbyists from hosting parties in honor of members at national party conventions.

Other Key Items
The House will create a searchable website with data that can be downloaded on travel and financial disclosure.

The Senate requires all committee and subcommittee meetings to be publicly available through the Internet — in the form of a video recording, audio recording or transcript — within 21 business days of the meeting. Additionally, there is a nonbinding sense of the Senate that all conference committees should be open to the public and that conferees

should be given adequate notice of time and place of the meetings.

Senate Committees OK Nussle

On July 31 and Aug. 2, the Senate Homeland Security and Governmental Affairs and Budget Committees approved the nomination of former Rep. Jim Nussle (R-IA) to serve as Office of Management and Budget (OMB) Director, by votes of 16-0 and 22-1, respectively. Senate Majority Leader Harry Reid (D-NV) has scheduled a floor vote on the nomination for Sept. 4.

On June 19, current OMB Director Rob Portman announced his resignation, effective in August. The same day, President Bush nominated Nussle to be the next OMB director. Portman left his post on Aug. 3, creating a vacancy that will last at least through Labor Day, barring a recess appointment. The Constitution allows presidents to fill vacancies "that may happen during the recess of the Senate" without waiting for confirmation votes. The Senate is in recess for the month of August.

At least two holds against the nomination are currently in place. After casting the only vote against Nussle in the Budget Committee, Sen. Bernie Sanders (I-VT) announced he had placed one of the holds on Nussle. Committee chair Kent Conrad (D-ND) confirmed at least one Democrat had also placed a hold on the nomination. Sanders cited philosophical differences with the administration's fiscal policy, saying, "President Bush is completely out of touch with the economic realities facing working families in America. Bush needs to hear the truth, not an echo. He needs a budget director who will make him face the facts, not fan his fantasies."

Another hold, by Republican Sen. Pete Domenici ☼ (NM), was lifted on the day the Budget Committee cleared Nussle for floor action. Domenici announced the hold was related to concerns he had about the Bush administration not moving forward on a new loan program he cared about. Apparently, he received assurances about the program and lifted the hold.

How and when the two remaining holds might be lifted is a matter of speculation. Although the confirmation process has slowed down with the Senate in recess, no observers expect Nussle's nomination to be rejected in the end. If Reid wants to proceed with floor consideration after the recess, he can move forward even with the holds still standing. However, he may need 60 votes if the senators with the holds choose to follow through with a filibuster.

Congress Approves Fiscally Responsible Expansion of Children's Health Insurance

During the week of July 30, the House and Senate passed different versions of a reauthorization and expansion of the State Children's Health Insurance Program (SCHIP) that will expand health care coverage to millions of uninsured children across the country. The Senate version would extend coverage to about four million additional children, while the House version would add five million children and root out excess costs in the Medicare Advantage program, which privatizes health insurance but at a higher cost than traditional Medicare coverage. President Bush has threatened to veto both bills.

The Senate approved its version (H.R. 976) on Aug. 2 68-31, which is enough votes to override a potential presidential veto should one occur. Senate Republicans have warned that even slight changes in the bill could result in them changing their votes, which would make it nearly impossible to override a veto.

The House bill's (H.R. 3162) vote was closer than the Senate's at 225-204. Under normal circumstances, this vote margin would not be enough to override a veto.

The closeness of the House vote is owed to the bill's many contested provisions, mostly regarding total SCHIP funding and the cuts in the Medicare Advantage program. The House bill includes $15 billion more in SCHIP funding over five years than the Senate's $35 billion version, which will help to cover an additional one million children. The Congressional Budget Office found that between five and six million uninsured children are eligible for SCHIP but have not been enrolled. A Bush administration-touted study showed that only one million eligible children were uninsured, but its study only included children who lacked insurance for a full year or more, instead of shorter periods within the year.

Both bills accomplish an expansion of the SCHIP program in a responsible, deficit neutral manner. Funding for the Senate bill came entirely from a 61-cent increase in the federal tobacco tax. The House bill would raise the tobacco tax by 45 cents, while eliminating overpayments in the Medicare Advantage program and its stabilization fund (for more on Medicare Advantage, see this background brief).

The Bush administration has issued a veto threat for both bills, on grounds of its opposition to "government-run" health care, the percentage of already insured children who would sign up for SCHIP under an expansion and the program's inclusion of a small percentage of adults. However, as the Center on Budget and Policy Priorities has documented, this SCHIP legislation should minimize these concerns. SCHIP programs are managed by the states, which work with private insurers to provide coverage, and health economists have found that SCHIP lets in a low percentage of insured children who opt out of private plans and sign up for SCHIP, compared to other federal insurance

programs.

Studies have also shown that when parents are enrolled in SCHIP, their children get coverage at a much higher rate. Even so, both the House and Senate versions would limit the extent to which states will be allowed to sign up parents and childless adults.

While the passage of these two bills is a significant accomplishment, the House and Senate will need to conference their two versions to arrive at a final proposal to reauthorize and expand the SCHIP program once they return to Washington in September. With time running out (the program is set to expire on Sept. 30) and the president threatening to veto either version of the reauthorization, there are still considerable obstacles to be overcome before work on the legislation is finished.

President's Warrantless Wiretapping Authority Vastly Expanded

Just before Congress broke for its August recess, members vastly expanded the Bush administration's authority to wiretap communications without warrants.

On Aug. 6, President Bush signed the Protect America Act of 2007 (S. 1927) (PAA), which gives the Attorney General and Director of National Intelligence (DNI) the authority to wiretap any person reasonably believed to be overseas, including communications to or from one or more parties who are inside the United States. Even though the PAA included a six-month sunset on the powers granted by the law, the mandatory orders can be issued for up to a year in secret with limited oversight by Congress and the judiciary.

Passage of the bill came after heavy lobbying by the administration to make drastic changes to the Foreign Intelligence Surveillance Act (FISA) and to reject revisions proposed by the Democratic majority. Congress deemed FISA, as it was written, inadequate because it permitted the warrantless wiretapping of communications between two foreigners when the wiretap was executed on foreign soil. When the call was routed through the U. S., however, as many communications are, a FISA order was required. Congress was under pressure to make revisions due to a revelation by Mike McConnell, the DNI, that the FISA court recently issued an opinion confirming the requirement of court orders for such wiretaps.

Congress's action comes on the heels of McConnell's other revelation that the spying activities under the administration's warrantless wiretapping program were in fact broader than previously acknowledged by Bush. In a letter to Sen. Arlen Specter ☼ (R-PA), ranking member of the Senate Judiciary Committee, McConnell acknowledged the existence of other programs beyond the National Security Agency's (NSA) Terrorist Surveillance Program (TSP), which was limited to international communications involving members of Al Qaeda. The revelation was made, in part, to allay concerns that

Attorney General Alberto Gonzales made a misstatement in his testimony before the Senate Judiciary Committee.

The Democratic proposal, drafted by Sen. Jay Rockefeller (D-WV), revised FISA to permit warrantless wiretapping of foreign-to-foreign communications, while preserving several important checks and balances. On Aug. 3, McConnell issued a statement arguing that the majority bill, by requiring warrants for communications involving U.S. citizens in the country, created "significant uncertainty" in the legality of the agency's surveillance practices. "I must have certainty in order to protect the nation from attacks that are being planned today to inflict mass casualties on the United States."

The administration rejected Rockefeller's bill and proposed the alternative, PAA, that was eventually signed into law. The PAA permits warrantless wiretaps involving foreign-to-foreign communications but does so by permitting warrantless wiretapping for all foreign intelligence collection methods and may even permit domestic warrantless wiretapping.

The PAA redefines "electronic surveillance" to omit "surveillance directed at a person reasonably believed to be located outside of the United States." Hence, the statutory requirement that judicial orders be received for electronic surveillance no longer applies to communications involving foreigners, even if U.S. citizens on U.S. soil are involved and even if there are no clear ties to criminal or terrorist behavior.

Congress's grant of authority in PAA goes far beyond the limits of TSP, which ignited a firestorm of controversy when it was reported by the *New York Times* in Dec. 2005. "The NSA could collect the communications of billions of people overseas and seize millions of international communications of Americans every day for the foreseeable future," stated the Center for National Security Studies.

The revision to FISA eliminates the statutory requirement to obtain judicial approval for wiretaps involving communications in which a "significant purpose" of the order is to collect foreign intelligence and one or more of the persons are not within the U.S. The orders to disclose communications are mandatory, though they can be challenged in court. It is still an unsettled question, though, as to whether the Fourth Amendment, which protects against unreasonable searches and seizures, or other sections of the U.S. Constitution apply to the subset of these communications involving American citizens, in which case a court order may still be required.

"I commend members Congress who supported these important reforms," said Bush on Aug. 5. "When Congress returns in September the Intelligence committees and leaders in both parties will need to complete work on the comprehensive reforms required by Director McConnell, including the important issue of providing meaningful liability protection to those who are alleged to have assisted our Nation following the attacks of September 11, 2001."

One provision not included in the bill but proposed by the administration, would have given blanket liability protection to telecommunication companies currently being sued for complying with orders issued by NSA's TSP. This issue will likely be debated in the lead-up to the six-month renewal of the PAA.

There are few reporting requirements in the PAA. The administration merely has to report to Congress if an agency exceeds the authority granted in the bill and does not have to report on how many calls are monitored or how often the powers of PAA are invoked. Additionally, there is a requirement for the executive to report to the FISA court on the procedures used to target foreigners after implementation of an order, but the court can only reject such procedures if the executive is found to be "clearly erroneous," a notoriously difficult standard to prove. The court is limited to considering whether or not the procedures limit the collection of intelligence to communications in which one or more persons outside the U.S. are targeted and in which foreign intelligence collection is a significant purpose.

A six-month sunset was placed on PAA after which, without renewal, its provisions would expire. The sunset, though, is weakened by the provision granting the Attorney General and DNI the authority to issue orders that are good for up to one year. Assuming this provision is still in effect in January 2008, warrantless wiretapping orders could be issued which would be good for the remainder of the Bush administration.

TRI Restoration Bill Passes Senate Committee

The Senate Environment and Public Works Committee voted 10-9 to approve the Toxic Right-to-Know Protection Act (S. 595) on July 31. The act would reverse a December 2006 U.S. Environmental Protection Agency rule change to the Toxics Release Inventory (TRI) that significantly reduced toxic release reporting requirements for polluting facilities.

Introduced by Sens. Frank Lautenberg (D-NJ), Robert Menendez (D-NJ) and Barbara Boxer (D-CA) in February, the bill was approved along party lines. Republican senators voiced concern over the impact of the regulatory burden on small businesses. Sen. James Inhofe ☼ (R-OK) was the most vocal opponent of the bill, originally submitting a series of amendments, each of which was designed to substantially weaken the bill's effect in restoring the TRI program. After Inhofe's first amendment met with defeat, he withdrew the remaining amendments. However, Inhofe appears ready to resubmit the amendments before the full Senate should S. 595 reach the Senate floor.

A House companion bill, H.R. 1055, has not moved from the Energy and Commerce Committee since being introduced by Reps. Frank Pallone (D-NJ) and Hilda Solis (D-CA) in February. The Senate committee vote may provide the momentum to prompt corresponding action in the House, although the House bill has yet to be scheduled for a

vote in committee.

Three hundred and five organizations publicly supported the passage of the Toxic Right-to-Know Protection Act in a July 30 letter to Congress, and there has been strong, decades-long public support for the TRI program, a small, yet powerful tool of pollution information and reduction.

Senate Passes FOIA Reform

On Aug. 3, the Senate passed the OPEN Government Act of 2007 (S. 849) by unanimous consent. The House passed similar legislation in March.

The bill was favorably reported out of the Senate Judiciary Committee April 12, but Sen. Jon Kyl ☼ (R-AZ) placed a hold on it. Kyl and the Justice Department had voiced several problems with the bill. After negotiations between Kyl and the bill's co-sponsors, Sens. Patrick Leahy (D-VT) and John Cornyn (R-TX), Congress moved to institute several important reforms to the Freedom of Information Act (FOIA) process.

The mounting problems regarding FOIA are well-documented. The Coalition of Journalists for Open Government's report *Waiting Game: FOIA Performance Hits New Lows* found that even though FOIA requests were down in 2005, the backlog of unanswered requests rose from 20 percent of total requests made in 2004 to 31 percent in 2005. In addition to the increase in unanswered requests, requesters had to wait longer for replies.

In response to increasing pressure to relieve agency backlogs and improve FOIA procedures, President George W. Bush issued Executive Order 13392 on Dec. 14, 2005. The order, though, did little to relieve agency backlogs. The Government Accountability Office (GAO) recently stated, "Despite increasing the numbers of requests processed, many agencies did not keep pace with the volume of requests that they received."

On March 14, by a vote of 308-117, the House passed the Freedom of Information Act Amendments of 2007 (H.R. 1309).

The Senate and House bills reaffirm the 20-day response requirement and impose penalties on agencies that fail to meet the requirement. They create a FOIA ombudsman at the National Archives to serve as a resource for the public in requesting documents and to exercise oversight of FOIA compliance. Additionally, the bills offer a needed correction and expansion of access to attorney's fees for those forced to hire lawyers and pursue information disclosure in court after agencies unjustly deny requests. Finally, the OPEN Government Act restores the presumption of disclosure under FOIA that was eliminated by a memorandum then-Attorney General John Ashcroft issued soon after 9/11.

The bills are expected to go to conference after the August recess to resolve differences between the two pieces of legislation.

House Committee Holds Hearing on Abuse of Information

A July 31 House Natural Resources Committee hearing continued to investigate reports of science manipulation within the U.S. Department of the Interior. Much of the hearing focused on the 2002 Klamath salmon die-off and former U.S. Fish and Wildlife Service (FWS) Deputy Assistant Secretary Julie MacDonald's interference in Endangered Species Act (ESA) findings.

The testimony of staff from two Inspectors General offices and an agency scientist established a clear disparity in perspective between those involved in the scientific analysis on the ground and those making policy decisions at higher levels. Committee Chair Nick Rahall (D-WV) aggressively questioned recent determinations made under the Endangered Species Act (ESA). Although no one claimed science research was changed outright, it became apparent that normal procedures were circumvented and expert recommendations were routinely disregarded when they resulted in conclusions that strayed from higher agency officials' policy priorities.

The Klamath Project controls water flows in the Klamath River basin, maintaining the natural river ecosystem while also diverting flows for agricultural needs. During a 2002 drought, the National Marine Fisheries Service (NMFS) decided to divert water in the river basin to local farms and ranches, and the area experienced the largest salmon die-off in history with over 60,000 fish dying.

A June 27 *Washington Post* article revealed possible interference from Vice President Dick Cheney in this farm-biased water management plan. Cheney reportedly pressured a high ranking Interior Department official, Sue Ellen Woodridge, and others "to get science on the side of the farmers." The water was ultimately diverted to the farmers after the National Research Council (NRC) found "no substantial scientific foundation" that restricting water from farmers' use would help the salmon.

Mike Kelly, the lead FWS biologist responsible for water management recommendations for Klamath Project operations, removed himself from the project because he believed that political pressure resulted in a decision that was inconsistent with the science, to the detriment of salmon, and potentially in violation of ESA. Kelly attributed the 2002 fish kill as "strong evidence" that the Klamath Project's failure to take a precautionary approach with regard to the salmon was partially responsible for the die-off. NRC's review supporting the farm-biased plan, he said, resulted from an "inappropriate burden of proof." This conclusion was supported by Oregon's science review team and an October 2004 Office of Inspector General (OIG) report which showed that normal standards and procedures ensuring scientific rigor were bypassed or expedited. Two of

three reviewers for the OIG report concurred that the "best science" was not used.

MacDonald resigned following an OIG report indicating her inappropriate involvement in endangered species de-listings. With no formal scientific background, she edited field reports and badgered staff to her accept her perspective. Responding to the Natural Resource Committee's previous investigation of MacDonald's scientific tampering, FWS Director Dale Hall affirmed at the hearing that the agency is reviewing eight ESA determinations that may have been unduly influenced by MacDonald. The process will be, according to Mary Kendall of OIG, "time-consuming and costly."

The Klamath Project and MacDonald's actions join the growing list of instances of scientific manipulation by the Bush administration, including information on polar bear and eagle ESA de-listings, the scope and extent of humanity's role in climate change, the Surgeon General's repressed health reports, and the U.S. Environmental Protection Agency's potentially higher-than-scientifically-recommended ozone standard.

OIRA Issues New Standards for Disseminating Statistical Information

Under the authority of the Information Quality Act, the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget published a new draft Statistical Policy Directive on Aug. 1, focusing on disclosure standards. OIRA uses Statistical Policy Directives to establish government-wide standards for statistical activities conducted by agencies.

Apparently, OIRA has been working on a new statistical policy directive that builds on the National Research Council's (NRC) Statistical Policy Directive No. 3 on the *Compilation, Release, and Evaluation of Principal Federal Economic Indicators*. However, a comparison reveals several potentially significant differences between the NRC directive and OIRA's draft.

A large portion of OIRA's directive addresses pre-release access to statistical information. While NRC's directive also addresses this issue, it makes clear that the primary intent of pre-release access is to inform the president and other policy officials about release of new economic indicator results. In contrast, OIRA's draft statistical directive makes no mention of policy makers being the primary audience for pre-release access and leaves the potential recipients of such access unaddressed. OMB Watch is concerned that under OIRA's more open-ended directive, industry associations and other special interest groups could be granted unfair early access to statistical information in order to promote "accuracy of any initial commentary."

Another noticeable difference between the directives is the elimination of the restriction that pre-release access can only precede release by 30 minutes or less. The OIRA draft directive contains no specific time restrictions at all on providing pre-release access and

offers no explanation as to why the provision was removed. Strict time restrictions are necessary to prevent misuse of early access to such information.

Finally, OMB Watch notes that the OIRA directive contains no reporting or evaluation provisions that would allow OIRA or others to monitor the impact of the directive's implementation. The NRC directive included requirements for agencies to submit performance evaluations every three years covering both the accuracy of the statistical indicators and the success of implementing the dissemination requirements. OMB Watch strongly recommends that OIRA include such monitoring provisions in the directive should it be finalized. For instance, in consideration of the heavy focus on pre-release access, OMB Watch would urge that agencies publicly report the official release of a statistical product, which parties received pre-release access and for what period of time.

The public has until Oct. 1 to submit comments on the directive to OIRA. OMB Watch will be conducting a more detailed review of the directive and submitting comments.

Toy Recalls Bring Attention to Commission's Inadequacies

The Aug. 2 recall by Mattel, Inc. of 1.5 million toys that may contain excessive levels of lead paint once again calls into question the Consumer Product Safety Commission's (CPSC) voluntary approach to regulating industry. Mattel's recall follows the June recall of 1.5 million toys by the RC2 Corp. for the same lead-based paint danger.

CPSC recalled certain Mattel toys manufactured between April 19 and July 6, 2007, bearing the Fisher-Price label. According to the announcement, "Surface paints on the toys could contain excessive levels of lead. Lead is toxic if ingested by young children and can cause adverse health effects." The June recall involved wooden toy trains coated with lead-based paint.

Sens. Dick Durbin (D-IL), Bill Nelson (D-FL), Chuck Schumer (D-NY) and Amy Klobuchar (D-MN), sent a letter Aug. 2 to Nancy Nord, chair of the CPSC, asking CPSC to conduct a risk analysis of Chinese toys to determine the need to issue a "detain and test" program similar to one the U.S. Food and Drug Administration issued for Chinese seafood after the recent discoveries of contaminated seafood products. CPSC is to respond to the letter in seven days.

A BNA article ($) notes that this is the fourth recall by Mattel or its Fisher-Price subsidiary in the last 12 months and the 26th toy recall this year, all involving toys made in China. BNA quotes a *Consumer Reports* spokesperson as saying there is a clear need for "better vigilance" on the part of manufacturers, but he goes on to say "As we have previously stated, we believe that independent, third-party inspections and certifications are crucial to keeping dangerous products off of U.S. shelves."

The problem with lead in toys is especially troublesome since 80 percent of toys bought in the U.S. are made in China, according to a *Washington Post* article about the recall. The toy industry is considered diligent and Mattel is supposed to have some of the strictest safety standards in the industry. Toy companies are required to report safety problems to the CPSC. The *Post* story quotes an independent toy industry analyst as saying the recall represents "a breakdown of that system. It raises a question of whether the industry can continue to be self-policing."

Furthermore, the CPSC's ability to set penalties, sue manufacturers and write rules for product safety was hampered by a lack of a quorum of its commissioners. As OMB Watch reported in an earlier *Watcher* article, CPSC had been operating without a quorum since January due to a commissioner vacancy. The law allowed the CPSC to operate for six months with just two of the three members of the commission. But since January, when the six months elapsed, they had not been able to take certain official actions. On Aug. 3, the problem was temporarily addressed when President Bush signed S. 4, Improving America's Security Act of 2007, into law. The bill contains a provision creating a waiver of the voting quorum for six additional months. The vacancy remains, however.

CPSC has also been plagued by diminishing resources. The commission was level-funded in 2006 and 2007, causing a significant staff decline. Both the House and the Senate FY 2008 Financial Services and General Government appropriations bills call for increasing the agency's budget above the small increase Bush requested for CPSC, according to a Senate appropriations report.

Durbin and Nelson introduced legislation July 23 to address some of the problems at CPSC. The Consumer Product Safety Modernization Act of 2007 reauthorizes the Consumer Product Safety Act (15 U.S.C. 2081), increases funding and permanently reduces the quorum requirement to two commissioners instead of three. It expedites the disclosure of several types of safety information and increases the maximum financial penalties the commission can impose. The bill has been referred to the Senate Committee on Commerce, Science and Transportation.

OMB Manipulates Science in Cost-Benefit Analysis for Ozone Rule

The U.S. Environmental Protection Agency (EPA) has released a cost-benefit analysis for a proposed rule aiming to tighten the federal standard for human exposure to ground-level ozone, also known as smog. Before its release, the White House Office of Management and Budget (OMB) edited scientific language in the analysis in order to downplay the economic benefits of the proposed rule.

On June 21, EPA announced a proposed rule revising the national standard for ground-level ozone. EPA proposed a range, 0.070 parts per million (ppm) to 0.075 ppm, from which it will choose a final standard. The current standard is 0.08 ppm. OMB reviewed

and edited the proposed rule before EPA released it for public viewing. EPA's proposal has drawn criticism for being too weak to fully protect the public from the adverse health effects of ozone.

On Aug. 2, EPA released a cost-benefit analysis for the proposed rule. Executive Order 12866, Regulatory Planning and Review, requires agencies to prepare a detailed economic analysis for rules that may have an annual impact on the economy of $100 million or more — an impact the ozone rule is likely to levy. The process and format for these cost-benefit analyses is governed by OMB Circular A-4, which was issued in 2003.

Agencies must attempt to monetize the costs and benefits of proposed rules and then judge the economic value of the rules through "net benefits" calculations. For purposes of comparison, agencies must also assess the costs and benefits of a variety of alternatives. Agencies release the final products as regulatory impact analyses (RIA). Before the RIAs are made public, OMB reviews and edits them.

In its review and edits of the ozone RIA, OMB manipulated scientific language in order make the benefits of EPA's proposed rule appear smaller, thus reducing its appeal from an economic standpoint. OMB consistently calls into question the causal relationship between ground-level ozone exposure and premature mortality and argues ground-level ozone is significantly beneficial due to its ability to block UVB rays.

According to the RIA, "the overall body of evidence is highly suggestive that (short-term exposure to) ozone directly or indirectly contributes to non-accidental cardiopulmonary-related mortality." For the purposes of cost-benefit analysis, assuming a causal relationship dramatically increases the economic benefits of reducing ozone exposure by incorporating the monetized value of human lives saved. As EPA states in the RIA, "Including premature mortality in our estimates had the largest impact on the overall magnitude of benefits: Premature mortality benefits account for more than 95 percent of the total benefits we can monetize."

Once EPA began drafting the RIA, OMB began altering language, which resulted in undermining the causal relationship between ozone and premature mortality. According to publicly available documents, an early draft of the RIA stated, "There is considerable variability in the magnitude of the ozone-related mortality association reported in the scientific literature, which we reflect by summarizing the primary estimates from four different studies below."

OMB altered the language to: "There is considerable *uncertainty* in the magnitude of the association between ozone and premature mortality. This analysis presents four alternative estimates for the association based upon different functions reported in the scientific literature." [emphasis added]

EPA's original language recognizes differences in the conclusions of scientific studies on the relationship between ozone and mortality, but it does not question the existence of a

causal relationship. OMB's edits are clearly intended to question the relationship.

OMB's manipulation is reflected in the benefits calculation for the proposed rule. At OMB's behest, EPA made two benefits calculations for each regulatory alternative — one that assumes a causal relationship between ozone exposure and one that assumes no relationship. EPA then presents monetized benefits as a range including the figures from both assumptions. The final outcome is damaging: Claiming no causal relationship reduces benefits associated with decreased mortality and skews the benefits range for each regulatory alternative in order to downplay the economic benefits of the proposed rule.

In its review and edits, OMB also pushed for the inclusion of questionable negative benefits by trumpeting the claim that ground-level ozone is beneficial because it blocks harmful UVB rays. Ozone does protect against UVB exposure, but the majority of protection occurs in the stratosphere, not at ground level. The ground-level ozone which shields UVB rays is largely naturally occurring, as opposed to the anthropogenic sources reduced by ozone regulations, according to EPA.

In initial drafts of the RIA, EPA addressed the negative benefits of increased UVB exposure but did so in only one paragraph. After OMB's review, EPA included a more detailed discussion and pledged to "work to present peer-reviewed quantified estimates for the final rule."

Expanding the discussion of UVB rays may reflect the influence of OMB's Office of Information and Regulatory Affairs (OIRA) Administrator Susan Dudley. According to a report by OMB Watch and Public Citizen, Dudley has a record of attempting to undermine the benefits of reduced ozone exposure by cautioning against increased UVB exposure. Dudley's nomination to head OIRA faced opposition from public interest groups and some senators for her views that regulations are harmful to the economy. President George W. Bush named Dudley administrator by recess appointment in April.

The Clean Air Act prohibits EPA from considering economic factors in setting its standard for ozone. The law orders EPA to protect public health within "an adequate margin of safety" regardless of economic costs or benefits.

The Act does not exclude economic considerations entirely. The air pollutant standards EPA sets are a two-step process. After setting the standard using only public health considerations, EPA then sets an implementation regulation in order to guide polluters in the proper way to achieve emission reductions. In this phase, EPA may consider economics in determining the most efficient way to reduce air pollution.

This proposed rule is in the first step of the Clean Air Act process. Nonetheless, EPA is forced to prepare the accompanying RIA because of provisions in E.O. 12866 and Circular A-4. Despite the intensive process of preparing the more-than-350-page document, EPA will be unable to use the RIA in setting the standard for ozone.

Nevertheless, industry lobbyists are already manipulating its findings with the goal of weakening the regulation. According to the Associated Press, a spokesman for the National Association of Manufacturers called the proposed rule "very expensive." OMB may also use the RIA's findings when it reviews the draft of the final rule.

In fact, because OMB forced EPA to include figures assuming no causal relationship, the net benefits range is so large the analysis may be of little use. For the 0.070 ppm option, estimated net benefits range from -$20 billion to $23 billion.

Examining benefits outside of an economic context provides information about the potential impact of the ozone standard. The upper-end of the benefits range for the 0.070 ppm option assumes as many as 5,400 lives saved and 780,000 school absences prevented per year.

EPA is under court order to publish the final standard by March 2008. The final rule will be accompanied by a final RIA, both of which will be subject to OMB review.

Size Matters: Nanotechnologies Present New Challenges

Three documents released since July 26, and a recent public hearing, highlighted the difficulties of promoting promising new nanotechnologies, protecting public health and safety, and safely disposing of waste products from their use and manufacturing. Nanotechnology involves manipulating matter the size of one-billionth of a meter or 100,000 times smaller than the width of a human hair. In 2005, more than $30 billion in nanotechnology products were sold globally, according to the Project on Emerging Nanotechnologies (PEN) at the Woodrow Wilson International Center for Scholars.

Nanotechnologies have been called the "next industrial revolution" with the potential to affect future products, from clothes to cars to medicine, according to Pew Trusts. However, if early studies are accurate, this promise comes with health, safety and environmental risks that should be considered.

First, the U.S. Food and Drug Administration's (FDA) Nanotechnologies Task Force issued a report July 25 urging the agency to issue guidance documents to clarify what information is necessary to ensure effective oversight of drugs, medical devices and other products. The report emphasizes the need for guidance to manufacturers and researchers because "the potential use of nanoscale materials includes most product types regulated by FDA and that those materials present regulatory challenges similar to other emerging technologies," according to a press release announcing the report.

BNA ($) reported July 26 that FDA's report brought both praise and criticism. The Director of PEN, Michael Wilson, a former FDA deputy commissioner, thought it was an important, positive step for the agency. The report's long list of required tasks, however,

means that Congress "needs to fix the problem of FDA's chronic underfunding."

At the same time, the report's call for issuing guidance documents instead of regulations and for not recommending labeling of nanotechnology products drew criticism from the International Center for Technology Assessment (ICTA). ICTA and a coalition of consumer and environmental groups petitioned FDA in 2006 to develop regulations for nanomaterial products.

Second, PEN released a report July 26 that focused on the critical issue of managing wastes from the manufacture and use of nanomaterials.

> Today, with over 500 nano-enabled products already on the market, one of the questions in greatest need of attention is how various forms of nanomaterials will be disposed of and treated at the end of their use. They may find their way into landfills or incinerators, and, eventually, into the air, soil, or water bodies. As we are learning, when we throw something away, there really is no "away."

The authors analyze the two primary U.S. statutes for regulating waste products, the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), or Superfund. Both laws give authority to regulate waste materials to the U.S. Environmental Protection Agency (EPA). The report concludes with recommendations for EPA such as encouraging "the development of data on human health and eco-toxicity and on the fate and transport of nanomaterials in the environment." It also contains recommendations for businesses and the investment community.

Third, on July 31, an international coalition of more than 40 groups from nearly every continent released a statement of principles for the oversight and regulation of nanotechnologies. The statement, released through ICTA, calls on governments, universities and businesses to adopt eight principles the coalition believes provides "the foundation for adequate oversight and assessment of the emerging field."

The principles include adopting a precautionary approach to approving products with nanomaterials and holding manufacturers liable for harm resulting from products and their production; protecting the environment through life cycle costing and protection of workers exposed to nanomaterials; labeling products and disclosing product safety data; and developing mandatory regulations for specific product classifications.

EPA held a public hearing Aug. 2 on its strategy for managing nanotechnology, a proposed Nanoscale Materials Stewardship Program (NMSP). The agenda included speakers from the public and private sectors and from government. Former EPA official and advisor to PEN, Terry Davies, stressed a sense of urgency that EPA's voluntary strategy does not recognize. He also criticized EPA's policy of using the Toxic Substances Control Act (TSCA) as the framework for its strategy, which treats nanomaterials as chemical substances. The size of nano-engineered substances means that their molecular

structure is different from larger-scale particles and, therefore, poses different risks because their properties are different, according to Davies. He urged EPA to begin a regulatory program in addition to the voluntary one.

Congress was not silent during this time. Rep. Mike Honda ☼ (D-CA) introduced H.R. 3235 July 31, which would establish a $100 million nanomanufacturing investment partnership to assist in the development of a research strategy. The research is to address the uncertainties hindering the commercialization of nanotechnologies. The bill has been referred to four House committees for action.

Senate Bill Bans States from Limiting Nonprofit Voter Registration Drives

On July 25, the Senate Rules Committee held a hearing on an election reform bill that includes a provision that would prevent states from placing undue restrictions on voter registration drives by nonprofits. During the last several years, there has been an increase in the number of voters registered through voter registration drives conducted by charities and other third parties, such as the League of Women Voters and ACORN. Discussion of the bill before the committee — the Ballot Integrity Act of 2007 (S. 1487) — largely focused, however, on provisions that mandate paper records for all electronic voting machines.

In recent years, lawmakers in several states have sought to limit the voter registration activities of nonprofit and other third-party groups. Florida, Texas, New Mexico, Ohio, Colorado, Maryland, Washington and Missouri have all passed laws intended to keep nonpartisan registrants on the sidelines, enforcing these new regulations with heavy fines and criminal penalties. These laws require voter registration groups to go through complicated procedures before conducting registration drives. Consequently, many nonprofits have been forced to discontinue their registration campaigns.

The Ballot Integrity Act of 2007 would prevent states from passing such laws, while at the same time allowing room for states to ensure their voter rolls are accurate and up-to-date. The bill also directs states to institute new safeguards to prevent errors and tampering at the polls, begin conducting public manual audits of all federal elections by the 2010 elections and improve poll worker training.

The bill is sponsored by Rules Committee Chair Dianne Feinstein (D-CA) and 11 other senators, including Christopher Dodd (D-CT), Hillary Rodham Clinton (D-NY), Barack Obama (D-IL), Patrick Leahy (D-VT), Edward M. Kennedy (D-MA), Daniel Inouye (D-HI), Robert Menendez (D-NJ), Sherrod Brown (D-OH), Bernard Sanders (I-VT), Barbara Boxer (D-CA), and Joseph Biden (D-DE).

Among the witnesses at the hearing was the president of the League of Women Voters, Mary Owens. She testified in support of the components of the bill that are designed to

prevent excessive regulation of voter registration drives. The Florida chapter of the League suspended its voter registration efforts in 2005 in the wake of a new Florida law which instituted new requirements for nonprofit registration drives and stiff penalties for organizations unable to comply. In her testimony, Owens said "the League applauds Congress stepping up to the plate" on the voter registration drive issue.

People For the American Way's Director of Public Policy Tanya Clay House also testified at the Rules Committee hearing in support of the bill's provision to prevent states from placing undue restrictions on third-party registration. In her testimony , House said that this portion of the bill "is especially urgent in light of the many instances of voter suppression that have taken place in recent elections as a result of voter registration problems.... which led to widespread confusion about registration status and very likely led to the disenfranchisement of hundreds, if not thousands, of voters."

A similar election reform bill — the Voter Confidence and Increased Accessibility Act of 2007 (H.R. 811) is also making progress in the House. The bill, however, does not contain provisions related to voter registration drives. Instead, the bill focuses on requiring that states ensure all electronic voting machines produce paper verification of ballots cast by the upcoming 2008 presidential election. The bill would also require states to conduct manual audits of elections in randomly selected counties. On July 27, House Majority Leader Steny Hoyer (D-MD) and Rep. Rush Holt ☼ (D-NJ) announced a compromise on some terms of the bill, which had been controversial. The compromise should allow the bill to move to a vote by the House soon.

Panel Discussion Focuses on Need for Clear Rules for 501(c)(3) Groups at Election Time

On Aug. 3, OMB Watch sponsored a panel discussion to address the pros and cons of creating a bright line rule defining what is and is not prohibited partisan intervention in elections by charities and religious organizations. The panelists addressed problems created by the current "facts and circumstances" test, which allows the Internal Revenue Service (IRS) to apply its interpretation of the standard on a case by case basis. They also discussed action the nonprofit sector can take to propose and promote a bright line test.

All four panelists were legal experts on nonprofit tax and election law. Each felt the ambiguities in the IRS rules regarding nonpartisan voter engagement activities create a chilling impact on charitable activity. One of the panelists, Beth Kingsley of Harmon Curran Spielberg & Eisenberg, noted that she cannot give clients a definitive statement about whether particular activities are permitted under IRS rules. She added that the IRS is woefully behind the times when it comes to addressing use of the Internet.

Marcus Owens, a lawyer with Caplin & Drysdale who previously ran the exempt organizations division within the IRS, provided a brief history of IRS regulations. He noted that the regulations regarding voter engagement activities were developed in a

very different manner than regulations regarding lobbying activities. He felt the IRS should find ways of refining the regulations given today's policy conditions.

Owens was referring to points raised by Karl Sandstrom, a lawyer with Perkins Coie and former Commissioner on the Federal Election Commission. Sandstrom highlighted the recent U.S. Supreme Court decision in the *Federal Election Commission v. Wisconsin Right to Life* (WRTL) case, which emphasized that for an ad to be considered electioneering, it must explicitly assert support or opposition of a federal candidate. Sandstrom emphasized that this standard runs counter to the IRS culture, which he likened to a "disease" orientation — that the IRS looks at voter engagement as a disease rather than as a sign of a healthy democracy.

Owens and Greg Colvin, a lawyer from San Francisco-based Silk Adler & Colvin, concurred that the Supreme Court's WRTL decision creates a new environment in which the IRS needs to respond. Colvin described a seven-point proposal he put forward in February 2006 for safe harbors; if embraced by the IRS, nonprofits could count on these activities as not constituting participation in political campaigns. But some of the safe harbors are controversial, such as a ban on communications pertaining to a candidate within 60 days of an election. This would eliminate all charitable issue advocacy, including lobbying, 60 days before an election, even if Congress is still in session.

Notwithstanding the controversy about specific safe harbors, all the panelists agreed that the current ambiguity in the IRS "facts and circumstances" test is a serious problem. While Sandstrom argued the merits of litigation, the other panelists were more supportive of mobilizing a campaign to get the IRS to write bright line rules. And all panelists agreed that IRS already has the authority to make regulatory changes.

House Hearing on Nonprofits Sees the Positive

The House Ways and Means Subcommittee on Oversight, led by Chairman John Lewis (D-GA), held a hearing July 24 on tax-exempt charitable organizations. Lewis praised charities and foundations, acknowledging they "make up the very fabric of our communities. They know the deepest human needs of our friends and neighbors and they know the solutions that work." Other members spoke positively about the work of nonprofits, referencing successful groups in their districts. The opening remarks of Rep. Bill Pascrell (D-NJ) challenged the Department of Treasury's assertion that charities are a "significant source of terrorist funding," observing that Treasury seems to be "painting the sector with a wide brush." Committee members focused on what could be done to promote charitable giving and increase volunteerism.

Pascrell's opening remarks were welcome, given that Treasury continues to allege that charities are a significant source of terrorist financing. OMB Watch and others have asked Treasury to withdraw this claim. During questioning, Pascrell asked Steve Gunderson, the President and CEO of the Council on Foundations, if he agrees with

Treasury's claim. Gunderson responded that he does not and went on to explain the difficulties facing the sector as a whole. Pascrell emphasized Gunderson's statement that not a single U.S. charity has been found to have redirected funds to a terrorist organization.

Gunderson's written statement stated, "In fact, we have seen no evidence to indicate that U.S. charities are a major source of terrorist support. Out of hundreds of thousands of U.S. charities and billions of dollars given out in grants and material aid each year, only six U.S. charities are alleged to have intentionally supported terrorists. Thus far, Treasury has not identified a single case of inadvertent diversion of funds from a legitimate U.S. charity to a terrorist organization. . . . An even larger issue is that, by exaggerating the extent to which U.S. charities serve as a source of terrorist funding, Treasury is fueling an environment in which wary donors may refrain from making charitable contributions."

The Internal Revenue Service (IRS) confirmed that nonprofits face challenges, including a blurred line between the tax-exempt and commercial sector, the overvaluation of donations, and charities established to benefit the donor. However, Steven Miller, IRS Tax Exempt and Government Entities Division commissioner, prefaced this by saying, "The charitable sector deserves to be commended for the vital work it does throughout America, and indeed throughout the world. Second, on the whole, the charitable sector is very compliant with the Tax Code. While we have seen problems, some of them serious, and some of them involving major charitable institutions, they are not widespread."

A new Government Accountability Office report that was released in conjunction with the hearing found that about 55,000 tax-exempt organizations have unpaid taxes. The alarming title of the report — "Thousands of Organizations Exempt from Federal Income Tax Owe Nearly $1 Billion in Payroll and Other Taxes" — moved Rep. Stephanie Tubbs Jones ☼ (D-OH) to observe that there are currently over one million 501(c)(3) charitable organizations in the U.S. She wanted a clarification in what she saw as a clearly skewed title given that only roughly three percent of charities have unpaid taxes. "Don't you think it would have been good to tell us there are 1.8 million exempt organizations when you threw out that 55,000 number? It's your job to get the numbers right," she said.

There was also discussion of the Pension Protection Act because certain provisions will expire on Dec. 31. Witnesses from both the Council on Foundations and Independent Sector stressed their support for expanding the IRA Charitable Rollover, which allows older Americans to make charitable contributions from their individual retirement funds without suffering tax consequences. Diana Aviv from Independent Sector also proposed that Congress create a Small Nonprofit Administration comparable to the Small Business Administration.

FBI Raids Two U.S. Muslim Charities on Eve of Holy Land Trial

On July 24, the Goodwill Charitable Organization (GCO) of Dearborn, MI, was added to the Department of Treasury's Specially Designated Nationals (SDN) list for alleged ties to Hezbollah. As a result, the group's assets have been frozen and U.S. citizens are barred from conducting any transactions with the organization. The office of Al-Mabarrat Charitable Organization was also searched and files removed, but the organization was not designated as a supporter of terrorism and continues to operate. The designation and raids occurred the same day as opening arguments in a high profile criminal trial involving a Muslim charity, the Holy Land Foundation. It appears the government relied on information from a former Treasury official whose credibility has been challenged in at least two instances.

The Treasury Department's press release said GCO functioned as a "Hizballah" front organization, reporting to the leadership of the Martyrs Foundation in Lebanon. It went on to say, "Hizballah recruited GCO leaders and has maintained close contact with GCO representatives in the United States. GCO has provided financial support to Hizballah directly and through the Martyrs Foundation in Lebanon. Hizballah's leaders in Lebanon have instructed Hizballah members in the United States to send their contributions to GCO and to contact the GCO for the purpose of contributing to the Martyrs Foundation. Since its founding, GCO has sent a significant amount of money to the Martyrs Foundation in Lebanon." A spokeswoman for the FBI in Detroit told *USA Today* that "JTTF [Joint Terrorism Task Force] removed paper files from GCO office but no arrests were made."

It appears the government relied on information provided by a controversial former Treasury official, Matthew Levitt, who has made broad allegations about ties between Islamic charities and terrorist organizations, often without citing supporting sources. Levitt is the director of the Stein Program on Terrorism, Intelligence and Policy at the Washington Institute for Near East Policy. Over a two-year period, he testified in congressional hearings three times and repeated the same information about GCO and other charities. In the transcript of an April 2005 House International Relations Subcommittee on Europe hearing titled "Islamic Extremism in Europe," Levitt stated, "According to a declassified research report based on Israeli intelligence Hezbollah also receives funds from charities that are not directly tied to Hezbollah but are radical Islamist organizations and donate to Hezbollah out of ideological affinity. . . . The report cites many such charities worldwide, including four in the Detroit area alone: The Islamic Resistance Support Association, the al-Shahid Fund, the Educational Development Association (EDA) and the Goodwill Charitable Organization (GCO)."

The testimony was repeated in a Senate Homeland Security and Governmental Affairs hearing on May 25, 2005, titled "Terrorists, Criminals and Counterfeit Goods" and a House Foreign Affairs Subcommittee on Europe hearing on June 20, 2007, titled,

"Adding Hezbollah to the EU Terrorist List."

Levitt's testimony cites a June 2003 study from the Intelligence and Terrorism Information Center of the Center for Special Studies (CSS) in Israel. According to its website, the center is an "NGO dedicated to the memory of the fallen of the Israeli Intelligence Community" and focuses on issues concerning intelligence and terrorism. Because current law does not allow GCO to see all the evidence against it, or to present evidence on its own behalf, the accuracy of the CSS information used by Levitt is not likely to be tested.

Levitt's credentials as an expert have been challenged on at least two occasions. Kinder USA filed a libel suit against him and Yale University Press in May over allegations in Levitt's book about Hamas that Kinder USA has ties to terrorism. According to the *Dallas Morning News* Levitt's testimony as an expert witness in the current criminal trial of leaders of the Holy Land Foundation was challenged by defense attorneys, who noted that he did not visit grassroots charities in the Palestinian territories he claimed have ties to Hamas, and instead relied on second-hand sources.

The JTTF raid on the Al-Mabarrat Charitable Organization seized files, but the group was not designated as a terrorist organization and its assets were not seized. The *Detroit Free Press* reported that Al-Mabarrat has a significant presence in the community through fundraisers and the placement of donation boxes at Dearborn mosques and restaurants that read, "Orphan's happiness depends on your donation." The raid left many Muslims in the Dearborn area "confused about the government's actions. Al-Mabarrat is still allowed to operate, though agents hauled away its documents and computers, making it difficult to function."

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In This Issue

Crandall Canyon Mine Collapse Implicates MSHA Procedures

The Aug. 6 mine collapse at the Crandall Canyon coal mine in Utah, which trapped six coal miners and led to the deaths of three rescue workers, again calls into question the effectiveness of the federal Mine Safety and Health Administration (MSHA). The mine operators were working under a plan approved by MSHA in June, just months after serious structural problems forced the operators to abandon a work area only 900 feet from where the miners are trapped.

In March, miners were engaged in "retreat mining" — cutting out the pillars of coal supporting the mountain above the main tunnel and allowing the roof to collapse — when the northern tunnel experienced a shift of the ground, a "bump," that caused severe damage, according to an Aug. 12 article by *The Salt Lake Tribune*. Mine operators often use retreat mining to extract the last substantial deposits of coal before abandoning

a mine area altogether.

According to a memo obtained by *The Tribune*, the mine operators knew the pressures from the 2,100 feet of mountain above the mine created the roof problems that caused them to abandon the northern tunnel. The operators, UtahAmerican Energy, Inc., hired a Colorado mining engineering firm, Agapito Associates, Inc., to help the operators determine a safer way of retreat mining the southern tunnel. The southern tunnel area is where the men are now trapped. Rescue efforts were suspended late Aug. 16 after three rescue workers were killed and six others injured by another collapse.

In late May, MSHA began inspecting the Crandall mine roof but the inspection was not completed by the time of the Aug. 6 collapse. In June, amidst the ongoing inspection, MSHA approved an amendment to the mining plan to allow retreat mining in the southern tunnel. To safely do this, Agapito recommended increasing the size of the coal pillars from 92 feet to 129 feet. According to *The Tribune*, it is not clear if the wider pillars were used. The Aug. 6 collapse registered as the equivalent of a 3.9 magnitude earthquake, according to seismology experts.

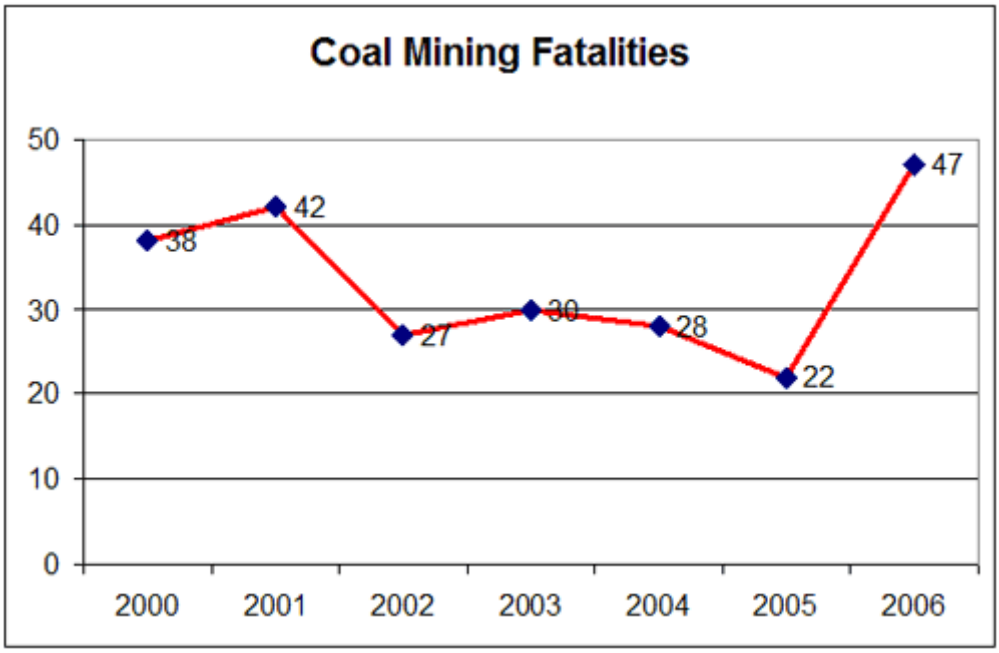
Robert Ferriter, director of the Colorado School of Mines and a 27-year veteran of MSHA, was highly critical of the decision to allow retreat mining in the southern tunnel. The conditions caused by the weight of the mountain above would not have been different from those in the northern tunnel 900 feet away, and that should have triggered a more cautious response from MSHA, he told *The Tribune*.

Others also criticized MSHA's approval of the plan amendment. Tony Oppegard, a former MSHA advisor and a Kentucky mining regulator, criticized the use of retreat mining at the Crandall mine given the conditions, according to another article by *The Tribune*. "Everyone understands that in the West you have tremendous pressures on those coal pillars from the overburden and they are subject to bursting," Oppegard reportedly said.

The Aug. 13 issue of *Mine Safety and Health News* reported that Dr. R. Larry Grayson, who heads the Pennsylvania State University mining and engineering program, agreed with Ferriter that he would not have approved retreat mining under the existing conditions at the Crandall mine. The mining company may have been following the MSHA-approved mining plan, but that does not mean that it was safe. "Generally speaking, most mines would not choose to mine pillars that lie between two extensive abandoned (mined out) areas," Grayson said.

Questions about MSHA's oversight at Crandall come on the heels of the 2006 Sago, Aracoma and Darby mine disasters. Nineteen miners died in these three incidents, and 47 miners died in all 2006 coal mining incidents, the highest number of fatalities since 2001, according to MSHA's statistics. Two House bills were introduced this congressional session to enhance the 2006 MINER Act passed in the wake of these incidents. To date, there have been 14 coal mining fatalities in 2007, not including the

recent deaths in Utah.



On Aug. 20, rescue efforts at the Utah mine were called off indefinitely due to concern about the safety of rescue workers.

Mine Safety and Health News also reported that Utah Gov. Jon Huntsman, Jr. (R) expects the state to play a role in the investigation of the Crandall mine incident and hopes to expand the state's role in regulating worker safety. Huntsman wants to use the model employed by West Virginia Gov. Joe Machin (D) after the Sago incident. Machin hired former MSHA administrator J. Davitt McAteer to represent the state during the Sago investigation. Currently, miner safety is a federal responsibility once the miners go underground. The state has surface environmental and worker health responsibilities. Hunstman wants to explore changes to the limited state role.

Bush Administration Skirts Broad Environmental Law

The Bush administration has expanded exclusions of the National Environmental Policy Act (NEPA). The administration will allow private industry to engage in selected land management projects without first assessing the potential impact on the environment. Furthermore, by excluding these activities, the administration has stripped the public of its opportunity to provide input into potentially damaging projects.

In 1970, NEPA was enacted to ensure environmental responsibility is considered in the actions of the federal government. NEPA is a cross-cutting statute that applies to the actions of all federal agencies.

During the development of agency rules, agencies must study the potential environmental impact of the action. If agencies determine in preliminary studies a proposed action would lead to a significant impact, the agency prepares a more detailed assessment.

However, under NEPA, federal agencies can issue Categorical Exclusions (CEs) for small-scale activities. The CEs exempt the actions from environmental study. This limits the administrative burden for activities that may have minimal or no environmental impact, such as maintenance activities or developing rules that establish administrative activities. According to the Code of Federal Regulations, "Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment" (40 CFR 1508.4).

NEPA also includes specific public participation mechanisms. The public may suggest what environmental factors should be considered in the study of environmental impact, and agencies are required to consider those comments. When an environmental assessment is completed, it is placed in a docket for the public to scrutinize and provide further input.

On Aug. 14, the Bureau of Land Management (BLM), a division of the Department of the Interior, published new CEs. BLM proposed the new exclusions in January 2006 and opened the proposal for public comment.

Two of the exclusions BLM finalized raised the ire of environmentalists during the public comment period. One exclusion will allow companies to use seismic technology to search for oil, gas or geothermal resources without consideration of environmental effects, so long as new road construction is not necessary. A coalition of environmental groups including the Natural Resources Defense Council submitted comments stating, "Seismic testing has direct and indirect effects, as well as cumulative impacts, to a host of natural and historic resources."

The CE could allow a controversial type of truck to travel through natural lands. Exploration using seismic technology often involves trucks which use heavy weights to strike the ground and measure resulting signals. The vehicles, known as thumper trucks, can leave tire tracks over one foot deep and can cause long-term damage to soil structure.

Exempting the projects from NEPA requirements would prevent more environmentally friendly alternatives from being considered. Because the new CE does not require an environmental assessment, companies will be solely responsible for the nature of the project. "As we have found time and time again, industry proposed seismic projects have an obvious bias towards permitting seismic activities in the most cost-effective manner, and not necessarily the most environmentally sensitive," the environmental groups stated in comments.

Another exclusion will allow BLM to issue grazing permits for rangelands without considering environmental impacts. Another group of environmentalists including NRDC and Earthjustice found legal fault with this exclusion. In *Natural Resources Defense Council, Inc. v. Morton* and *Idaho Watersheds Project v. Hahn*, federal courts found the issuance of grazing permits to significantly affect the human environment, according to the groups.

In both cases, the application of CEs will prevent environmental impact from being known prior to a project being undertaken. Additionally, the public will be left out of the decision-making process. The CEs exempt the activities from the public participation provisions of NEPA and will prevent the public from commenting on proposed projects.

BLM published the CEs just days after its new director took office. James L. Caswell was confirmed by unanimous consent in the Senate on Aug. 3.

This is not the first time the Bush administration has met with opposition for CEs of NEPA. In 2003, the U.S. Department of Agriculture's Forest Service issued CEs that allow large-scale logging projects to proceed without the completion of an environmental assessment. Critics charged the administration with pursuing the CEs at the behest of industry. The CEs were contested in court but were upheld.

Those CEs were the subject of a House Natural Resources Committee subcommittee hearing on June 28. In the hearing, a Forest Service official defended the use of the CEs. A witness from the Government Accountability Office testified about the extent to which the CEs have been used. Since taking effect, 72 percent of vegetation management plans impacting 2.9 million acres have been approved using the CEs, according to testimony.

New Report Examines Agency Review of Regulations

The Government Accountability Office (GAO) has released a new report on the process by which federal regulatory agencies review regulations after they take effect. Agencies conduct reviews to comply with existing law, as a matter of agency policy, and in response to White House requests. The report finds the quality of reviews varies widely and determines the major barriers to more useful reviews are gaps in available data and problems with public participation.

In the report, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO examined the reviews of nine regulatory agencies completed from 2001-2006.

GAO found the nine agencies reviewed at least 1,300 regulations. GAO acknowledged the number may be higher because agencies sometimes do not document reviews. Of the 1,300, the majority were conducted at the discretion of agencies, not as a result of

statutory requirements.

GAO categorized regulatory reviews as either mandatory — those required by statute — or discretionary — those resulting from inter-agency policies or petitions from regulated entities or the public. The most common type of mandatory review is that which is required by Section 610 of the Regulatory Flexibility Act. Section 610 requires agencies to review every ten years rules having a "significant economic impact" on small businesses or other small entities.

A significant number of discretionary reviews were performed at the behest of the White House Office of Management and Budget (OMB), according to the report. Under President George W. Bush, OMB's Office of Information and Regulatory Affairs has frequently prepared lists of regulations the White House desires agencies to review. For the rules studied, the OMB initiative accounted for up to 20 percent of reviews. OMB's suggestions accounted for up to 74 percent of the rules EPA reviewed, according to the report.

The outcome of these reviews can be valuable to decision-makers, regulated entities and the public. Agencies most often evaluate "ways to improve the efficiency or effectiveness" of a rule and "options for reducing regulatory burdens on regulated entities." Review results may lead to changes in regulations or identification of the need for further study. If agencies determine no change is necessary, it is often seen as confirmation that the rule is effective and continues to provide public value.

Overall, agencies reported discretionary reviews to be more valuable than mandatory reviews in accomplishing these goals, according to GAO. The report stated, "A primary reason for this appears to be that discretionary reviews may better be suited to address emerging issues than mandatory reviews with a predetermined time frame." Agencies often conduct discretionary reviews in response to public petition or at the behest of regulated entities.

GAO identified three factors as characteristic of a quality review: use of uniform standards in selecting, conducting and reporting reviews; solicitation and consideration of public input; and documentation of the review process. For all three factors, GAO found variability among agencies and between mandatory and discretionary reviews.

GAO's findings related to public participation raise concerns over the access of the regulated community during the review process. For the selection of rules to review, GAO stated, "Agencies in our review more often reported that they solicit public input on which regulations to review during informal meetings with their regulated entities." For the conduct of the review, agencies often publish notices of intent to review a rule in the *Federal Register* allowing both the public and regulated entities to comment, according to the report.

Because reviews varied in the quality of their conduct and their usefulness, GAO

identified barriers impeding more effective review. Among others, problems include a lack of necessary and useful data and a lack of public participation and transparency.

Agency officials complain of a lack of baseline data, according to the report. Baseline data provides information on conditions before a regulation took effect and is necessary to measure progress.

The Paperwork Reduction Act (PRA) impairs the ability of agencies to collect data and may be exacerbating data gaps. The PRA requires agencies to obtain approval from OMB before collecting data or other forms of information, and it creates requirements for reducing government paperwork on an annual basis. Another problem is the failure of agencies to plan for future review during development of a regulation.

Agency officials also believe a lack of public participation negatively impacts the quality and usefulness of reviews, according to GAO. Agencies report receiving little input despite outreach efforts. However, lack of awareness of reviews is still a problem. GAO stated, "We were not always able to track retrospective review activities, identify the outcome of the review, or link review results to subsequent follow-up activities." The lack of transparency may contribute to depressed public participation in the review process.

GAO made several recommendations for officials in the executive branch. GAO urged OMB to propose to agencies guidelines for the review process. GAO encouraged OMB to address how agencies should plan for future reviews during the development of a rule, how agencies can prioritize reviews, what standards should be set for reporting and documenting reviews, and how public participation can be stimulated.

GAO prepared the report for Reps. Joe Barton (R-TX) and Ed Whitfield (R-KY). GAO sent the report to the congressmen on July 16 and released it to the public Aug. 15.

The Year in Fiscal Policy...So Far

After the elections in November 2006, with a new majority and low public confidence in Congress following multiple lobbying and ethics scandals, members vowed to restore integrity and responsibility to the legislative process, particularly in fiscal policy. Congress pledged it would prioritize funding for domestic needs and abide by pay-as-you-go rules for new mandatory spending and taxes. It would shed light on the earmarking process and spend more time minding the people's business in Washington. In short, the new Congress said it would clean up Washington and rebuild public confidence in government.

Now that Congress is in its annual August recess, we have occasion to compare what Congress promised with what it's delivered since January.

Fiscal Responsibility

Steps Forward: Re-enactment of strong PAYGO rules; adherence to the rules thus far.
Steps Back: None yet, but still difficult fiscal issues to resolve.
What's Next: Passage of SCHIP re-authorization and AMT might test dedication to PAYGO.

Over the course of the Bush administration, the U.S. national debt has ballooned from $5.95 trillion to almost $9 trillion. A combination of huge new tax cuts, increases in military spending and enactment of expansions of entitlement programs — all passed without regard for how to pay for the increases — has caused one of the largest fiscal deteriorations in the country's history.

Against this backdrop, the new majority in the 110th Congress promised to bring fiscal responsibility back to Washington and has taken an important step toward doing so by enacting strong pay-as-you-go (PAYGO) rules. The House adopted the proven budget control rules immediately in January as part of its new rules package, and the Senate followed suit in May with the passage of the FY 2008 budget resolution containing PAYGO rules.

Thus far, Congress has adhered to PAYGO rules in the SCHIP re-authorization bill and other mandatory spending bills, as well as on the tax side. But the big hurdles are yet to come with reform of the Alternative Minimum Tax and other difficult fiscal policy issues (i.e., how to handle the president's first-term tax cuts) left unresolved. Moving forward, it will be essential for Congress to pass deficit-neutral legislation in these areas as well to keep the promise of fiscal responsibility alive.

Congress Addressing Federal Priorities, But Conflicts with the White House Remain

Steps Forward: Congress takes first step toward restoring adequate funding for national priorities.
Steps Back: None yet, but antagonism between Congress and the president threatens timely implementation; Senate running out of time to enact appropriations.
What's Next: The Senate has to pass eleven of twelve spending bills; Congress will wrestle with the president over slim differences.

Twenty-one billion and two percent. Those are the numbers over which Congress and the president are going to the mat. The president's $933 billion discretionary budget request represents about a seven percent increase over 2007 levels, while Congress's $954 billion spending plan would boost discretionary spending by nine percent. The president's stubborn objections over the $21 billion difference is absolutely vexing when compared to the $3 trillion increase in the national debt that the president has overseen during his

tenure.

Adjusting for inflation, the president's budget would be a 2.2 percent cut in non-defense, discretionary spending, compared to the 3.1 percent increase under the congressional plan. When population growth and inflation are factored in, the FY 2008 budget passed by Congress represents spending below 2002 levels. That the president would call this budget "irresponsible and excessive" is a stark reminder of how much his priorities are skewed.

When Congress returns in September, the Senate will have nineteen legislative days until the end of the fiscal year to pass eleven of the twelve spending bills and then conference all twelve bills with the House. While it is possible the Senate will pass the bills before the current spending regime expires on Sept. 30, veto threats issued against nine of the bills put timely presidential approval in jeopardy. Congress and the president have held steadfastly to their positions, but both appear willing to discuss differences. If a compromise can be achieved in the coming weeks, a budget standoff may be avoided, but a continuing resolution is almost assured.

Earmarks: Groundbreaking Reforms Enacted

> **Steps Forward:** Enactment of legislative earmark disclosure rules for the first time.
> **Steps Back:** Rules could have been slightly stronger to improve access; ignored executive branch earmarks.
> **What's Next:** Reforms awaiting president's signature.

A popular revulsion at various congressional excesses and scandals in 2006, headlined by the Jack Abramoff investigation, provided Congress with a strong mandate to address the "culture of corruption" in Washington. In response, Congress overwhelmingly passed the Honest Leadership and Open Government Act of 2007, which prescribed disclosure requirements for legislative earmarks for the first time ever.

The Act — which awaits the president's signature — requires that earmarks in bills, resolutions and conference reports be identified and posted on the Internet at least 48 hours before a vote on the underlying legislation, and that sponsors certify they and their immediate families will not financially benefit from the earmark. Earmarks that suddenly appear in a conference report (i.e., not approved by either chamber) are now subject to a 60-vote point of order in the Senate that will not jeopardize the entire conference report. In a related development, plaudits also go to the voluntary publication by the Office of Management and Budget of a database of FY 2005 and FY 2008-to-date earmarks.

Congress ultimately stepped back from adding an earmark reform to the act that the Senate had adopted earlier this year that would have required earmark information be published in a *searchable format* — a reform urged by Sen. Jim DeMint (R-SC).

Congress also seemed to create a partial loophole by allowing earmarks to be voted on without public disclosure in certain instances if such disclosure is not "technologically feasible."

In all likelihood, Congress will not return to earmark reform this year. The next major step forward in earmarks disclosure should be an examination of executive branch earmarks — a form of spending wholly neglected in this year's reform process, but which involves at least as much bottom-line and self-interested spending as its legislative twin. It's also likely continued progress will be made by OMB as it fills in its database of FY 2008 earmark and adds functionality to the website.

Working Harder: Congress Resolves to Spend More Time Legislating

> **Steps Forward:** The House and Senate have been in session more this year than last.
> **Steps Back:** Little work done on Mondays still leaves four-day work weeks.
> **What's Next:** As adjournment approaches, Congress is likely to keep up the pace.

The new majority was elected on promises to put Congress to work. The 109th Congress had neared historic lows of actual days spent in session and number of votes on legislation. This combined with its few legislative accomplishments earned it the "do-nothing" label that President Harry Truman originally gave in 1948 to a similarly inactive Congress.

So far, both the House and Senate have put in longer weeks and more days than Congress did in 2006 (See current and past legislative calendars). The Senate has logged 121 legislative days, compared to the 107 days put in by the last Congress at this stage last year. Meanwhile, the House has spent 40 percent more time working, racking up 111 legislative days in outpacing the paltry 79 days put in last year.

Leaders also promised to try to reinstitute a five-day work week while in session. The House has so far had mixed success. A little more than 40 percent of the weeks spent in session were five-day weeks. This is still better than last session, when only 20 percent were full weeks. The Senate has had more success, with 60 percent of their weeks coming in at five days — about the same proportion as last session. However, most Mondays are still "in session-days" in name only, since voting typically begins at 6:30 p.m. and few votes are held. Therefore, the number of "full" weeks is misleading, as they are usually only four days long.

The House has scheduled 34 more voting days left for the rest of the session and has a target adjournment date of Oct. 26. The Senate has tentatively scheduled its adjournment for Nov. 16, but with significantly more work left to complete, that could easily slip into December.

Reauthorizations: Expanding Investments While Adhering to PAYGO

> **Steps Forward:** Both houses have made good progress on reauthorizations and are expanding crucial investments.
> **Steps Back:** None yet, as no expiration dates have been missed.
> **What's Next:** Intense negotiations will be required to resolve significant differences between the House, Senate and the White House.

Recent Congresses have had difficulty doing the required work of renewing program authorizations before they expire — most notably in the case of the Temporary Assistance to Needy Families, which Congress took four years to reauthorize after it came up for reauthorization in 2002. A host of important programs — including student loan programs, the State Children's Health Insurance Program (SCHIP), and a variety of farm and nutrition programs — are testing Congress's ability to get routine work done.

So far, no deadlines for reauthorization have been missed, but a few are looming on the horizon, most notably the SCHIP, which expires at the end of September. SCHIP reauthorization bills that would significantly expand coverage have been passed by the Senate and the House. The House has passed a version of the farm bill that includes a $4 billion increase for the Food Stamp Program. And both the House and Senate have passed versions of the student loan program reauthorization, both of which increase federal student financial aid packages.

None of these reauthorizations have been completed yet, and Congress has much work ahead of it. Significant differences remain between the House and Senate in these reauthorizations. Further, the Bush administration has said it would veto both the Senate and House versions of the SCHIP reauthorization, and it opposes the current versions of the Higher Education Access Act and the farm bill reauthorization.

Carried Interest Issue Gathering Momentum in Congress

Congress's tax-writing committees have focused increasing attention this summer on a hitherto little-noticed tax preference enjoyed by private equity and other fund managers that allows them to pay capital gains rates (15 percent) on "carried interest" income they are paid to manage investment funds they do not own. This is significantly lower than the income tax rate that would otherwise be assessed, which could be as high as 35 percent. As Congress moves to take action to close this loophole, nonprofit advocacy groups are mobilizing to support a fix to this unfair aspect of the tax code. At the same time, powerful special interests are working to protect this tax break, which affects some of the wealthiest individuals in this country.

Both the House and Senate have been busy investigating this tax loophole and developing solutions. The Senate Finance Committee held two hearings on the issue in July, and the House Ways and Means Committee will hold a hearing on it Sept. 6. In

addition, a bill (H.R. 2834) to close the loophole has been introduced in the House by Rep. Sander Levin ☼ (D-MI) and is co-sponsored by powerful House committee chairs Charles Rangel (D-NY) and Barney Frank (D-MA).

Recently, Rangel and others have raised the possibility that some form of the Levin bill may be paired with legislation reforming or patching the Alternative Minimum Tax (AMT), to help offset the cost. This has improved the odds that the carried interest issue may see floor action in Congress this fall. Rangel and Ways and Means Subcommittee on Select Revenue Measures Chair Richard Neal (D-MA) are known to be working on legislation to overhaul the AMT, which they are expected to introduce in the fall. The Senate will also debate AMT legislation, as Senate Finance Committee Chair Max Baucus (D-MT) and Ranking Member Charles Grassley (R-IA) have long sought to extend the "hold-harmless" patch freezing the number of taxpayers liable to AMT for one or two years.

Baucus, who initially seemed cool to closing the carried interest loophole, appears now to have joined his Finance Committee colleague Grassley in support of the Levin bill in principle. Sen. Charles Schumer ☼ (D-NY), another influential member of the panel who represents New York City's sizable financial sector, is supportive of closing the loophole but wants to make sure the Levin bill will apply equally to managers of funds across all economic sectors. The scope of the bill and the amount of revenue it would bring in are not definitively established, but revenue estimates tend to fall in the range of $5-10 billion a year.

The Levin bill has generated some media interest, with frequent op-ed pieces and editorials appearing in papers across the country, most of which endorse the bill. Private lobbying firms and the U.S. Chamber of Commerce have been busy lobbying Congress against the bill, arguing it discriminates against fund managers unfairly. But in the wake of the $4.3 billion Blackstone IPO in June, which showered fund managers with a windfall of untaxed profits, their views are not meeting with an outpouring of sympathy.

Meanwhile, state, local and national nonprofit advocacy groups — including some of the country's largest labor organizations — have begun to organize support for the effort to close the carried interest loophole. OMB Watch has joined with these groups, signing on to a letter to legislators urging them to close this loophole. **To sign your organization on, visit Citizens for Tax Justice's sign-up page**.

State Secrets Privilege on Trial

The Ninth Circuit U.S. Court of Appeals heard arguments on Aug. 15 regarding the administration's claims that two lawsuits involving the National Security Agency's spying program cannot move forward because of the state secrets privilege. The administration argues that the cases involve secret matters essential to protecting national security.

The arguments were heard in the wake of two important developments involving the executive's use of the state secrets privilege. A U.S. appellate court, for the first time ever, overturned the dismissal of a case based on the state secrets privilege. Second, the American Bar Association (ABA) passed a resolution arguing for limitations on the use of the state secrets privilege.

Based on the judges' questions during the hearing, the three-member panel of the Ninth Circuit appeared deeply skeptical of the government's invocation of state secrets. The cases involve plaintiffs who allege they have evidence of the National Security Agency's (NSA) Terrorist Surveillance Program (TSP). But, the government claimed, "Litigating this action could result in exceptionally grave harm to the national security of the United States."

One of the cases involves an alleged secret room at AT&T in San Francisco, which plaintiffs claim was used to collect and send information to the NSA. The other case involves members of an Islamic charity in Portland, OR, who have evidence of a top secret call log showing that its conversations were monitored by the government. The phone log was accidentally released by the government and, subsequently, ordered to be destroyed. Both of these cases, the government argues, are top secret matters, and proving or disproving their existence would be severely detrimental to national security.

The judges appeared to reject the government's reasoning. "The bottom line here is the government declares something is a state secret, that's the end of it. No cases ... The king can do no wrong," said Judge Harry Pregerson.

The state secrets privilege is a legal power possessed by the executive branch to protect sensitive national security information from disclosure in litigation. It dates to 1953, when it was first invoked to protect the disclosure of information regarding a U.S. Air Force flight in which three civilian passengers died. Declaring the flight, "a highly secret mission," the Air Force refused to disclose information, preventing the widows from suing for damages. Years later, as reported in the *Watcher*, it was revealed that the mission was not a sensitive matter.

The Ninth Circuit arguments were held the same week the ABA passed a resolution calling for legislation that would restrict the use of the state secrets privilege and require court oversight and approval. Absent judicial review, the ABA argued, "There is a risk that the government would effectively judge its own claim that information necessary to prove a plaintiff's case must be kept secret because disclosure would harm national defense or diplomatic relations of the United States."

The government's latest state secrets claims in NSA suits also come after the first ruling to ever overturn the dismissal of a state secrets case. The ruling, *In Re: Sealed Case*, was released on July 20 by the U.S. Court of Appeals for the District of Columbia. By a two to one margin, the court decided to reverse and remand a decision to dismiss a suit on the grounds of state secrets. The government argued that the case could not proceed because

it necessitates the disclosure of national security information. The court held that the plaintiff "can establish a prima facie case without using the privileged information."

The D.C. Circuit's ruling is a very significant decision regarding the state secrets privilege and could provide support for the NSA spying suits. Moreover, it may provide an impetus for Congress to legislate and mandate limitations on the use of the state secrets privilege, since the administration has essentially argued that anything relating to national security is a state secret and, hence, no lawsuits involving privileged information may proceed.

As far as the Ninth Circuit's decision, no date has been set. However, some speculate that since the circuit is perceived as liberal, the decision, if against the government, will be appealed, as the government will want the U.S. Supreme Court to review the state secrets privilege.

EPA Overlooking Testing and Regulations of Nanochemicals

As the nanotechnology sector expands, the U.S. Environmental Protection Agency (EPA) has not kept pace with oversight controls. Despite work to develop research strategies and priorities, the agency has not proposed any actual regulatory program for nanotech materials.

EPA has developed an agency research strategy and participated in setting national research priorities as part of the National Nanotechology Initiative (NNI) of the presidential National Science and Technology Council (NSTC). EPA's only proposal for control over the production and use of this new technology is a voluntary stewardship program. EPA has also proposed requiring no new review for nanochemicals whose "normal" chemical has already been reviewed under the Toxic Substances Control Act (TSCA).

Nanotechnology is the ability to measure, see, manipulate and manufacture things usually between one and 100 nanometers, a "near atomic" scale, with a myriad of potentially beneficial applications. Already incorporated into billions of dollars worth of products, the possible adverse impacts of this radically different material is mostly unknown. Governmental oversight of nanomaterials has been lagging far behind industrial production. Of particular concern is what significant health and environmental risks, if any, do nanomaterials pose on both ends of the lifecycle: production and decomposition.

In a step toward stronger management, on Aug. 16, the National Nanotechonology Coordination Office (NNCO) of NSTC released a list of federal research priorities addressing the environmental, health and safety concerns for nanotechnology. *Prioritization of Environmental, Health and Safety Research Needs for Engineered*

Materials identified top priorities within the following five research areas: scientific methodology, human health, the environment, exposure and risk management. The priorities include developing methods to detect nanomaterials on the biological level, standardizing assessment of particle attributes, identifying principal environmental exposure sources and groups vulnerable to exposure and development of workplace best practices.

While this document is an improvement on previous research agendas, some experts want immediate government action to ensure the safe development and use of nanotech products, not just research. Andrew Maynard, chief science adviser for the Project on Emerging Nanotechonologies of the Woodrow Wilson International Center for Scholars said, "I would give the federal government a B+ for effort, but only a C- for achievement."

The Nanoscale Materials Stewardship Program (NMSP), under which companies agree to share information about nanomaterials and participate in a risk management plan, has also received criticism. J. Clarence Davies, Emerging Nanotechnologies Senior Advisor, sees NMSP as flawed since "the agency has signaled that real regulation is a long way off, and may never happen," which acts as a participatory disincentive. In his May 2007 report, *EPA and Nanotechnology: Oversight for the 21st Century*, Davies called for a voluntary program in the context of a strong regulatory framework.

Even though experts agree that many questions about impacts from nanotechnology remain unanswered, EPA's July paper, *TSCA Inventory Status of Nanoscale Substances*, treats nanochemicals the same as their traditional chemical counterparts. This approach exempts the new nanotech versions of chemicals from pre-manufacture EPA review if the chemical, in its traditional non-nanotech form, is already on the TSCA Inventory. Davies, who also authored the original administrative version of TSCA, explains that this is a legal quandary, not a scientific one. TSCA's legal definition of a chemical substance, created in 1976, could not have imagined size as a distinguishing attribute and unintentionally failed to include this limitation. Nanotechnology has changed those parameters, and in Davies' opinion, EPA's disregard in the July paper for this new reality "flies in the face of the vast majority of scientific evidence."

"Every day that EPA is not exercisizing some kind of oversight on nanomaterials is another day when the American public is involuntarily participating in a huge experiment to see whether nanotechnology poses any threat to health or the environment," Davis said at an Aug. 2 public meeting. "It is another day when the agency is not giving the public the protection it should have."

Prioritization of Environmental, Health and Safety Research Needs for Engineered Materials is open for public comment until Sept. 17.

FOIA Performance Goes from Bad to Worst

The Coalition of Journalists for Open Government's (CJOG) analysis of government's implementation of the Freedom of Information Act (FOIA) indicates record-setting FOIA problems despite a positive June report on FOIA from the Justice Department. These problems come to light as a legislative effort to reform FOIA has passed both the House and Senate and may soon become law.

The CJOG report, *Still Waiting After All These Years: An In-Depth Analysis of FOIA Performance from 1998 to 2006*, reviewed FOIA performance by 30 executive departments and agencies for the past eight years, which is when FOIA performance reporting by government began. The report documents growing problems with backlogs of unprocessed requests, declining levels of disclosure and increasing processing costs.

The report notes that the backlog of unprocessed FOIA requests across all government agencies rose 26 percent from 2005 to 2006 to a new all-time high. According to the report, 26 agencies had a combined backlog of 39 percent at the end of 2006, which means that almost two out of every five requests did not get processed. Overall, the FOIA backlog has grown 200 percent since 1998. This record high occurred even though the number of requests dropped for two years running, six percent from 2005 and 10 percent since 2004.

Information disclosure, even for the requests processed by agencies, has dropped significantly according to the CJOG report. In 2006, the number of denials, even with fewer requests being handled, rose 10 percent from the number of request denials in 2005. The number of requests for information that were fully granted by the government hit an all-time low in 2006, with only 41 percent of requests being fully granted. This is a significant drop from the 56 percent of requests that were fully granted in 1998.

Another troubling trend uncovered in the CJOG report is the growing cost of processing FOIA requests despite reduced requests and personnel. Since 1998, total costs for FOIA processing have risen 40 percent, even though the number of requests processed dropped 20 percent during the same period. The average cost of handling an individual request rose from almost 80 percent, from $294 in 1998 to $526 in 2006. These increased costs also came despite the fact that the number of personnel working on FOIA is down 10 percent.

"The self-reported performances of the federal departments and agencies in responding to Freedom of Information Act requests continues to deteriorate, despite a public nudge from the president, in a December 2005 executive order, to improve service," stated CJOG in the report. The CJOG findings starkly contrast the conclusions of a June report from the Department of Justice on agencies' implementation of a 2005 executive order to improve FOIA processing. The Justice report states that agencies are making "diligent and measurable progress." Executive Order 13392 required agencies to develop plans to improve FOIA procedures, reduce backlogs and increase public access to highly sought-

after government information.

However, as the CJOG report documents, the executive order has not been successful in improving FOIA. One form of help might be FOIA reform legislation, sponsored by Sens. Patrick Leahy (D-VT) and John Cornyn (R-TX). Before the Senate went into its August recess, it unanimously passed the OPEN Government Act of 2007 (S. 849), which is a comprehensive reform of the FOIA process. The House passed similar legislation, the Freedom of Information Act Amendments of 2007 (H.R. 1309), on March 14, by a vote of 308-117. Now the two versions will need to be conferenced, which should not prove difficult. Hopefully, the new legislation will be more successful than the executive order in reducing agency backlogs and increasing the efficiency of FOIA procedures.

Agencies Extend Legal Services Restriction to HIV/AIDS Grants

In an apparent attempt to derail a constitutional challenge to a requirement that all grantees in an HIV/AIDS prevention program adopt formal policies against sex trafficking, the United States Agency for International Development (USAID) and the Department of Health and Human Services (HHS) have issued guidelines for grantees that allow affiliations with groups that do not adopt such pledges. The guidelines, issued July 23, are even more restrictive than similar requirements for legal services programs that are also the subject of a constitutional challenge. They require separate "management and governance" and complete physical separation "between an affiliate which expresses views on prostitution and sex-trafficking contrary to the government's message..." and the grantee. Four leaders in the House have written to USAID urging it to adopt the less restrictive standards that allow faith-based organizations to keep religious and government funded activity separate in time and place without the need for a separate affiliate. Although the guidance is already effective, HHS intends to publish the rule for public comment.

Alliance for Open Society, Inc. v. USAID is one of two constitutional challenges to what has become known as the "pledge policy," which required USAID grantees to pledge they oppose prostitution. USAID, HHS and the Centers for Disease Control and Prevention have appealed a May 2006 ruling of the United States District Court for the Southern District of New York holding the rule unconstitutional. In June 2007, the Court of Appeals for the Second Circuit heard oral arguments in the case and asked government attorneys for more information about the defendants' intent to develop guidelines for affiliates. The following week, DOJ sent a letter informing the court that all defendant agencies would develop such guidelines and follow up with a rulemaking and public comment process. On July 23, HHS and USAID published essentially identical guidelines that describe "the legal, financial and organizational separation that should exist between these recipients of HHS funds and an affiliate organization that engages in activities that are not consistent with a policy opposing prostitution and sex trafficking."

In 2003, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act (PL 108-25) that funds prevention programs. 22 USC 7631(f) bars grants to any group that "does not have a policy explicitly opposing prostitution and sex trafficking." The new requirement, initially only applied to foreign grantees, has been controversial from the start, generating two lawsuits. A 2005 policy brief by the Center for Health and Gender Equity says, "The restrictions preclude recipients of U.S. funds from using the best practices at their disposal to prevent the spread of HIV among marginalized populations...The broad language of the restrictions increases the risk that organizations will self-censor or curtail effective programs for fear of being seen as supporting or promoting prostitution." Their timeline on the restrictions says, "The law is applied inconsistently."

The government's approach capitalizes on another federal appeals court ruling in *DKT International v. USAID*, in the U.S. Circuit Court for the District of Columbia. That March 2007 decision overturned a lower court's ruling voiding the pledge requirement, in part because DKT could have set up a subsidiary organization to adopt the pledge and accept the grant. In the DKT case, the appeals court found that because of the act's educational message, USAID has the right to discriminate based on viewpoint based on its interpretation of the U.S. Supreme Court case *Rust v. Sullivan*. In *Rust*, the Supreme Court said a clinic could provide abortion counseling "through programs that are separate and independent from the project that receives Title X funds." However, in *DKT*, the appeals court applied this principle beyond the government program. DKT has sought a rehearing. The parties in the AOSI case will file briefs on how the new guidelines affect the constitutional claims being considered. In the meantime, the lower court's injunction against application of the rule to U.S.-based groups remains in place.

A July 27 alert from the Brennan Center for Justice, which represents AOSI in the litigation, said, "The guidelines go further than the LSC model, as they also authorize consideration of whether the affiliated entity has separate "management and governance." The Supplementary Information in the guidelines says they are based on legal services standards that have been upheld in the courts. However, the Brennan Center noted that the challenge they brought against excessive separation requirements for legal services programs has been sent back to a lower court for further review, and the appeals court has not ruled on their constitutionality.

The Supplementary Information says a grantee can be affiliated with an independent organization that does not comply with the pledge requirement, and "the independent affiliate's position on these issues will have no effect on the recipient organization's eligibility for Leadership Act funds, so long as the affiliate satisfies the criteria for objective integrity and independence detailed in the guidance." The affiliated organization must be legally separate and receive no funds or subsidy from Leadership Act funds. There must be physical and financial separation. The definition of separation is general, and the guidance says the agency will determine whether there is sufficient separation on a case-by-case basis, based on factors that "include but will not be limited

to":

- separate personnel, management and governance
- separate financial records and accounts, including timesheets
- the "degree of separation" of facilities, equipment and supplies and the "extent of such restricted activities" by the affiliate
- whether signs, printed materials and other public communications distinguish the grantee from the affiliate
- whether the U.S. government and project name are "protected from public association with the affiliated organization and its restricted activities" in the public eye.

Congress Weighs In

Before the guidance was released, four leaders in the House wrote to HHS Secretary Mike Levitt and USAID Administrator Henrietta Fore expressing concern about the upcoming guidelines, noting, "Groups working to address the causes and consequences of prostitution are concerned that the pledge requirement increases stigmatization and hinders outreach; and there is international public health consensus that effective outreach to marginalized populations is crucial to HIV prevention." The letter suggested the legal services model for separation is not the appropriate one, saying it "would require organizations to set up legally and physically separate affiliates, with separate staff, in order to use private funds to speak freely about prostitution and AIDS." Instead, the letter suggested the agencies adopt the less restrictive model used in the faith-based initiative, which only requires religious organizations to conduct government funded activity in a separate time and place. The letter was signed by Rep. Henry Waxman ☼ (D-CA), Chair of the Committee on Oversight and Government Reform, Rep. Tom Lantos (D-CA), Chair of the Committee on Foreign Affairs, Rep. Donald Payne ☼ (D-NJ), Chair of the Committee on Foreign Affairs Subcommittee on Africa and Global Health, and Rep. Barbara Lee ☼ (D-CA).

Panel Debates Pros and Cons of Allowing Charities to Become Partisan

On Aug. 9, the Hudson Institute's Bradley Center for Philanthropy and Civic Renewal hosted a forum titled "Should Nonprofit Organizations Play an Active Role in Election Campaigns?". The debate was inspired by separate opinion pieces in *The Chronicle of Philanthropy*, one by Robert Egger of the DC Central Kitchen, titled "Charities Must Challenge Politicians," and one by Pablo Eisenberg of Georgetown University, titled "Charities Should Remain Nonpolitical". Egger fiercely defended his argument that charities and religious organizations should be directly involved in partisan politics, while Eisenberg warned that such participation would taint the sector.

Both speakers referred to charitable and religious organizations (501(c)(3)s) generally as

"nonprofits." Egger said that the laws preventing 501(c)(3)s from participating in partisan politics should be changed, citing a need for innovation and criticizing the "we are all trapped in this charity" model. Egger reasoned that nonprofits often work on the front lines to help vulnerable populations and so can identify the candidates who would work to solve the root causes of those social ills in the first place. This gives nonprofits a unique role, and the most effective advocacy that nonprofits can engage in, according to Egger, would be the public endorsement of a candidate or other direct campaign activity. Egger argued that a typical "advocacy day" on Capitol Hill is not enough and only brings the same response from the lawmaker. He said, "And the politicians have figured out just how to mollify us, just how to say, I'm your champion on the Hill. I'm your tiger. You can count on me. Nice talking with you. And they pat you off. And down the hill these people go, thinking that their cause is going to be championed on the Hill. And the reality is, as much as they probably mean it, we're no overt threat to politicians right now." Egger saw that the only way for the nonprofit sector to have a real impact in government would be the capability to get those people elected who would work for various nonprofit causes and actually bring about real change.

Eisenberg offered five reasons for keeping nonprofits nonpartisan. First, he said taxpayers would strongly oppose having their charitable funds used for partisan politics. Second, it would simply be politically unpractical. Members of Congress would not want nonprofits interfering in politics and have historically tried to weaken the advocacy role of nonprofits. "[And] third, direct political activity would inevitably taint the integrity and public trust of nonprofits, thereby diminishing their capacity to deliver services, retain public confidence and raise charitable dollars for their operations." A fourth reason addressed the matter of independence of the nonprofit sector. Eisenberg said if nonprofits want to do their jobs well, they must remain independent from business, government and politics. This "unique quality of 'nonprofitness' has been the backbone of our civil society over the years. It is that quality that has enabled nonprofits to challenge governments, monitor and hold accountable corporate America, give a voice to the voiceless, mobilize constituencies, influence public policies and generate crucial scientific and medical research."

The final argument Eisenberg offered is that nonprofits have not taken full advantage of the current regulations that allow for policy activism. "They [nonprofits] have not yet begun to tap their enormous legal capacity to lobby, to shape policies and to influence politicians and the political process. When you think that just a little more than 1 percent of all public charities that report to the IRS report any money going to lobbying, you'll see the untapped potential." Instead of changing the laws as Egger suggests, Eisenberg said we should understand why nonprofits are not currently engaging in the utmost permissible levels of advocacy. As Eisenberg said, the problem is "our own reluctance to be activists." A part of this foot-dragging is inaccurate information from some funders, who say "do not lobby, it's illegal to lobby." In response, organizations fear they will stop receiving funds from foundations if they do any lobbying whatsoever.

The room was filled with people committed to the nonprofit sector, and the discussion

turned into a reflective one about the future of the sector as a whole.

Note to Readers

The next issue of the Watcher *will be published Sept. 11.*

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In This Issue

Parts of Patriot Act Ruled Unconstitutional

On Sept. 6, the U.S. District Court for the Southern District of New York ruled that a controversial section of the USA PATRIOT Act is unconstitutional. In *John Doe v. Gonzales*, Judge Victor Morrerro ruled that the National Security Letter (NSL) provisions of the USA PATRIOT Act are in violation of the separation of powers doctrine and the First Amendment's protection of free speech.

The NSL provisions of the USA PATRIOT Act gave the Federal Bureau of Investigation

(FBI) the power to issue NSLs to obtain records from businesses about their customers. The legislation broadened the ability to use NSLs, which previously were restricted to suspected terrorists or spies, to cover any information that is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." Without court approval, the FBI can issue NSL requests that require Internet service providers, telephone companies, credit reporting agencies and banks to disclose information relating to individuals':

- Internet use: websites visited and the e-mail addresses to which and from which e-mails were sent or received
- Telephone use: the times and durations of calls and the numbers to which or from which calls were received or dialed
- Financial transactions: checking and savings account information, credit card transactions, loan information, credit reports and other financial information

The USA PATRIOT Act also expanded approval authority of NSLs beyond senior FBI Headquarters officials to all special agents in charge of the FBI's 56 field offices. There is no policy regarding how long information collected through NSLs can be maintained or under what circumstances information must be disposed. Moreover, the order is mandatory and is accompanied by a gag order that prevents the recipient from disclosing the existence of the NSL with anyone besides legal counsel.

Doe v. Gonzales was remanded from the Second Circuit back to the U.S. District Court after the reauthorization of the USA PATRIOT Act changed the NSL provisions to explicitly allow for judicial review and consultation with counsel. The District Court originally found the PATRIOT Act provisions unconstitutional. Morrerro, in ruling for the District Court, affirmed that the revised provisions still violate the Constitution. He said,"The Court finds that several aspects of the revised nondisclosure provision of the NSL statute violates the First Amendment and the principle of separation of powers."

Morrerro cites a report by the Office of the Inspector General (OIG) at the Department of Justice (DOJ), which uncovered widespread abuse of the NSL powers. In March, OMB Watch reported on the OIG's findings:

- 39,000 NSL requests were issued by the FBI in 2003, 56,000 in 2004 and 47,000 in 2005.
- OIG investigation found that the FBI significantly underreported the requests.
- One-fifth of the reviewed files contained unidentified violations of NSL legislation and policy.
- 700 emergency letters ("exigent letters") were used to collect information from three telecommunications companies on over 3,000 telephone numbers in violation of law and policy.

Morrerro stated that the OIG findings support the claim that the NSL provisions are too susceptible to abuse. "[A]s powerful and valuable as it may be as a means of surveillance,

and as crucial the purpose it serves, the NSL nonetheless poses profound concern to our society, not the least of which, as reported by the OIG, is the potential for abuse in its employment," he wrote.

"As this court recognized, there must be real, meaningful judicial checks on the exercise of executive power," said Melissa Goodman, ACLU staff attorney who was counsel on the case. "Without oversight, there is nothing to stop the government from engaging in broad fishing expeditions, or targeting people for the wrong reasons, and then gagging Americans from ever speaking out against potential abuses of this intrusive surveillance power."

The court issued a 90-day stay on the order to enjoin the FBI from issuing NSLs. This will allow the government to appeal the decision to the U.S. Court of Appeals for the Second Circuit, which is the government is expected to do.

Wiretapping Made Simple

On Aug. 6, President Bush signed the Protect America Act of 2007 (PAA), granting the government the authority to wiretap anyone, including U.S. citizens, without any court approval as long as the "target" of the surveillance is located outside the U.S. The legislation will expire in six months, but members of Congress and concerned public interest groups are not waiting for the sunsets. They are seeking immediate revisions to address the invasion of privacy and erosion of civil liberties contained in the act.

The PAA amended the Foreign Intelligence Surveillance Act (FISA) and permits the Attorney General and Director of National Intelligence (DNI) widespread wiretap authority without court approval, including such examples as:

- An immigration group calling a foreign country to help a client;
- A church calling Kenya to arrange for members to volunteer at an orphanage; or
- An association holding its convention in Toronto that calls a hotel to make arrangements.

This expansion of government authority to collect information without judicial oversight was fast-tracked into law without much congressional oversight. Only five days separated the introduction of the PAA bill in Congress on Aug. 1 and the president's signature. No committee hearings, no reports and no serious debate of the issues were conducted during those five days. Many groups contend that the impacts on personal privacy and people's right to due process were never sufficiently considered by Congress because of its haste to pass the legislation.

House Speaker Nancy Pelosi (D-CA) and Senate Majority Leader Harry Reid (D-NV) have agreed to ask Congress to take a second look at the PAA and FISA right away and consider important privacy protections that were not in the bill. Pelosi has issued a letter

to Judiciary Committee Chairman John Conyers, Jr. (D-MI) and Permanent Select Committee on Intelligence Chairman Silvestre Reyes (D-TX) calling for legislation to re-amend FISA as soon as possible.

The letter states, "Many provisions of this legislation are unacceptable, and, although the bill has a six month sunset clause, I do not believe the American people will want to wait that long before corrective action is taken."

Conyers responded with a Sept. 5 hearing to review the PAA. Hearing witnesses expressed unease with the White House for not explaining to the public the constitutional basis for the changes. Democrats have clearly made reconsidering the FISA amendments a top priority.

EPA's Second Round of 9/11 Testing Falls Short

According to a Sept. 5 Government Accountability Office (GAO) report, the U.S. Environmental Protection Agency's (EPA) second program to test and clean building interiors contaminated by toxins from the World Trade Center (WTC) collapse was a virtual failure. The program's problems stemmed from EPA's inadequate public notification and refusal to listen to its own science experts. The GAO report also indicated that EPA was reluctant to accept cleanup responsibility according to expert recommendations. The result was a limited program grossly underutilized by the public.

The 2001 WTC attacks resulted in toxic dust clouds spread throughout New York City. Though EPA tested the outside air for public health concerns, it initially deferred responsibility for indoor air concerns to New York agencies. The Department of Homeland Security has since clarified that EPA has lead responsibility for building cleanup when contamination is related to terrorism. EPA then began the first building testing and cleanup program in September 2002 for individual apartments, upon tenant request, in lower Manhattan.

After a 2003 Inspector General (IG) review critical of the first program, EPA began a second program in December 2006, based on the recommendations of an expert panel, to address the IG concerns. The resulting program expanded the number of chemicals considered and allowed for testing dust as well as air but, disregarding panel recommendations, remained limited to independently participating apartments in the small area of lower Manhattan. The program also did not test outside of normally accessible areas, such as behind appliances and in heating systems. Cleaning an apartment without addressing recontamination risks from other potentially contaminated apartments in the same building is seen as short-sighted and counterproductive, ignoring the likelihood that other apartments are health risks to their tenants and could undo the progress made in the cleaned areas.

Though there are approximately 20,000 apartments in lower Manhattan, only 272

residents participated in the second program. This low participation rate may be more understandable when considering that EPA used results from the first program to insinuate that there was little or no risk of WTC dust contamination in residences. What EPA *didn't* explain was that 80 percent of the results finding no asbestos risks were from after cleaning, not before. Apartments with air so dirty the filters clogged were disregarded, and only asbestos levels were tested, which gives no indication of the potential health risks from other toxins.

EPA has also been reactive instead of preventative when considering geographic boundaries for the program. Though obvious that buildings outside the small designated area of lower Manhattan were polluted, EPA used the difficulty in confirming the origins of toxic dust that might be found as the reason for not expanding the program above Canal Street or into Brooklyn. Avoiding areas known to have a high probability of WTC contamination because the exact science for confirmation does not exist is more conservative than the expert panel recommended.

EPA has cited resource constraints for the second program limitations. However, EPA never assessed the program needs or requested additional funds, considering itself bound to $7 million left over from the first program, which used almost $38 million.

Beyond ignoring the majority of the expert panel recommendations in the second program, the GAO report found that EPA's management of the panel and lack of transparency actually hindered the panel's effectiveness. EPA did not regard the panel as an independent body, and instead, treated them more as personal advisors. Rather than developing panel consensus recommendations, EPA considered members' individual suggestions separately. Thirteen of the eighteen members considered this process "inappropriate." Additionally, panel meetings and conversations were not adequately documented, which resulted in the reported loss of recommendations.

As a result, none of the members considered the panel successful in meeting its established goals:

1. to develop the second program;
2. to identify unmet public health needs;
3. to identify remaining risks using exposure and health surveillance information; and
4. to determine steps to further minimize risk.

Some members were so unsatisfied with the second program that they discouraged public participation.

OMB Watch Releases *An Attack on Cancer Research*

OMB Watch released a report in late August that further documents industry's attempt

to restrict access to health and safety information produced by the National Toxicology Program (NTP). The report comes just as Congress is investigating allegations of mismanagement, industry influence, and suppression of whistleblowers at the National Institute of Environmental Health Sciences and the NTP.

An Attack on Cancer Research: Industry's Obstruction of the National Toxicology Program illustrates how, over the past five years, industry has repeatedly misused the Data Quality Act (DQA) to suppress or delay important cancer-related information. Among other duties, NTP publishes the biennial Report on Carcinogens (RoC), which is used by local, state and federal authorities to set environmental policies, explore regulations on dangerous substances and provide for preventative health measures.

DQA has been used by the chemical and manufacturing industry to obstruct NTP's research on cancer-causing agents. DQA is a two-paragraph provision that slipped through Congress in late 2000 without debate and has grown into a mountain of controversy, pitting industry against the public interest. It has been used to lodge frivolous information quality challenges, which slow regulatory action and pressure agencies to remove or revise information.

"We discovered that industry has tried to use DQA to challenge every aspect of the NTP scientific review and release process," said Clayton Northouse, Information Policy Analyst at OMB Watch and lead author of the report. "Special interest associations have challenged meetings, press releases, notices to study specific chemicals and other documents that are clearly beyond the parameters of DQA. Instead of seeking to improve the quality of data, the intent of these challenges seems to be to keep scientific information out of the hands of health professionals and government decision-makers."

The report documents how the latest RoC has been delayed for more than one year due to numerous frivolous DQA challenges. The industry challenges, though, do more than impede the flow of critical information to those who need it. The complaints also use up valuable staff time in a program with a small number of employees. This is time that should instead be used to research potential cancer-causing agents and safeguard public health. The report documents how government agencies and public health officials have been denied access to the latest information on the most dangerous toxic chemicals.

OMB Watch concludes the report with recommendations for NTP and other government programs and agencies regarding the implementation of DQA. In particular, the report recommends that government agencies implement the following procedures:

- Dismiss DQA challenges covered by existing information quality procedures.
- Only consider challenges of substantive information.
- Distinguish between fact and policy.
- Dismiss challenges that would result in significant delays in agency action.

The goal of the recommendations, Northouse said, is to "improve the quality of

government data without diverting resources away from protecting the health and safety of the American public."

Federal Agencies Knew of Diacetyl Dangers and Kept Silent

Federal regulatory agencies have known for years the dangers that diacetyl exposure creates among workers in factories where bags of microwave popcorn are tested. The only agency to have taken any action, the U.S. Environmental Protection Agency (EPA), has kept its study of the chemical's impact on consumers secret except for sharing it with the popcorn industry. Now the first case of potential consumer illness from exposure to diacetyl has been documented.

Diacetyl is a flavoring added to many types of food, including artificial butter flavoring in microwave popcorn, and is in widespread use. The Food and Drug Administration (FDA) declared it safe for consumption, but the Project on Scientific Knowledge and Public Policy (SKAPP) at George Washington University's School of Public Health reports on its website that the

> National Institute for Occupational Safety and Health (NIOSH) conducted several studies that confirmed the link between occupational exposure to artificial butter flavoring and lung diseases. In 2000, they issued recommendations to a Missouri microwave popcorn plant about protecting workers from this hazard, and in 2003, they sent an alert recommending safeguards to 4,000 businesses that might use or make butter flavoring.

According to a *Seattle Post-Intelligencer* article, there have been "scores of jury decisions and settlements awarding millions of dollars to workers who sued after having their lungs destroyed" by diacetyl exposure. These workers suffer from the debilitating lung disease bronchiolitis obliterans, or "popcorn workers lung."

The Occupational Safety and Health Administration (OSHA) has the authority to regulate workplace safety in this area but has not. On Sept. 7, a coalition of unions and public health experts wrote a letter to Secretary of Labor Elaine Chao urging her to push OSHA to issue an Emergency Temporary Standard for diacetyl and then follow with a regulation. It was the second letter the group sent to Chao, the first sent over a year ago. OSHA failed to take any action after the first letter.

The second letter urging OSHA to address the issue was prompted in part by a new revelation that "popcorn lung" had been discovered in a non-factory worker, a consumer who ate microwave popcorn at least twice a day, according to a Sept. 6 *Chicago Tribune* article. Dr. Cecile Rose, a lung specialist at the National Jewish Medical and Research Center in Denver, treated the patient and tested the levels of diacetyl fumes in his home while microwaving popcorn. "Peak levels of the fumes were similar to those measured in

factories," the *Tribune* reported.

Rose wrote a letter in July to EPA, FDA, OSHA and the Centers for Disease Control and Prevention (CDC) about her patient and outlined the medical symptoms he experienced and their consistency with factory workers' clinical symptoms. SKAPP had petitioned FDA in September 2006 to remove diacetyl's "generally regarded as safe" status. Thus FDA and OSHA, the two agencies responsible for protecting consumers and workers, respectively, already knew the dangers from diacetyl exposure, and NIOSH (part of CDC) had confirmed the link between the lung disease and exposure.

The only agency that addressed the diacetyl issue was EPA, which conducts indoor air quality research. According to the *Post-Intelligencer* article, EPA began studying whether consumers were at risk in 2003 and finished its study last year. It still has not released the report, but it has circulated it to the popcorn industry for its review. The article states that George Gray, the head of EPA's Office of Research and Development, shared the report with the industry to assure it that none of industries' confidential information would be released to the public through the report. Gray also said the information could not be released publicly because it might prevent his scientists from getting their work published in peer reviewed journals.

The EPA denied a Freedom of Information Act request last fall from The Associated Press (AP) for the report, arguing it was a draft still under review. The agency has not yet answered an AP appeal of that rejection, according to a Sept. 5 article in the *Washington Post*. The Office of Management and Budget's 2004 Peer Review Bulletin allows agencies to exempt "time-sensitive medical, health, and safety determinations" from the peer review requirements. EPA has the discretion under the peer review guidelines, therefore, to release the information if it sees a public health benefit.

The *Post-Intelligencer* quotes Dr. David Michaels of SKAPP, and one of the signatories of the letter to Chao, as saying, "EPA cannot be permitted to play these games with matters that are important to public health. This is just questionable science at its worst."

Meanwhile, manufacturers of microwave popcorn have now begun to voluntarily remove diacetyl from their products, although they had the results of the EPA study in late 2005, according to the *Washington Post* story. ConAgra Foods, Inc., General Mills, Inc., the American Popcorn Company and Weaver Popcorn have started to phase out or replace the flavoring additive.

Bush's Anti-Regulatory Ideology under Increasing Scrutiny

The public and the media are paying more attention to and showing increasing frustration with the anti-regulatory ideology of President George W. Bush. A new report by the Center for American Progress traces several recent failures of the federal

government to the anti-government views of Bush and senior administration officials. Separately, increasing concern over the federal product safety net is causing many to question Bush's seriousness about using government resources to protect American consumers.

On Aug. 23, the Center for American Progress, a progressive think tank founded by former Clinton advisor John Podesta, released a report authored by Reece Rushing titled *Safeguarding the American People: The Progressive Vision Versus the Bush Record*.

The report links Bush's anti-regulatory ideology to bad government practices. The report states, "This ideology sees government principally as an instrument for advancing the interests of the corporate sector and by extension political allies who support this agenda." It goes on to call the ideology "indifferent or even hostile to the common good."

One questionable Bush practice is "cronyism." The report chronicles Bush appointees who, prior to government service, worked as industry lobbyists or were financial supporters of Bush's campaigns. The report finds these appointees have frequently failed their responsibility to protect the American people. The appointees include Michael Brown, the former director of the Federal Emergency Management Agency and Bush campaign contributor, who was blamed for the government's inadequate response to Hurricane Katrina, and Richard Stickler, the head of the Mine Safety and Health Administration and former coal industry executive, who has failed to implement congressionally mandated mine safety reforms in the wake of three mine disasters in 2006.

Other questionable practices include suppressing scientific research and findings, reducing monitoring of environmental threats and other problems, weakening and eliminating public protections already in effect, failing to enforce federal law, and restricting public access to information.

These practices provide a common link among a host of recent failures of the federal government. Food-borne illness outbreaks, the 2003 blackout of large sections of the Northeast, the Minneapolis bridge collapse, increasing identity theft, and a host of other problems can be traced back to the anti-regulatory philosophy of the Bush administration, according to the report. It identifies commonalities such as Bush's failure to devote adequate resources to federal agencies and response plans and his refusal to recognize the need for government action to protect the public from growing threats and worsening problems.

The report also describes a progressive vision for safeguarding the public. This vision embraces the idea of a positive government and actively seeks to expand information collection and public access and hold corporations accountable for violations of federal law.

The recent spate of controversies involving dangerous Chinese imports can also be linked

to Bush's anti-regulatory ideology. The Consumer Product Safety Commission (CPSC) is the federal agency responsible for ensuring product safety and for recalling products found to be dangerous. Critics have assailed CPSC for recent product safety problems including the lead paint contamination of Thomas and Friends train toys and Barbie dolls. The Toy Industry Association, an organization that lobbies on behalf of toy makers, has asked the CPSC to adopt a mandatory testing system to help ensure toys are safe.

However, many are beginning to realize the broader problems at CPSC which reflect Bush's anti-regulatory views. Multiple media reports and opinion columns and public interest groups such as Consumers Union, the nonprofit publisher of *Consumer Reports*, are increasingly recognizing the need for better funding and a change in CPSC's culture.

Throughout his presidency, Bush has slashed the CPSC budget and staffing. Bush has failed to propose increases in CPSC's funding to match inflation. Bush's proposed FY 2008 budget calls for 401 full-time employees, the lowest staffing level ever at CPSC.

A recent *New York Times* investigation by reporter Eric Lipton described the ways in which these budget cuts manifest themselves. According to the investigation, CPSC "investigates only 10 percent to 15 percent of the reported injuries or deaths linked to consumer goods." The investigation also found compliance investigations "dropped 45 percent from 2003 to 2006."

The agency's culture, which promotes voluntary compliance with product safety rules and negotiated recalls of dangerous products, may also be to blame. The agency has been relatively toothless in enforcing federal law in the face of industry opposition. In one case, Robert Eckert, the chairman of Mattel, revealed to the *Wall Street Journal* that the toy maker often conducts investigations of hazardous products on its own, and outside of the public view, before notifying CPSC. With rare exception, manufacturers are to notify CPSC within 24 hours if they believe a product to even be potentially hazardous. Eckert called the law and CPSC's enforcement unreasonable, according the article.

On Sept. 6, Consumers Union wrote to the Senate expressing its displeasure with Mattel's disregard for the law and urging Congress to take oversight action. On Sept. 12, a subcommittee of the Senate Appropriations Committee will hold a hearing on CPSC and toy safety. Eckert is scheduled to testify.

However, with senior administration officials believing government should not play a role in protecting the public, problems are likely to continue through the remainder of Bush's term. As a Sept. 6 *New York Times* editorial concluded, "The Bush administration apparently considers regulatory weakness a virtue."

It's Industry vs. Consumers and Health Specialists in National Ozone Hearings

Recent field hearings in five major U.S. cities highlighted the debate over the need to write a more stringent air quality standard for ozone. The U.S. Environmental Protection Agency (EPA) is under court order to issue an updated standard by March 2008. Industry representatives used two familiar arguments to urge EPA to leave the existing ten-year old ozone standard untouched, while public health experts and citizens argued the health impacts under the current standard are potentially devastating.

On June 21, EPA announced a proposed rule revising the national standard for ground-level ozone. EPA proposed a range, 0.070 parts per million (ppm) to 0.075 ppm, from which it will choose a final standard. The current standard is 0.08 ppm. EPA Administrator Stephen Johnson called the current standard inadequate and recognizes the need for a more stringent regulation. However, Johnson will not endorse a standard within the 0.060-0.070 range proposed by the Clean Air Scientific Advisory Committee (CASAC), EPA's premier scientific panel on air quality issues. Other EPA internal reports call for a standard no less than 0.070.

The EPA field hearings were designed to collect comments on what the appropriate standard should be. Two hearings were held Aug. 30 in Philadelphia and Los Angeles. Three more were held on Sept. 5 in Chicago, Atlanta and Houston.

The Clean Air Act instructs EPA to put public safety above economic factors in setting its standard for ozone. The law orders EPA to protect public health within "an adequate margin of safety" (42 U.S.C. 7408, Sec. 109(b)(1)) regardless of economic costs or benefits. Nevertheless, industry representatives from organizations like the California Manufacturers & Technology Association and the National Association of Manufacturers consistently argued that the costs of implementing a more stringent standard would harm the economy, according to articles in the *Los Angeles Times* and the *Philadelphia Inquirer*.

At the Houston hearing, some industry representatives questioned the connection between asthma and ground-level ozone exposure, according to an article in the *Houston Chronicle*. "We do not believe that the current scientific evidence clearly supports the lowering of the ozone standard at this time," said David DiMarcello of the BASF Corporation. "The EPA's existing ozone standard ... will continue to provide ample protection for public health," the paper reported.

This issue of questioning the science behind regulation was the other argument industry consistently used at the hearings. A BNA story ($) on the Chicago hearing, for example, reported the statement of the Engine Manufacturers Association (EMA):

> "The science of ozone health effects does not provide sufficient evidence to justify tightening of the ozone standard from its current level," said Joseph Suchecki,

director of public affairs for the EMA. "EMA believes it is more important for the EPA and states to concentrate their efforts on achieving compliance with the current ozone standard rather than to adopt a stricter standard based on questionable scientific evidence."

Scientists, local air quality officials, local elected officials and citizens suffering from asthma and respiratory problems testified for the strong need for a stricter ozone standard. Critics maligned EPA for proposing too weak a standard. An American Lung Association (ALA) environmental health expert was quoted in a BNA story on the Philadelphia hearing as arguing that EPA's proposal "only grudgingly touches the review panel's weakest recommendation, and even worse, contemplates retaining the current inadequate standard." And he argued that there is a "truly immense body of evidence" establishing the adverse impacts of ozone pollution, especially on the most vulnerable populations such as children, the elderly and those with existing respiratory problems.

To counter industry arguments about the costs of a stricter standard, some public health advocates had their own cost-benefit arguments. The *LA Times* story reported that Linda Weiner, director of air advocacy for the ALA in California, argued, "The human toll from air pollution is huge in terms of illness, emergency room visits, asthma attacks and even premature death....Total benefits of EPA's air pollution regulations outweigh the costs by as much as 40 to 1."

Many environmental and health advocates urged EPA to adopt a standard of 0.060 ppm, the strictest option within CASAC's recommended range. BNA reported that at the Chicago hearing, Joel Africk, president of the Respiratory Health Association of Metropolitan Chicago, testified that a majority of the nation's public health organizations back the 0.060 standard. The article quoted Africk as saying. "We urge the EPA to listen to its own advisers and independent experts who recommended a tighter ozone health standard than the agency proposes ... Public health professionals and organizations such as the American Thoracic Society, the American Academy of Pediatrics, the American Public Health Association, the Asthma and Allergy Foundation of America, and the Respiratory Health Association of Metropolitan Chicago all endorse a much tighter standard."

New Small Business Program Will Influence Agency Regulatory Reviews

The Small Business Administration's (SBA) Office of Advocacy has launched a new program that may expand SBA's influence into agency regulatory activity. The Office of Advocacy acts as a liaison between the business community and the federal government, particularly the executive branch.

The new program is an attempt by the Office of Advocacy to influence agency reviews of regulations already in effect. Agencies conduct these reviews for a variety of reasons.

Section 610 of the Regulatory Flexibility Act (RFA) requires agencies to review every ten years rules having a "significant economic impact" on small businesses or other small entities. Some agencies have internal policies for how frequently they review rules, and others conduct reviews on an *ad hoc* basis.

The new program, the Regulatory Review and Reform Initiative, or "R3," includes uniform recommendations for the conduct of agency reviews. More significantly, the Office of Advocacy will solicit the business community for recommendations on which existing rules agencies should review and transmit those recommendations to the appropriate agency.

The Office of Advocacy cites a new report by the Government Accountability Office (GAO) as the major reason for the inception of the new program. In the report, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO examined the reviews of nine regulatory agencies completed from 2001-2006.

GAO found the nine agencies reviewed at least 1,300 regulations. Of the 1,300, the majority were conducted at the discretion of agencies, not as a result of statutory requirements such as Section 610 of the RFA.

The report finds room for improvement in the conduct of agency reviews. The report urges agencies to employ uniform standards for conducting its reviews and to better document and inform the public of results. GAO also found agencies often conduct reviews at their own discretion more frequently than the ten-year Section 610 reviews. These discretionary reviews tend to be more valuable to the agency, according to the report.

The first part of the Office of Advocacy program, recommendations for best practices, addresses one of the problems GAO identified in its report — the need for uniform conduct and improved documentation in reviews. However, the best practices guide only discusses practices related to the conduct of Section 610 reviews. It ignores the conduct of discretionary reviews, which are more numerous and more helpful to agencies, as mentioned above.

The second part of the program, soliciting recommendations for rules agencies should review, is not consistent with GAO's findings. Agencies are able to select rules as they see fit and often do so in order to "address emerging issues." Agencies are not hindered in selecting rules to review but by a lack of resources to conduct reviews for the many federal regulations in effect, according to GAO.

The practice of soliciting recommendations for rules agencies should review is not new. Each year from 2001-2004, the Office of Information and Regulatory Affairs (OIRA), an office within the White House Office of Management and Budget, asked for suggestions from the public on specific regulations that could be rescinded or changed to increase

benefits to the public. Industry groups and conservative think tanks made many of the suggestions. OIRA tended to give those suggestions more priority than those made by other interest groups or individual citizens. Subsequently, many dubbed the White House effort an "anti-regulatory hit list."

That program was successful in prompting agency reviews. According to the GAO report, for the rules studied, the OIRA initiative accounted for up to 20 percent of reviews, and up to 74 percent of reviews conducted by the U.S. Environmental Protection Agency.

The White House may have been involved in the development of the new Office of Advocacy Program, and may continue to be involved as it progresses. The Bush White House has encouraged SBA to be aggressive in its regulatory advocacy on behalf of small businesses. In 2002, OIRA and the Office of Advocacy signed a memorandum of understanding under which both offices pledged to work together in order to "achieve a reduction in unnecessary regulatory burden for small entities." Although the memorandum expired in 2005, nothing precludes the offices from continuing to work together.

The Office of Advocacy's Chief Counsel Thomas Sullivan said in a statement, "The Office of Management and Budget has committed to work cooperatively with Advocacy to make R3 a success."

The Office of Advocacy also consistently cites the cost of federal regulations as another need for engaging in regulatory reform. Sullivan claims federal regulations imposed costs of $1.1 trillion on the economy in 2004. The $1.1 trillion claim comes from a study the Office of Advocacy commissioned and released in 2005.

The study, written by anti-regulatory academic W. Mark Crain of Lafayette College in Pennsylvania, is deeply flawed. The study relies on government predictions of what regulations will cost before they take effect, rather than actual realized costs to the economy. John Graham, former OIRA administrator under Bush, has criticized the study and pointed out that it is merely an updated aggregation of other studies, some of which date back to the 1970s. The study also ignores the benefits of regulations. Many of these benefits, such as human lives or environmental preservation, cannot be adequately expressed in monetary terms.

Nussle Approved as Budget Head, Faces Task of Completing FY 2008 Budget

In the Senate's first vote following the August recess, former Rep. Jim Nussle (R-IA) was confirmed as director of the Office and Management and Budget (OMB), 69-24, with all Republican senators voting in favor of Nussle and the Democrats split down the middle. Notably, Senate Majority Leader Harry Reid (D-NV), Appropriations Committee Chair Robert Byrd (D-WV), and Senate Budget Committee Chair Kent Conrad (D-ND) voted

against the nominee. Nussle's approval sets up what is expected to be a bitter struggle to complete work on the FY 2008 budget during the fall.

The struggle ahead centers on how much to spend in the FY 2008 appropriations and other bills. The Senate has a mere fourteen legislative days until the end of the 2007 fiscal year on Sept. 30 to pass ten of the twelve FY 2008 spending bills and then conference all twelve bills with the House. This is simply not enough time to finish the bills individually, particularly when the executive and legislative branches seem deadlocked over spending levels. Congress' budget resolution calls for $22 billion more in overall discretionary spending than the $933 billion the president has requested, drawing veto threats from President Bush. Additional struggles on fiscal policy are expected over extending farm subsidies, reauthorization of the State Children's Health Insurance Program, and renewing more than 40 expiring tax cuts.

While there is a remote possibility Congress will pass all the appropriations bills before the current fiscal year ends, veto threats issued against nine of the bills put timely presidential approval in jeopardy. Congress and the president have held steadfastly to their positions, but private negotiations could yield a compromise. If a compromise cannot be achieved in the coming weeks, a continuing resolution or a multi-bill omnibus measure is almost assured.

A number of advocacy groups came out against Nussle — including OMB Watch — taking the opportunity of his nomination to express hope the White House will adopt a less ideological, more flexible approach to budget-making with a Congress now controlled by Democrats. The OMB Watch statement also drew attention to OMB's regulatory responsibilities, encouraging Nussle to "lead an OMB respectful of agencies' scientific and technical expertise and to focus on providing adequate resources rather than additional analytical burdens."

Despite Nussle's reputation as a fierce partisan during his years as chair of the House Budget Committee and his unwillingness during his committee confirmation hearings in July to specify a strategy for breaking the FY 2008 budget deadlock, little of the Senate floor debate on his nomination focused on him specifically. Conrad said though Nussle is "clearly qualified [my vote] was a question of what policy we pursue in the future." Conrad's floor vote was a surprise in view of his Budget Committee vote in favor of Nussle. Reid added, "Voting against confirming Congressman Jim Nussle as OMB Director will send a clear signal of my opposition to this [administration's] reckless fiscal policy."

Some of the most vociferous opposition to Nussle came from freshman Sen. Bernie Sanders (I-VT), who called Nussle a symbol of everything wrong with the president's domestic policies:

> Personally, I like Jim Nussle... My strong opposition to Jim Nussle becoming Director of OMB has much less to do with Mr. Nussle and much more to do with

> the current failed trickle-down economic policies of the Bush administration.... President Bush desperately needs a budget director ... who is willing to compromise with a Democratic Congress for the benefit of all of the American people, not just large corporations, and the wealthy few. Unfortunately, I am afraid Jim Nussle is not that person.

A more restrained but equally solemn assessment was issued from the Senate's other independent member, Homeland Security and Governmental Affairs Chair Joseph Lieberman (CT), who said although he would vote in favor of Nussle:

> I do so with the understanding that Congressman Nussle will have to exercise the full measure of his diplomatic skills at both ends of Pennsylvania Avenue to help bring the FY 2008 budget and appropriations process to a satisfactory conclusion.

It remains to be seen whether Nussle, and the rest of the Bush administration, will be able to find compromise with Congress on the FY 2008 spending bills before the fiscal year begins on Oct. 1.

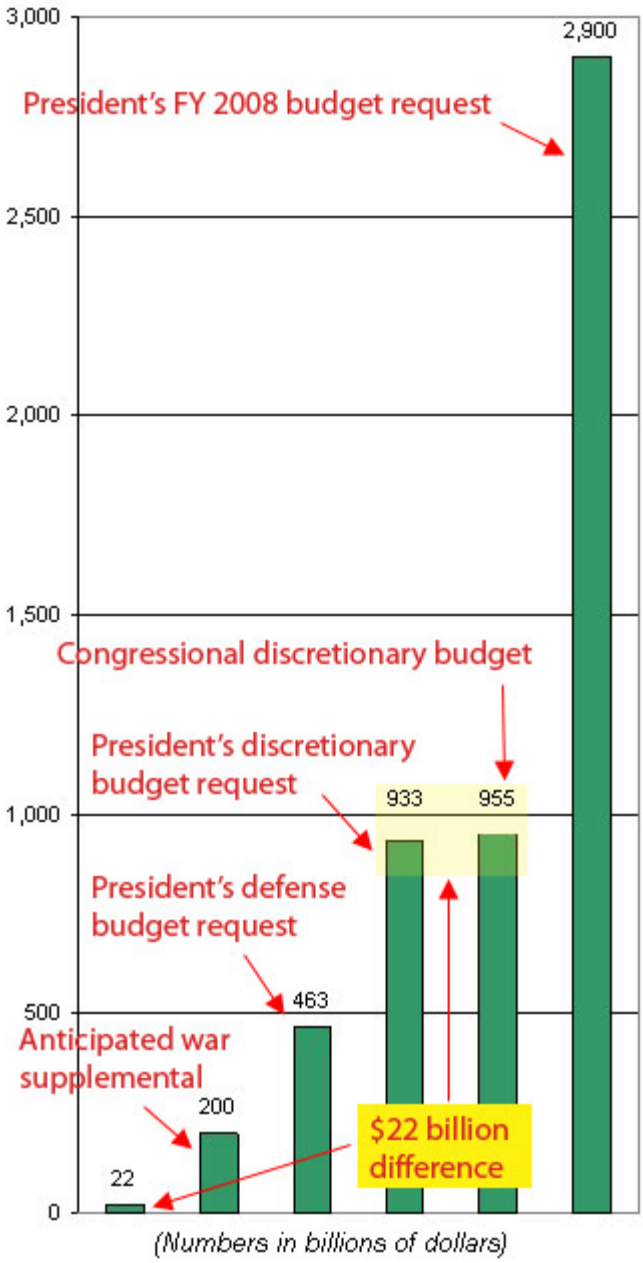
Continuing Resolution a Virtual Certainty; Congress Continues to Work for Appropriations Passage

A plethora of veto threats and the Senate's dithering over spending legislation have combined to all but guarantee the necessity of enacting a continuing resolution before the start of the new fiscal year on Oct. 1. While Senate Majority Leader Harry Reid (D-NV) has indicated that a continuing resolution will likely fund government operations for weeks, not months, time is not their only obstacle. Although it remains unclear how long it will take the Senate to complete its appropriations work, congressional leaders will also have to formulate a strategy to overcome President Bush's veto threats to see their spending priorities ultimately enacted.

The House completed all its appropriations work on Aug. 5 when it passed its version of the Defense Appropriations bill. Across the Capitol, the Senate had passed only one of its spending bills (Homeland Security) when Congress adjourned for the month-long August recess. Upon returning from summer vacation, however, the Senate immediately passed both Military Construction-Veterans Affairs (92-1) and State-Foreign Operations (81-12) by veto-proof margins. However, of all three Senate-passed measures, none have been handed off to a conference committee for final negotiations with the House. While Senate floor action on Transportation-HUD is expected before the current fiscal year ends on Sept. 30, that will likely be the last spending bill passed by the Senate before the start of FY 2008.

Bush is also doing his part to slow down enactment of the spending bills. He has threatened to veto nine of the House-passed bills, citing Congress's failure to

"demonstrate a path to live within the President's top line" of $933 billion in total discretionary spending for seven of the bills. Although it is unlikely Congress will send to the president a veto-threatened spending bill before the end of the month, any veto of appropriations bills will delay enactment of new funding legislation for a significant length of time into the new fiscal year.



Showing no indication that he intends to negotiate with Congress, the president's position on the FY 2008 appropriations bills is little more than executive feet stomping. His nominal rationale for adhering to a "top line" of $933 billion is a desire to avoid "irresponsible and excessive level of spending." Representing a little over two percent of his discretionary budget, and less than one percent of his total budget, the $22 billion difference between Congress's and the president's budgets is vanishingly small — hardly worthy of risking government shutdown and certainly not worth the attention it has garnered this year during budget debates in Washington. Despite its size in relation to the rest of the budget, the extra discretionary money would go a long way to reverse underinvestment in communities around the country.

In addition, the reality of President Bush's fiscal record belies his claims of fiscal responsibility. Since taking office, the president has refused to veto a single spending bill even as many of his irresponsible policies caused the national debt to explode by more than $3 trillion. Bush may be serious about vetoing spending bills over insignificant differences, but he is hardly serious about fiscal responsibility.

Presented with Bush's obdurate veto threats, Congress may seek to put the president in the politically awkward situation of vetoing massively popular spending bills. Because of broad bipartisan support shown for Military Construction-VA and Homeland Security

appropriations bills, the Democratic Congress could attach other domestic spending bills with less Republican support to them in order to garner veto-resistant support. This will complicate the president's decision to veto combined spending bills as Congress may be able to override his veto. Congress's strong, bipartisan support of defense and homeland security spending may not only lead to a veto override, but rejection of must-pass spending may cost Bush a measure of his rapidly dwindling political capital.

As the fiscal year draws to a close, the Senate is inching toward completing its appropriations duties, but is still far behind schedule. It remains highly unlikely that its saunter will turn into a sprint to pass the nine remaining spending bills, virtually guaranteeing the enactment of a continuing resolution to fund the beginning of FY 2008. But even if the Senate finishes its work and both chambers manage to complete conference negotiations before Oct. 1, Bush's veto threats present significant hurdles for timely enactment of next year's spending legislation.

Carried Interest Issue Gets Full Hearing(s) in Congress

On Sept. 6, the carried interest tax loophole took center stage, featuring a four-panel, 20-witness marathon hearing in the House Ways and Means Committee and the third hearing this year on the topic in the Senate Finance Committee. The day before the hearings, over 300 national, state and local nonprofit organizations sent a letter to Congress urging it to close the loophole in order to bring equity to the tax code.

By day's end, deep divisions had emerged among private equity and other fund managers, with an increasing number now openly supporting H.R. 2834, a bill introduced by Rep. Sander Levin ☼ (D-MI). The Levin bill would require fund managers to pay tax on their partnerships' carried interest income at ordinary rates of up to 35 percent, rather than the 15 percent capital gains rate they now pay. During the hearing, the Levin bill appeared to gain traction among committee members, particularly if it is paired with an effort to reform or patch the Alternative Minimum Tax.

Indeed, many of the arguments offered at the hearing by beneficiaries of the special carried interest tax break were countered by other such beneficiaries. In the words of one, William D. Stanfill, a founding partner of TrailHead Ventures, "I don't think it's fair for those teachers and firefighters to subsidize special tax breaks for me and other venture capitalists ... or for private equity and hedge fund managers."

Those testifying in defense of the preferential tax treatment warned of dire economic consequences for the United States, should the loophole be closed. Bruce E. Rosenblum, managing director of the Carlyle Group and chairman of an industry lobbying organization, said, "There is no inequity in the current taxation of capital gains attributable to carried interest. Fairness requires that the tax code not single out certain investors for less favorable treatment." Another, Jonathan Silver, managing director of Core Capital Partners, told the committee that the Levin bill would hurt the nation's

global competitiveness by raising taxes on investors and "fundamentally change the venture capital business."

But others in the business pointed out that the Levin bill has no impact on investors as such, only on fund managers, and that fund managers had indeed been singled out — and given a special tax subsidy enjoyed by no other profession. Leo Hindery Jr., managing partner at a private equity fund, InterMedia Partners, disputed Rosenblum and Silver's claims, telling the committee that the industry had taken advantage of a "tax loophole the size of a Mack truck ... Congress, starting with this committee, needs to tax money management income, what we call carried interest, as what it is ... plain old ordinary income." He called the argument that the bill would hurt the economy "self-serving ... complete poppycock."

Testimony at the Senate Finance Committee hearing similarly dismissed concerns the Levin bill will reduce returns to state pension plans, many of which are partially invested in hedge funds. Professor Alan Auerbach said in his testimony that while affects are difficult to predict, he thought state pension funds "might see a decline in returns of one basis point, or one-one hundredth of one percent." The pension fund investment industry involves trillions of dollars, Auerbach said.

Managers of public employee pension funds also testified at the hearing that claims about the Levin bill's potential affects on such funds are overstated. Russell Read, the Chief Investment Officer of the California state pension fund, the largest public pension fund in the country, said he could not predict what the effect of the Levin bill might be on the pension fund's investments. Further, a representative from the New York state pension fund said he highly doubted a different tax structure would discourage people from working at hedge funds.

Additionally, the National Conference on Public Employee Retirement Systems retracted a statement it had made opposing the Levin bill at a prior Senate hearing, after many of their members pressured the conference's leadership for the retraction.

Although it has developed momentum through the summer, the fate of the Levin bill could be bound up with efforts afoot to eliminate the Alternative Minimum Tax (AMT) or to pass an AMT "patch," which would hold the number of taxpayers liable under the AMT steady for one or two years. Ways and Means Committee Chair Charles Rangel (D-NY), asked if he would support a one-year patch while working on a larger repeal bill, replied ($), "You do what you have to do, but that is not on the radar screen at all." Rangel said he would look to the Levin bill to help pay for the expensive ten-year, $800 billion AMT repeal or for a $60 billion one-year patch he implied he might "have to do." This would not only help AMT legislation comply with Congress' new PAYGO requirements, but would also offer a way to simplify and bring equity to the tax code.

Census Report Shows Working Americans Falling Behind

The U.S. Census Bureau released its annual report, *Income, Poverty, and Health Insurance Coverage in the United States 2006* on Aug. 28. The report, which covers the most recent Current Population Survey (CPS) data, showed slight overall improvement in income and poverty, but continued declining rates of health insurance coverage. The headline numbers — a 0.7 percent increase in median household income and a 0.3 percent decline in poverty — are undermined, however, by the underlying story that middle- and low-income working Americans are not seeing substantial gains from the current economy.

Upon release of the Census data, President Bush used the veneer of apparent improved living standards to tout "low" taxes and "in check" government spending. He also erroneously claimed the Census report "confirms that more of our citizens are doing better in this economy, with continued rising incomes and more Americans pulling themselves out of poverty."

His claims, however, are not supported by even a cursory examination of the data. For a third year in a row, men and women both saw their annual earnings decrease. From 2005 to 2006, median income for men declined from $42,743 to $42,261; women saw their income fall from $32,903 to $32,515. Therefore, the $356 rise in median household income (from $47,845 to $48,201) is attributed not to robust economic gains accruing to the middle-class, but rather to the fact that more members of the average household are working.

The trend in income is even more disturbing when income levels in 2006, five years into an economic recovery, are compared to income levels in 2001, when the last recession bottomed out. An analysis by the Center on Budget and Policy Priorities shows median, working-age household income was $1,336 lower in 2006 than it was in 2001. The analysis also reports those same families are $2,375 off their peak income from 2000, immediately prior to the most recent recession.

Perhaps the most troubling statistic uncovered in the Census data is that the trend in poverty follows that of income. An apparent improvement over the prior year's measurement of poverty is strongly tempered when put into the context of past economic performance. During worst part of the mild 2001 recession, 32,907,000 people were poor, a poverty rate of 11.7 percent. In 2006, well into the recovery, the poverty rate was 12.3 percent (a 0.6 percent increase) with over 3 million more people living in poverty.

And, according to the CBPP analysis:

> The findings that poverty remains higher, and median income for working-age households lower, than in 2001 when the last recession hit bottom, are the latest evidence that the current economic recovery has been exceptionally uneven and that an unusually small share of the gains has reached low- and middle-income

families.

Table 2: Key Changes in Poverty, Income, and Health Insurance		
	2005 to 2006	**2001 to 2006**
Poverty Rate	-0.3 percentage points*	+0.6 percentage points*
Number Poor	-490,000	+3.6 million*
Real Median Household Income	+$356*	-$110
Real Median income of non-elderly households	+$725*	-$1,336*
Percentage of Americans without Health Insurance	+0.5 percentage points*	+1.7 percentage points*
Number without Health Insurance	+2.2 million*	+7.2 million*
* denotes a statistically significant change		

(source Center on Budget and Policy Priorities)

More troubling than the income and poverty data, however, was Census data on health insurance coverage. The number of Americans with health insurance continued its six-year decline as 46,995,000 Americans went without coverage in 2006. Fortunately, there is an opposite trend in the number of people covered by government health care. For the ninth year in a row, coverage of individuals by Medicare, Medicaid, military health care, or other government health care programs, like the State Children's Health Insurance Program, has increased. Private health insurers continued to cover a smaller portion of the population, falling from 60.2 percent in 2005 to 59.7 percent in 2006.

This year's CPS data report is far from good news, and for many Americans, the data show an economy in which workers continue to fall behind. The rise in household income from 2005 to 2006, when viewed in the context of recent economic history, is rather disappointing as the median household income has yet to catch up with that of the trough of the 2001 recession. The poverty data, marking the second year of a reverse in the upward trend in the poverty rate, is a positive indicator, but both the poverty rate and the number of poor people are still above their respective levels of the lowest point of the 2001 recession.

Meanwhile, gains in household income are mitigated by declining rates of health insurance coverage. Declines in wages are exacerbated as families lose health insurance and are forced to spend more of their paychecks on health care. Although the Census report shows improvements in household income and the poverty rate, it marks only the

beginning of a reversal of troublesome trends and an economy that has left too many working families behind.

Americans Dislike Rising Inequality, Contrary to Popular Belief

It is commonly assumed that Americans do not oppose increasing inequality. After all, a consensus among social scientists exists that most Americans favor equality of opportunity over equality of outcome, and the public has supported welfare state retrenchment and regressive tax cuts, both of which increase inequality. However, this belief may be a misinterpretation of American values and policy preferences.

Recent research on public attitudes regarding inequality has shown that Americans have strong concerns that income differences are too large, and these views are mainly dependent on perceptions of the "deservingness" of different income groups. In addition, policy preferences may be a poor indicator of how the public sees inequality.

What the Public Believes about Inequality

While most Americans believe equality of opportunity is more important than equality of outcome, survey data shows a significant portion of the public is aware of and unnerved by rising inequality of outcome. In a paper soon to be published, Professor Leslie McCall of Northwestern University examined survey data from 1987 to 2000 on public attitudes toward inequality and found significant opposition to it:

> Even at their lowest points during the period under study, 58, 49, and 38 percent of Americans strongly agreed or agreed that income differences are too large, that inequality continues to exist because it benefits the rich and powerful, and that inequality is unnecessary for prosperity, respectively. At their peaks in 1992 and 1996, these shares rose to 77, 63, and 58 percent. These are significant increases that remain so after extensive controls for compositional and behavioral shifts.

McCall concluded that the public may see outcomes as a measurement of the availability of economic opportunity. Attitudes about inequality depended on the state of the economy and how broadly prosperity was shared. If *only* the rich are getting richer, Americans may believe that opportunities are not being made available to enough people. In short, inequality may be tolerated only if it is a sufficient condition of upward mobility in the nation as a whole.

An alternative theory, articulated by Professor Christina Wong at Carnegie Mellon University, is the public's preference for redistribution depends on whether incomes are perceived as fairly acquired. Americans tend to judge the fairness of market outcomes by effort, talent and societal contribution. Opposition to inequality may grow if the public becomes skeptical that the market rewards these traits and behaviors, or if the wealthy

are primarily perceived as the beneficiaries of luck or family background.

Both researchers seem to have found that the public's attitude towards different aspects of inequality is most influenced by how people view social groups. Much opposition to redistribution is rooted in the racially-tinged belief that poor people do not work hard enough to deserve assistance, and that they are unwilling to take advantage of readily available opportunities. Yet support for redistribution could arise from beliefs that the rich may not work hard enough to justify a large income, or may be taking unfair advantage of opportunities unavailable to others.

According to McCall and Wong, perceptions of the poor, the middle class and the rich also appear to be malleable, being highly dependent on the type and quantity of media coverage, while loosely tracking trends of rising inequality. And minorities, who may be more aware of discrimination in market outcomes, and college-educated respondents tended to express stronger support for redistribution.

Inequality, Policy and the Market

Policy preferences may not only be affected by beliefs regarding "who deserves what," but of the state and the market.

A limited set of policies that address inequality seem to attract public support. McCall found that significant support exists for reducing inequality, but not through policies that are connected to poverty reduction or progressive taxation (though in 1992, concern about inequality probably led to greater support for taxing the rich). Increased educational funding, for example, consistently resonated as a solution for inequality.

The public also fails to recognize — or be concerned — that policies they favor are not in line with their views on inequality. The public may have supported the regressive tax cuts of 2001-2006 out of dislike for taxation, connected in part to their perception of whether they pay too much in taxes. Professor Larry Bartels of Princeton University analyzed a survey of public opinion regarding these tax cut packages and found significant support for tax cuts regardless of who they actually benefited. Even people who disliked rising inequality still supported the tax cuts.

Many people also look toward the market, rather than the government, to address inequality. Pollster Stan Greenberg observed, in focus groups held in 1996, that people who aspire to a better-than-average lifestyle see government as offering limited help — even as being an obstacle to advancement:

> This struggle to rise above the average is highly personal. It depends on people's qualities and attitudes, on their personal determination to improve themselves and get an education. It depends on the support and work of family members. Without those things, one would struggle like the rest of America, not getting anywhere. But the resources and strategies are private; as one of the men bluntly put it, "Unless you're willing to watch out for yourself or do something for

> yourself, nobody else is really going to help you."
>
> When asked who is on their side, about a third of the participants look to family, about 10 percent look to friends, and about a quarter look to the church. People have little expectation that civic organizations will rise to their defense or advance their interests. Barely anybody thinks of unions. Barely one in ten of the participants mention political leaders as a force on their side.

In addition, McCall argued the public tendency to rely on the market and a limited set of policies may be a product of history and institutional configurations.

> One way to partially reconcile these opposing perspectives — though, admittedly, it gives more credence to the former "persistence" perspective — is to suggest that existing levels of welfare state generosity will condition the response to similar rises in inequality across countries. Support for redistributive policies will increase where generosity is taken for granted (i.e., in social democratic societies), while it will be unaffected where generosity is more limited (i.e., in liberal market societies), reinforcing existing regimes.

Views about government, however, may not always be static and self-reinforcing. Greenberg found a significant change in attitudes once respondents were exposed to pro-government statements. Indeed, the persistence of rising inequality and the destabilizing affects of globalization, technological change and policy retrenchment may provide an opening for a progressive message that generates support for selective government intervention, if it taps and shapes public beliefs in equality of opportunity and market fairness.

FEC Proposes Rulemaking on Elections and Issue Advocacy

On Aug. 23, the Federal Election Commission (FEC) issued a Notice of Proposed Rulemaking (NPRM) stating the agency's intent to make its regulations consistent with the recent U.S. Supreme Court decision in *FEC v. Wisconsin Right to Life* (WRTL II). The FEC seeks public comment on two alternative proposals by Oct. 1. The FEC will hold a hearing on Oct. 17, and it plans to vote on a final rule by the end of November, in time for the presidential primaries. The difference between the alternative proposals is that one would require sponsors of grassroots, non-electoral broadcasts to file disclosure reports on their funding sources to the FEC; the other approach amends the definition of electioneering communications to allow issue advocacy and would not require disclosure to the FEC.

In the WRTL II case, the Supreme Court ruled the electioneering communications provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) cannot be constitutionally applied to broadcasts that cannot be reasonably interpreted as appeals to vote for or against a federal candidate. (The law bans corporations, including

nonprofits and labor unions, from paying for broadcasts that refer to federal candidates within 60 days of a federal general election or 30 days of a primary.) The Court's decision then left it up to the FEC to determine which ads, other than the ones considered in the WRTL case, would also be exempt from BCRA's electioneering communication restrictions.

The FEC Proposal

Each of the two alternatives proposed by FEC have some common elements. They provide a general exemption from BCRA, using language directly from the Court opinion, that says corporations and labor unions can pay for broadcasts that otherwise meet the definition of electioneering communications if "the communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." (p. 54-55)

Under both alternatives, the FEC proposal provides a series of safe harbors. The safe harbor for grassroots lobbying exemption would protect a paid broadcast that:

- "exclusively discusses a pending legislative or executive matter or issue"
- "urges an officeholder to take a particular position or action with respect to the matter or issue, or urges the public to adopt a particular position and to contact the officeholder with respect to the matter or issue."
- Does not include any reference to "any election, candidacy, political party, opposing candidate, or voting by the general public", and
- Takes no position about the officeholder's character or fitness for office.

The proposed safe harbor for commercial and business broadcasts contains similar factors, except it must refer to the candidate's business instead of pending legislative or executive decisions. Although the electioneering communications provision in BCRA only applies to broadcasts on television, radio, cable or satellite, the proposed rules refer generally to "communications" or "ads." This is misleading, since the rule has never applied to non-broadcast forms of communication, such as direct mail campaigns, newspaper ads or the Internet.

The FEC's Background and Questions for Public Comment

The proposal clarifies in the beginning that "electioneering communications are subject to both funding restrictions and reporting requirements" (p. 6) and that the WRTL II case only challenged the funding restrictions. As a result, the FEC seeks comment as to "whether the Commission has the authority to change its electioneering communications rules beyond what is required by the Supreme Court's decision." (p. 7)

This is an odd question, since the FEC notes on page 3 that BCRA "specifically authorizes the Commission to promulgate regulations exempting other communications as long as the exempted communications do not promote, support, attack or oppose ("PASO") a

candidate." That section of BCRA also specifically exempts broadcasts of announcements of candidate debates, forums and news. It is highly doubtful that the FEC would attempt to force news corporations to disclosure their shareholders names. The same logic should apply to any exempt electioneering communication, including grassroots lobbying and issue ads.

The Proposed General Rule

The Supplementary Information preceding the text of the proposed rule makes some clarifications and asks a series of questions about the general rule. In particular, it says, "a communication that does not qualify for either of the safe harbors may still come within the general exemption..." The FEC asks if it should include a list of examples of "background information", and if so, what they should be. It also asks whether it may look beyond the actual content of the broadcast.

The Two Alternatives

The FEC provides two alternatives. Under Alternative 1, FEC seeks input on whether to create a reporting requirement on broadcasts that are not express advocacy. The FEC's discussion of its disclosure proposal begins at page 41. Alternative 1 would require nonprofits, labor unions and corporations to file detailed reports naming every funder, donor or shareholder that contributes $1,000 or more "during the period beginning on the first day of the preceding calendar year and ending on the disclosure date" if they spent more than $10,000 on exempt grassroots lobbying broadcasts (p. 41). If an organization uses a separate segregated fund (SSF) for its grassroots lobbying broadcasts, it only would have to report the donors to that fund.

The proposed disclosure requirement for Alternative 1 raises several serious issues that are inconsistent with the Supreme Court's holding in the WRTL II case. For instance:

- It would violate donor privacy for issue advocacy unrelated to federal elections, which was barred by the Supreme Court in the case *NAACP v. Alabama*.
- On a practical level, it leaves a nonprofit with two bad choices: either disclose donors for the entire organization or have the difficult job of separate fundraising for the SSF.
- FEC reporting for non-electoral activity would place a significant burden on free speech, contrary to the Supreme Court's warning to the FEC in WRTL II that its enforcement process must not be overly burdensome.

Under Alternative 2, the FEC proposes to modify the definition of an "electioneering communication." A communication qualifying for the exemption — that is a broadcast that is not express advocacy — would be exempt from the funding restrictions and would not be subject to the reporting requirements to the FEC. These communications would be construed as grassroots lobbying.

The Proposed Safe Harbor for Grassroots Lobbying

Safe harbors have a tendency to become de facto rules because of the certainty they provide. For that reason, it is important to look closely at the FEC's questions about its proposed grassroots lobbying safe harbor. On page 16, the FEC asks if it should take this approach at all. It asks if it should "instead of, or in addition to, creating safe harbors, provide an exhaustive or non-exhaustive list of factors to be considered." The FEC then provides a list of examples for each prong of the proposed safe harbor.

For nonprofits engaged in issue advocacy and grassroots lobbying, the four criteria of the proposed safe harbor raise some concerns. For example:

- Prong 1 requires a broadcast to focus exclusively on a pending legislative matter. The practical problem with this is that a nonprofit might want to include a fundraising appeal or other non-electoral message in its broadcast. It should be able to do so. In addition, there is no definition of "pending." A nonprofit may want to push for consideration of a stalled bill, which should be protected under the WRTL II decision.
- Prong 2 requires the broadcast to urge an officeholder to adopt a position or ask the public to contact him or her and ask to adopt that position. This excludes appeals to contact a federal candidate who is not an officeholder. Non-electoral issue ads could potentially refer to such a person.
- Prong 3 bars the ad from mentioning the election, parties or related activity, including voting. The FEC asks if it should be possible to include a reference to voting. Nonpartisan get out the vote appeals could potentially be included in an issue advocacy ad.
- Prong 4 says the broadcast cannot comment on an officeholder's character or fitness for office. The FEC says "effective lobbying may require reference to an officeholder's position or record on a particular issue. . . . Thus, a discussion of an officeholder's position on a public policy issue or legislative record may be consistent with the content of a genuine issue advertisement, and may, therefore not automatically render a communication ineligible for the proposed safe harbor." (p. 24-25) The FEC asks for comments to clarify where the line on this question should be.

Overall, both alternatives put forth by the FEC include a general exemption and safe harbors for grassroots lobbying and business advertisements. The difference is that Alternative 1 would require that sponsors of non-electoral broadcasts file disclosure reports on their funding sources to the FEC. The FEC does not have jurisdiction over lobbying, and the federal Lobbying Disclosure Act, ethics disclosure requirements in most states and, for charities, the Internal Revenue Service, all require disclosure of lobbying information. This makes it difficult to see how the FEC could require donor disclosure for activities it has no authority to regulate.

In supporting the First Amendment rights of nonprofit organizations to engage in

advocacy and their valuable role in public policy, OMB Watch plans to submit comments reiterating that the FEC should not try to require the disclosure of grassroots lobbying costs. Grassroots advocacy communications are not about an election, and therefore they should not have to be reported to the FEC. We encourage nonprofits to submit comments before the Oct. 1 deadline.

USAID Temporarily Delays Implementation of Partner Vetting System

The U.S. Agency for International Development (USAID) has agreed to temporarily delay implementation of a new database, called the Partner Vetting System (PVS), that would "[ensure] that neither USAID funds nor USAID-funded activities inadvertently or otherwise provide support to entities or individuals associated with terrorism." Under the plan, initially announced on July 17, all nonprofits that apply for grants, contracts or other financial partnership with USAID would have to provide the government with highly detailed personal information about employees, executives, trustees, subcontractors and others associated with the organization. On July 20, USAID also proposed to exempt portions of the PVS database from the Privacy Act. USAID is accepting comment on the Privacy Act exemption until Sept. 18. Charities are actively objecting to this burdensome and unwarranted program in which thousands of nonprofit workers would have to be screened. USAID is moving forward with a pilot program for aid recipients working in the West Bank and the Gaza Strip before expanding it globally as first intended.

The information USAID would collect under the PVS includes phone numbers, date and place of birth, e-mail addresses, nationality, gender, profession, citizenship, and government issued identification (such as Social Security numbers and passport numbers), which would be vetted for possible connections to individuals or groups designated as terrorists by the federal government. Organizations would be forced to maintain far-reaching records, imposing a great administrative burden. Resources meant for charitable works inevitably would be stretched thin, especially in smaller organizations.

Congressional spending bills since 2003 have required the Secretary of State to take "appropriate steps to ensure that such assistance is not provided to or through any individual, private or government entity, or education institution that the Secretary knows or has reason to believe advocates, plans, sponsors, engages in, or has engaged in, terrorist activity." A Government Accountability Office (GAO) report criticized USAID's implementation of these requirements. However, the GAO report did not make any recommendation to expand the PVS program globally.

There are many reasons the charitable community has protested this proposal. One main concern is that there has simply been no evidence that USAID funds are going to terrorist organizations. According to the most recent USAID Office of Inspector General

report, which covers October 2006 to the end of March 2007, "OIG oversight activities during this period did not identify any instances where terrorist organizations received USAID funds." USAID audit procedures should be enough to prevent terrorist financing.

InterAction, a coalition of U.S.-based foreign aid groups including many that receive USAID funding, sent a letter to the Chief Privacy Officer at USAID asking that the plan be withdrawn. The coalition's letter states, "There is no statutory basis for the PVS or any similar system outside of, arguably, the West Bank and Gaza. The fact that Congress has not required such measures elsewhere indicates the proposed system has not been deemed necessary by our national legislature. Nor is it required by Executive Order 13224."

The letter InterAction submitted also makes the important point that the lives of those working in particular areas may be put at increased risk. "If they are perceived to be extension of the U.S. intelligence community, terrorist attacks against them can only increase."

An alarming aspect of the PVS as USAID noted in its proposal to exempt the program from the Privacy Act is that "USAID cannot confirm or deny whether an individual 'passed' or 'failed' screening." This secrecy was part of the focus of comments OMB Watch submitted to USAID, which stated, "PVS will more than likely result in the creation of a secret USAID blacklist of ineligible grant applicants, based on PVS results. Organizations and individuals erroneously listed as having ties with terrorism will have no way of knowing they are deemed as such, or why. Innocent and well deserving grantees will have no formal means of appealing such decisions."

The program was proposed without any consultation with relief and development organizations, and it seemingly was intended to begin without any consultation. The program was originally scheduled to go into effect the day public comments were due, Aug. 27, suggesting the agency had no intention of considering the concerns of the charitable community. However, USAID said it would delay implementing the program until comments were reviewed. The program has been cut back to begin first as a pilot program in West Bank/Gaza. After reviewing the pilot program and the written comments received, the agency would implement the program globally. In addition, after receiving such outspoken protest, USAID also agreed to meet with some representatives of organizations that submitted comments.

According to the *Washington Post*, at the meeting, USAID officials explained the pilot program for recipients of grants and contracts in the West Bank and Gaza. The USAID presentation referenced a report by the Palestinian Media Watch, an Israel-based organization that was also pushing for the program. The report stated that Al-Quds Open University, a USAID recipient, "hosts branches of the Hamas and Islamic Jihad terror organizations." It also protested USAID's plan to provide $2.4 million in scholarships for about 2,000 Palestinian students without a guarantee that recipients have not voted for Hamas in any election. The fact that the U.S. government is responding to the appeals of

an organization which is concerned about the political beliefs of students who receive scholarship money from U.S. funds and may or may not have voted for Hamas is disturbing. This politicizes aid and violates the principle of a secret ballot.

The notice in the *Federal Register* left many with unanswered questions because the language is so vague and open-ended. For example, who would decide whether groups are qualified to receive grants? What does "associated with terrorism" mean, and how will it be determined? If one person is suspect, would an entire organization be banned from receiving any USAID funds completely? USAID has not provided any information regarding how an individual or the organization would be able to provide any defense. Whom will be vetted — every employee of an organization? If the program is about stopping money from going to terrorists, or those associated with terrorists, such a vetting program should also be applied to government contractors working in those areas as well since they are just as likely as charities to be infiltrated with ties to terrorists.

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In This Issue

Congress Hears Pleas for Expanded Authority and Resources at CPSC

A proliferation of children's product recalls due to potentially dangerous exposure to lead has left many turning to the federal government for answers. The Consumer Product Safety Commission (CPSC) has borne much of the brunt for the regulatory failures. Congress is considering solutions including new federal standards for lead, expanding

the agency's regulatory authority and increasing agency resources.

Currently, CPSC regulations ban the use of lead paint in many products, including toys. Children may also be exposed to lead in jewelry. CPSC has initiated a rulemaking which would ban lead in jewelry. While that rule moves through the regulatory pipeline, CPSC has begun a campaign of voluntary recalls focusing on reducing lead exposure in children's products.

However, neither CPSC regulations nor enforcement practices have kept up with a changing marketplace dominated by Chinese imports. Subsequently, a large number of children's products containing lead have found their way into American households. In these cases, CPSC has had to resort to voluntary recalls, in which the agency works with toy manufacturers and distributors in order to publicize a recall and work to remove tainted products from the market.

In 2007, CPSC has negotiated at least 43 recalls of children's products — from toys to school supplies to jewelry — containing lead, according to CPSC recall announcements. Those 43 recalls have involved approximately 10.8 million products, 84 percent of which were manufactured in China.

The product failures have spurred congressional oversight. Both the House and the Senate have held hearings focusing on children's exposure to lead from toys, jewelry and other products.

The Senate Appropriations Committee Subcommittee on Financial Services and General Government held a hearing on Sept. 12. One panel of witnesses included CPSC Acting Chairman Nancy Nord. Subcommittee members questioned Nord on a new agreement CPSC has negotiated with its Chinese counterpart. Under the agreement, the Chinese agency, the General Administration of Quality Supervision, Inspection and Quarantine, has pledged to work to eliminate lead in toys manufactured in China.

Senators inquired as to whether the agreement would yield actual benefits in the form of safer toys. Nord could not provide a straightforward answer. On multiple occasions, Nord instructed the subcommittee to "ask the Chinese."

Another panel included Mattel chairman Robert Eckert, Toy Industry Association president Carter Keithley, and Consumers Union counsel Sally Greenberg. Eckert was forthright in acknowledging his company had allowed lead-tainted products on the market and apologized for the mistakes. All witnesses expressed full-throated support for a strong and well-resourced CPSC.

During the hearing, ranking member Sam Brownback (R-KS) urged CPSC to "pull out the heavy club" and do a better job enforcing current regulations. Sen. Richard Durbin ☼ (D-IL), chairman of the subcommittee, closed the hearing by saying that China, the CPSC and Congress had failed, and he encouraged greater federal involvement: "There are

moments when we need government, when we need someone to make certain that the products on the shelves are always going to be safe for our families and our kids. We need to step up to that responsibility."

On Sept. 19 and 20, the House Energy and Commerce Committee Subcommittee on Commerce, Trade and Consumer Protection held a two-day hearing on lead paint in children's toys. Congressmen from both parties were critical of CPSC and the toy industry. Committee Chair John Dingell (D-MI) scolded Nord for being too trustworthy of China, saying, "We have a fistful of promises from China."

Congressmen and witnesses also discussed legislative solutions. One proposed solution would require toys be certified for safety by an independent third party before the products could be sold. Gary Knell, president of the Sesame Workshop, announced his company would begin the process voluntarily.

Sen. Mark Pryor ☼ (D-AR) has introduced the CPSC Reform Act of 2007 (S. 2045). The bill would mandate third-party certification for children's products. It would also ban the presence of lead in children's products and tighten the standard for lead in all paints to 0.009 percent from the current 0.06 percent standard.

The legislation goes beyond children's products and lead issues and addresses some of the broader problems plaguing CPSC. Pryor's legislation would also provide CPSC expanded ability to assess civil penalties for parties in violation of CPSC standards. The legislation would also mandate an expansion in appropriations for CPSC.

CPSC's eroding resources have been cited as a reason for the agency's inability to properly ensure product safety. The agency's budget is half of what it was in the 1970s when accounting for inflation. CPSC's staff, once near 1,000, is now 420.

President George W. Bush's proposed budget for FY 2008 would exacerbate this problem. CPSC's budget for FY 2007 was $62,728,000. Bush has proposed a new funding level of $63,250,000 for FY 2008, a cut when taking inflation into account. Bush's budget proposes a cut in staff down to 401.

Congress is attempting to counter the president on his proposed cuts. In their respective versions of the Financial Services and General Government Appropriations bills, the House proposed $66,838,000 for CPSC, and the Senate proposed $70,000,000 for FY 2008. Bush has repeatedly indicated he will veto appropriations bills exceeding his requests.

Pryor's legislation would mandate an increase in staff to at least 500 full-time employees by the beginning of FY 2014. It would also mandate an increase in appropriations to $141,725,000 by FY 2015. The legislation has not yet been considered by the Senate Commerce, Science and Transportation Committee.

New White House Guidelines Fit into Broad Attack on Federal Protections

The White House has issued new guidelines for federal agencies in conducting risk analysis. Risk analysis, of which risk assessment is a central factor, is a process by which agencies identify and evaluate risks such as toxic exposure or structural failure. Risk analysis often lays the scientific or technical foundation for public health and safety rulemakings.

Susan Dudley, administrator of the Office of Information and Regulatory Affairs, and Sharon Hays, associate director of the Office of Science and Technology Policy, issued the guidelines in the form of a Sept. 19 memo titled, "Updated Principles for Risk Analysis."

The memo updates a 1995 memo on risk analysis. The 1995 memo divided broad principles for risk analysis into five parts: General Principles, Principles for Risk Assessment, Principles for Risk Management, Principles for Risk Communication, and Principles for Priority Setting Using Risk Analysis. Clinton-era OIRA administrator Sally Katzen issued the 1995 memo.

The new memo keeps these five categories as well as each individual principle. The new memo includes additional text with each original principle. In some cases, the explanatory text is brief. In other cases, it includes detailed discussions of certain aspects of risk analysis such as the treatment of scientific uncertainty or analyzing effects on sensitive subpopulations.

In the memo, Dudley and Hays announced they issued the document in lieu of the controversial Proposed Risk Assessment Bulletin. The Bulletin contained a set of guidelines to govern all risk assessments and included technical standards for all federal agencies to use when conducting risk assessments, as well as other scientific documents.

However, the standards in the Bulletin were too prescriptive and represented an unrealistic one-size-fits-all approach toward all federal risk assessments. Public interest groups and lawmakers criticized the Bulletin when OMB proposed it.

OMB requested that the National Research Council, part of the National Academies, review the bulletin. The NRC review found the Bulletin to be "fundamentally flawed." NRC suggested the Bulletin be withdrawn completely. Following the release of the report, OMB announced it would go back to the drawing board to "develop improved guidance for risk assessment."

The memo marks the official withdrawal of the Bulletin. "OMB Watch applauds the decision to withdraw the Risk Assessment Bulletin," the organization said in a statement.

The risk analysis memo is an improvement over the proposed bulletin. It imposes no

new requirements on agencies, nor does it give OMB additional reviewing powers. The memo is also broader. While the Bulletin focused on risk assessment, the memo more expressly covers other aspects of risk analysis including management, communication and prioritization.

However, the memo does raise significant concerns. The memo fits into a pattern of changes to the regulatory process enacted by OMB during the Bush administration. Although the memo updates the 1995 risk analysis principles, it places these principles in the context of those broad regulatory changes.

The memo reaffirms the new requirements for agency "guidance documents" set out by the Good Guidance Practices Bulletin and amendments to Executive Order 12866, Regulatory Planning and Review. The changes subject agency guidance documents to an OMB review period, although neither the Bulletin nor the revised E.O. define guidance documents clearly. The memo indicates OMB considers risk assessments to be a form of guidance. Sweeping risk assessments into OMB's review of guidance raises concern because risk assessments are not just documents but processes of scientific or technical evaluation.

The memo also places risk analysis in the context of economic assessments. The memo encourages agencies to refer to OMB's Circular A-4 — a document describing the process by which agencies prepare cost-benefit analyses for regulatory activities — when evaluating or choosing risk management strategies. This is the latest example of OMB attempts to make economics the preeminent criteria in rulemaking.

OMB also uses the memo to promote its 2002 Information Quality guidelines. For example, the memo states, "The agency also should identify the sources of the underlying information ... and the supporting data and models, so that the public can evaluate whether there may be some reason to question objectivity." While OMB Watch supports transparency and objectivity, this statement may be an attempt to promote Data Quality Act challenges. The guidelines allow these challenges, which are public requests for agencies to reevaluate technical or scientific data or reassess conclusions. Industry representatives often use the challenges to delay agency regulatory activity.

"The practical effect of this new memo is probably not very significant," said Rick Melberth, Director of Regulatory Policy at OMB Watch. "Agencies will probably stick this in a desk drawer because this doesn't change much in the way that agencies conduct their regulatory analyses." Nonetheless, OMB Watch remains concerned about how the memorandum may be used to fit into a broader pattern of "less regulation is better regulation" promoted by the Bush administration.

Senate Reviews Agencies' Attempts to Preempt Congress and the States

The Senate Judiciary Committee held a hearing Sept. 12 about federal agencies' practice of inserting into regulations language that removes consumers' ability to sue under state tort law those corporations whose products cause harm. In addition, the use of this preemption language limits the ability of state and local governments to protect the health, safety and welfare of their citizens. Federal preemption removes the targeted policy area from state and local jurisdiction and makes it almost exclusively a federal policy issue.

According to the legal website USLegal,

> Preemption is the rule of law that if the federal government through Congress has enacted legislation on a subject matter it shall be controlling over state laws and/or preclude the state from enacting laws on the same subject if Congress has specifically declared it has "occupied the field." Preemption can occur by Congress passing a law, preempting state or local law. If Congress has not clearly claimed preemption, a federal or state court may examine legislative history to determine the lawmakers' intent toward preemption.

As this definition clearly states, preemption usually is done through congressional action and intent. Current legislative proposals show Congress struggling with the question of preemption in diverse policy areas. For example, BNA reports ($) that the House and Senate versions of the Mental Health Parity Act of 2007 reflect different views on preemption, but that the Senate's bill is moving toward the House version by removing preemption language that would have prevented states from having stronger mental health laws.

In another BNA summary, this time about the reauthorization of user fees to fund U.S. Food and Drug Administration (FDA) drug approval activities, the Senate's version included a provision that would have jeopardized consumers' ability to sue drug companies for harm from drugs like Vioxx. This provision was removed from the final legislation.

In the absence of a clear indication from Congress about preemption, the courts are left to determine congressional intent when federal and state laws conflict. At the hearing, witnesses pointed out numerous occasions when federal agencies inserted preemption language into regulations, thereby usurping both expressed congressional intent and state law.

Donna D. Stone, a Delaware state representative and president of the National Conference of State Legislatures, provided numerous examples in her testimony in which the Center for Medicare and Medicaid Services (CMS) tried to change Medicaid statutory intent in 2007 by issuing rules without congressional authorization or consultation with

state and local governments.

In his written testimony, David Vladeck, a Georgetown University law professor and OMB Watch board member, described three cases of agencies inserting preemption language into rules directly impacting consumer safety:

- In 2006, FDA "announced that its approval of a drug's label immunizes the manufacturer" from claims by consumers that they were inadequately warned of dangers from using the drug.
- "The National Highway Traffic Safety Administration [NHTSA] now routinely claims that its regulatory actions preempt state law — both state statutory and regulatory law and state damages actions."
- In 2006, the Consumer Product Safety Commission inserted language into the preamble of a regulation on mattress flammability standards. "As with the FDA and NHTSA, nowhere does the CPSC explain why it has reversed field and, for the first time in the agency's history, taken the position that its regulatory action extinguishes tort law remedies."

These agency preemptions have real consequences according to an attorney who brought claims on behalf of consumers. Collyn Peddie described two consumers who suffered harm, a 62-year-old woman from Vioxx and a toddler from an injection of a faulty vaccine. In both cases, judges prevented the claims from going forward due to preemption language even when, in the case of the toddler, Congress expressly upheld the right to seek damages under the Vaccine Act. Traditionally, judges give great deference to agencies' rulemakings, so they may not look beyond the regulation.

The panelists proposed solutions to this growing trend of agencies' use of preemption. Recommendations included 1) an increase in congressional oversight of agencies like FDA, 2) use of explicit language indicating Congress's intentions regarding preemption, and 3) federal legislation limiting and advising state court judges' interpretations of the preemption doctrine. No specific proposals have been introduced in Congress.

The hearing is an important first step according to Gerie Voss, regulatory counsel for the American Association for Justice. "The Senate Judiciary's preemption hearing shed light on what appears to be a coordinated effort by Bush Administration agencies to take away the rights of Americans to hold negligent corporations accountable for dangerous products," she told OMB Watch.

Congress Expands FDA User Fee Program, Reforms Drug Safety Process

Congress has passed legislation which will reauthorize a program allowing the U.S. Food and Drug Administration (FDA) to collect fees from pharmaceutical companies in order to conduct drug approvals. The bill will also dramatically expand FDA's regulatory

authority in response to recent controversy. President George W. Bush is expected to sign the bill into law soon.

In 1992, Congress passed the Prescription Drug User Fee Act (PDUFA). PDUFA gives the FDA the authority to collect fees from pharmaceutical companies for the safety review and approval of new drugs. Under the original legislation, Congress must reauthorize PDUFA every five years. PDUFA is set to expire Sept. 30.

The Food and Drug Administration Amendments Act of 2007 (H.R. 3850) will renew and expand the user fee program. FDA will increase the amount of user fees it collects to almost $400 million, up from approximately $300 million. User fees will fund approximately half of the agency's drug review program and a fifth of the agency's overall budget.

While user fees account for a significant portion of FDA's funding, critics say the program ties the interests of FDA's drug approval office too closely to those of the pharmaceutical industry. In an open letter, the public interest group Public Citizen tells Congress, "The agency has become dependent for its funding upon the very industry over which it has regulatory authority." Due to the dependence on user fees, the letter says, "pharmaceutical companies are increasingly seen as stakeholders, customers or even clients."

However, because user fees account for such a large portion of FDA funding and expiration of PDUFA is looming, the reauthorization bill was considered must-pass legislation.

In addition to reauthorizing PDUFA, the bill will expand the regulatory authority of the FDA. Recent controversies concerning the safety of the food and drug supply have subjected FDA to increased public and congressional scrutiny. PDUFA reauthorization provided a vehicle for lawmakers to address public concerns and to begin to solve FDA's problems. Subsequently, the legislation morphed into a broad-based FDA reform measure.

In response to controversy over the arthritis drug Vioxx and other high-profile FDA missteps resulting in drug recalls, the bill includes provisions to strengthen FDA's regulatory authority for drugs already on the market. The legislation will expand FDA's ability to require drug companies to perform post-market safety studies and perform "risk evaluation and mitigation" for drugs exhibiting adverse effects.

The bill will also give FDA more authority to regulate direct-to-consumer advertising of pharmaceuticals, an arena over which FDA has held scant regulatory authority. However, the bill does not go as far as some drug safety advocates desired because it will not give FDA the authority to ban direct-to-consumer advertisements found to be false or misleading.

The legislation will also allow FDA to promptly order drug companies to change the labeling for a drug, a process which industry has been able to delay. The bill will also expand FDA's ability to assess civil penalties if drug companies violate any of these provisions.

Other post-marketing provisions include the creation of a publicly-available clinical trials database. Under the bill, the National Institutes of Health will administer a database where the public can search the results of clinical trials of drugs and medical devices. Drug safety advocates believe — by allowing individuals to examine separate studies of the effects of individual drugs or medical devices — the database will facilitate the ability of medical researchers to detect adverse effects.

While the primary focus of the bill is on improving FDA's regulatory regime for drugs, the bill includes some provisions related to food safety. The bill will give FDA the authority to better regulate, and recall if necessary, pet food. This comes in response to the contaminated pet food outbreak which occurred in March 2007.

On May 9, the Senate had passed its version of the PDUFA renewal and FDA reform legislation (S. 1082). The House had passed its version (H.R. 2900) June 21.

However, negotiations between the two chambers stalled, and Congress did not form a conference committee to reconcile the two bills. Because of the need to finalize the legislation by Sept. 30, Rep. John Dingell ☼ (D-MI) introduced Sept. 19 the Food and Drug Administration Amendments Act of 2007, which was based on the two original bills. The House and the Senate voted favorably on an identical version of Dingell's bill. On Sept. 19, the House approved the bill 405-7. On Sept. 20, the Senate approved the bill by unanimous consent.

Two provisions proved contentious during the final days of negotiations. One provision concerned conflicts of interest on FDA advisory panels. Advisory panels are composed of governmental and non-governmental experts and provide recommendations on a variety of topics such as the safety of a particular drug. Federal law prohibits individuals with conflicts of interest from serving on FDA advisory panels; however, the FDA commissioner may grant waivers allowing individuals to serve regardless of the degree or nature of the conflict.

A provision in the original House bill would have capped at one the number of waivers the commissioner could grant per advisory panel. The Senate voted on a similar provision but, in a 47-47 tie vote, did not adopt it. Lawmakers could not reconcile the issue. Instead, the final bill includes language which will limit conflicts by assessing the sum of conflicts on all FDA advisory committees. FDA will reduce by five percent each year the number of waivers granted. Currently, about 25 percent of panel members receive waivers, according to the Center for Science in the Public Interest.

The other contentious provision would have required pharmaceutical companies to

receive FDA approval before changing a drug's labeling. Currently, companies may make changes without FDA approval and often do so when discovering new information about a drug's side effects.

The American Association for Justice and some congressional Democrats opposed the provision which Sen. Richard Burr ☼ (R-NC) introduced. Those critics said, if the bill forced drug companies to receive FDA approval for label changes, companies may be able to avoid liability in cases where victims of a drug's negative side effects would seek damages. The bill would have preempted state tort law, the critics argued. The provision was not included in the final bill.

President Bush is expected to sign the bill into law in the coming days. If the bill does not become law by Sept. 30, FDA will face funding shortfalls and may be forced to begin reducing staff levels.

Wartime Commission Would Investigate Contracting Abuses in Iraq and Afghanistan

Sens. Jim Webb (D-VA) and Claire McCaskill (D-MO) have sponsored a bill (S. 1825) that would set up a commission to investigate and reform wartime contracting. It is likely the bill will be introduced as an amendment to the Defense Reauthorization Act that is currently being debated in the Senate.

OMB Watch has sent a letter of support to Congress urging adoption of Webb's potential amendment. The Project on Government Oversight, Government Accountability Project, and Taxpayers for Common Sense also support the bill.

The commission, modeled on the Truman Committee that exposed $15 billion of waste and fraud in World War II contracting, would be given subpoena powers and a broad and ambitious mission. The proposal would also expand the powers of the Special Inspector General for Iraqi Reconstruction (SIGIR), which has a proven record of exposing waste, fraud and abuse. If enacted, the commission will have the opportunity to focus more attention on reforming the government contracting process generally.

The commission would perform three essential functions:

- Investigate wartime contracting and procedures
- Recommend changes to reform and improve contracting procedures
- Expand the authority of the SIGIR

Oversight of wartime contracting is one of the most critical tasks facing Congress. Much of the military functions in Iraq and Afghanistan have been performed by contractors. Yet, the public and policymakers know little about how well contractors have performed and the full extent of contractor waste, fraud and abuse. Recent problems with private

contractors that provide security in Iraq, such as Blackwater, USA, have brought to light additional reasons why a comprehensive look at contracting during the wars is necessary.

Furthermore, contract oversight is becoming increasingly important outside of Iraq and Afghanistan operations. Total funding devoted to contracting by all federal agencies has doubled since 2000.

Senate leaders have not yet agreed to allow a vote on the Webb/McCaskill bill as an amendment to the Defense Authorization Act.

FY 2008 War Funding Could Top $200 Billion

In May, Congress passed a $99.5 billion supplemental war spending bill that expires on Sept. 30. The next supplemental bill for FY 2008 war spending is expected to total close to $200 billion. That total, however, is an estimate based on speculation in Washington and continuously changing conditions in the wars in Iraq and Afghanistan.

When the president submitted his FY 2008 budget request to Congress in February, he included two war supplemental requests: $93.4 billion for FY 2007 (approved by Congress with $5.1 billion in additional funding in May) and $141.7 billion for FY 2008. The budget request also contained a caveat that "[a]s activity on the ground evolves, the Administration may adjust the requested amount..."

By July, the administration was already beginning to lay the groundwork to expand their FY 2008 supplemental request. Testifying before the House Budget Committee on July 31, Deputy Defense Secretary Gordon England told his interlocutors that the Pentagon would be requesting an additional $5.4 billion to pay for the acquisition of some 1,520 Mine Resistant Ambush Protected vehicles. England stipulated at the time that additional war funding requests were not confined to those cited in his testimony.

> The forthcoming Iraqi Security Forces Assessment Commission Report, and the President's September Report on Iraqi Benchmarks, are likely to provide additional input and analysis relevant to GWOT requirements in FY 2008. The nature and scope of adjustments to the GWOT request will depend on these new insights, on the evolving situation on the ground...

At the time of England's testimony, the FY 2008 war supplemental request was expected to be $147 billion, but there were also expectations that it would grow larger as the situation in Iraq evolved.

On Aug. 29, the *Washington Post* reported the White House would be requesting "up to $50 billion" in additional war funding, which bring the total FY 2008 supplemental war funding request to almost $200 billion. The *Post* story cited an anonymous White House

source, but White House spokesperson Gordon Johndroe refused to comment on the figure.

Johndroe did indicate funding decisions would not be made until Gen. Petraeus reported to Congress on the status of the so-called surge strategy (this was the president's September Report on Iraqi Benchmarks referred to by England in his July testimony). Petraeus testified Sept. 10, but the White House has not confirmed any details about the additional $50 billion request. It is possible Defense Secretary Robert Gates will give Congress more details on Sept. 26 when he is scheduled to testify before the Senate Appropriations Committee.

It is doubtful Congress will pass any FY 2008 supplemental funding prior to Oct. 1, but instead will include some war spending in the long anticipated FY 2008 continuing resolution (CR) that will be debated this week in Congress. Exactly how Congress will fund the wars in the CR is unknown, but one option gaining favor would be to fund the wars at the same rate that was approved in the FY 2007 defense appropriations bill. This would be a slightly lower level than was spent per month in FY 2007, but would sustain the war effort until Congress has time to pass the FY 2008 defense appropriations bill later this year. It also buys Congress additional time to debate war policy through consideration of the president's supplemental war request while avoiding the appearance of cutting off funding for soldiers in the field.

Discussions concerning the CR will take place this week in Congress, and unknown details about war spending, such as funding levels and duration, will need to be resolved before Oct. 1. Although details of war spending for the next fiscal year are far from firm, it appears the eventual bottom line will fall somewhere between $150 billion and $200 billion.

Composition of Anticipated FY 2008 War Supplemental Request (*billions of dollars*)		
Date	**Occasion**	**Amount**
February	President's FY 2008 Budget Request	141.7
July 31	Deputy Defense Secretary England's congressional testimony	5.3
August 29	Unnamed White House source cited in *Washington Post*	50.0
Total anticipated FY 2008 war supplemental request:		**197.0**

Congress to Vote on Compromise SCHIP Package

House and Senate negotiators have agreed to an expansion of the State Children's Health Insurance Program (SCHIP) that closely mirrors the earlier Senate version. The House is scheduled to vote on the package today, Sept. 25, with the Senate voting later in the

week. President Bush has promised to veto the bill.

The agreement is nearly identical to a version of the expansion the Senate passed in August. It provides an additional $35 billion in funding over five years. This additional money will enable states to sign up an estimated four million additional children, almost all of whom are already eligible for SCHIP but were not enrolled because of lack of funding.

The new agreement will be financed by a 61-cent increase in the federal tobacco tax, as the original Senate version called for. Furthermore, it would replace guidance recently issued by the Centers for Medicare and Medicaid Services (CMS) that prevented states from insuring children in families above a certain threshold unless they reach unrealistically high enrollment rates among children from the lowest-income families eligible for SCHIP. The new guidance would be less restrictive, according to a press release from House Speaker Nancy Pelosi (D-CA).

During negotiations, senators would not accept a number of provisions the House passed earlier this year because they believed the full Senate would not approve them. The original House version contained cost-reducing reforms of the Medicare Advantage program, which consistently costs more than traditional Medicare partly because it relies on private insurance companies. The House bill's increase in the tobacco tax was less steep, at 45 cents, and it included a $50 billion funding increase that would have extended coverage to five million children.

The president has promised to veto the expansion, on the basis of misleading arguments. If the president does veto the bill, it will likely force Congress to vote on whether to override the veto. The override vote should be close, and therefore, it is critical as many people as possible contact their congressional representatives to urge them to vote for the new package and to override a presidential veto.

The conflict between Congress and the president will be even more tense as the SCHIP program's authorization expires on Sept. 30. If it is not reauthorized in time, everyone in the program will lose their health insurance. Most likely, Congress and the president will not resolve their differences by then, so they will have to approve a temporary extension of the program's authorization. If funding levels remain unadjusted for the rising cost in health care, a temporary extension would result in fewer children covered by the program.

U.S. Reaches Debt Limit: The Case for Long-Term Analysis

The Senate will vote soon on legislation to raise the ceiling on the national debt to nearly $10 trillion. This action is imperative as the statutory limit of $8.965 trillion on the United States' level of public debt will be reached by Oct. 1, according to Treasury

Secretary Henry Paulson.

The national debt, which has increased 40 percent during the Bush presidency, is the total accumulation of annual budget deficits. If the debt limit is not increased, the U.S. Treasury would be unable to pay interest on existing notes and bonds or borrow more funds needed to keep the federal government operating. The United States has never defaulted on a single debt payment.

On Sept. 12, the Senate Finance Committee approved a bill to increase the debt limit by $850 billion, to a total of $9.815 trillion. The bill will now move to the Senate floor, where adoption is almost assured. Despite this assurance, there may be a lack of debate on why the United States must continue to take on increasing levels of debt. The last time the statutory debt limit was increased, in March 2006, the Senate debate was strictly partisan and the vote was close to party-line, 52-48, with all Democrats and only three Republicans voting against the measure. This time around, the situation will likely be reversed, with Democrats supporting the increase and Republicans voting against it.

But the issues involved in raising the debt ceiling are serious ones that transcend party politics. Policymakers have debated for decades the relative merits of deficit financing in a macroeconomic context, focusing mostly on the trade-offs involved in incurring debt to stimulate the economy and what is the optimal or acceptable level of national debt as a percentage of GDP.

Largely absent from debates about the national debt, especially congressional ones, are dynamic considerations such as the impact on interest expenses of policies that add to the national debt, trade-offs involved in long- versus short-term budget commitments, and the necessity or merits of extending the Bush tax cuts.

Some voices in the debt and deficit debate this year are bringing overdue attention to the larger questions of long-term budget priorities and how dynamic analysis can illuminate the costs involved. For example, Sen. Tom Coburn (R-OK) told Senate Minority Leader Mitch McConnell (R-KY) last week:

> Congress should be required to make the same difficult choices about financial priorities that are made every day by American families. It's no wonder that only 11 percent of the American public has a positive view of Congress... The debate over whether to increase the debt limit provides Congress with yet another opportunity to show American taxpayers that it has the courage to make tough decisions about spending priorities.

In testimony before the House Ways and Means Committee on Sept. 6, Jason Furman of the Brookings Institution brought these questions into greater focus:

> Although some of these financing costs will likely fall on future generations, many of them will fall on the exact same households that receive the tax cuts

today. For example, a person might get a $500 tax cut today but lose $700 in present value terms in future Medicare benefits. It is common in dynamic analysis to explicitly specify how tax cuts are financed in order to calculate the impact of the tax cuts on economic performance. These same financing assumptions have major implications for the distribution of the tax cuts that should also be presented in these analyses.

Setting aside the differences in these perspectives — Coburn would address the debt by spending reductions, while Furman looks at the effects of tax cuts — they both support an analysis which the Joint Committee on Taxation (JCT) and the Congressional Budget Office (CBO) might do well to perform when they "score" legislative tax and spending proposals: an analysis of the impact of a given proposal on the national debt, estimating the additional interest expense to the federal government if proposals are deficit financed, and also any benefits to the country over the long-term due to the investment.

For example, a proposal to invest an additional $100 billion over ten years on rebuilding the nation's infrastructure might obviate emergency spending for repairs during that period that could end up costing more in the long-run if not spent on preventative measures. In Furman's example about tax cuts, a deficit-financed tax cut may not appear as attractive when policymakers realize families will end up paying more in the long run than they will receive in a tax cut.

Requiring such a deficit impact analysis by the JCT (in the case of tax proposals) and CBO (for spending proposals) would help policymakers make comprehensive assessments of tax and spending proposals and facilitate efforts to set national priorities. If successful, it may also have the long-term impact of fewer increases to the national debt ceiling.

Wiretapping Law the Focus of House Hearings

The House Committee on the Judiciary and the House Permanent Select Committee on Intelligence held several hearings the week of Sept. 17 on the implications of the Protect America Act (PAA) and its revisions to the Foreign Intelligence Surveillance Act (FISA). Director of National Intelligence (DNI) Mike McConnell argued that the changes need to be made permanent, while others argued that PAA unnecessarily violates civil liberties.

On Aug. 5, President Bush signed the Protect America Act of 2007 (PAA), granting the government the authority to wiretap anyone, including U.S. citizens, without court approval as long as the "target" of the surveillance is reasonably believed to be located outside the country. The legislation expires February 2008, but the House Judiciary and Intelligence committees held hearings this week to consider immediate changes. Public interest organizations and many members of Congress are seeking revisions to address the invasion of privacy and erosion of civil liberties they believe provisions of the act

represent.

DNI McConnell strongly argued before the House Committee on the Judiciary and the House Permanent Select Committee on Intelligence for the importance and necessity of PAA. "The Protect America Act, passed by Congress and signed into law by the President on August 5, 2007, has already made the nation safer by allowing the Intelligence Community to close existing gaps in our foreign intelligence collection," said McConnell. "After the Protect America Act was signed we took immediate action to close critical foreign intelligence gaps related to the terrorist threat, particularly the pre-eminent threats to our national security."

Kenneth Wainstein, Assistant Attorney General, National Security Division of the Department of Justice, argued for three changes in law. "First, the Protect America Act should be made permanent. Second, Congress should provide liability protection to companies that are alleged to have assisted the nation in the conduct of intelligence activities in the wake of the September 11 attacks. Third, it is important that Congress consider and ultimately pass other provisions in our proposal." Among the specific provisions included in the third request are streamlining of the FISA application process and modifying the definition of "agent of a foreign power."

James Dempsey of the Center for Democracy and Technology argued for revisions in PAA's amendment to FISA. Dempsey asserted that because the PAA permits searches and wiretaps that are presumptively unconstitutional, "it is highly likely that a search under the PAA of international communications of US persons would be unconstitutional."

Dempsey went on to note that the intelligence community can be provided with the tools necessary to collect intelligence without infringing on rights to privacy. "The legitimate goal of providing the NSA with speed and agility in targeting persons overseas can be accomplished in a way that builds on the constitutional system of judicial review."

Kate Martin and Lisa Graves of the Center for National Security Studies also argued that, "the far-reaching changes written into FISA [by PAA] are unconstitutional. They are unnecessary because there are alternatives that would provide additional flexibility to the intelligence community and increase its effectiveness while preserving Americans' constitutional rights, and constitutional checks and balances."

The House Committee on the Judiciary and the House Permanent Select Committee on Intelligence are expected to consider legislation on FISA as early as Oct. 4. "For more than 200 years we have managed to have both liberty and security," stated Rep. Silvestre Reyes (D-TX), Chairman of the House Permanent Select Committee on Intelligence, "and I intend to do my part to ensure that we continue to maintain this careful balance for years to come."

Secrecy on the Rise, Reports OpenTheGovernment.org

OpenTheGovernment.org released a report in September detailing an increase in government secrecy in the realms of national security, government contracting, and state governments, among other areas. The *Secrecy Report Card 2007* is the latest report in an annual series by the coalition that analyzes objective measurements of secrecy in government.

National Security Information

The report notes that from 2002 to 2006, the average number of original classification decisions was 258,824; this is a 47 percent increase from the average number of original classification decisions from 1995 to 2000. Once information has been designated as classified by an original classifier, many other documents can be derivatively classified. Hence, an increase in original classification decisions can have an exponential increase in classified information writ large.

The report also explores the vast amount of money spent to keep information classified and secret, which has also increased in recent years. In 2006, the government spent $8.2 billion, a 7.5 percent rise from 2005. The *Secrecy Report Card* also notes that for every dollar spent in 2006 on declassifying documents, the government spent $185 to keep information secret. Despite a new requirement to declassify documents 25 years old or older, the resources devoted to declassification dropped by 22.6 percent from 2005. The number of pages declassified, though, increased 27 percent from 2005.

The *Secrecy Report Card* also notes that between 2003 and 2005, the government issued 143,074 National Security Letters, which are secret mandatory requests for personal information. Approximately 50 percent of these requests were directed at U.S. persons.

Government Contracting

Using data from FedSpending.org, the *Secrecy Report Card* documents a 166 percent increase, after adjusting for inflation, in the amount of money spent on federal contracts from Fiscal Year 2000 to Fiscal Year 2006, $208 billion to $415 billion, respectively. Contracts awarded without full and open competition rose from 55 percent of all federal contracts in 2000 to 66 percent in 2006. Between 2000 and 2006, $1.3 trillion was spent on contracts awarded without full and open competition.

State Governments

The report states that since 2001, 339 bills pertaining to the restriction of access to previously public information have been introduced in state legislatures, and 266 of these have passed. In particular, the *Secrecy Report Card* notes that 64 bills were introduced and 61 passed relating to the restriction of access to information on

previously publicly available vulnerability assessments, energy and public utilities information, building and architectural plans and information relating to mass transit and telecommunication systems. The report indicates that 114 bills were introduced, of which 52 passed, relating to the increase of executive powers and the closure of previously public government meetings.

NRC to Release Documents on Spill

The Nuclear Regulatory Commission (NRC) has revoked a three-year-old secrecy policy and plans to release documents from two nuclear fuel processing plants in response to congressional demands. This about-face was precipitated by a congressional inquiry into a uranium leak kept secret from the public for more than a year.

An Aug. 31 memorandum directed the release of "Sensitive Unclassified Non-Safeguards Information" (SUNSI) documents from the nuclear fuel facilities Nuclear Fuel Services (NFS) in Tennessee and BWX Technologies (BWXT) in Virginia.

The March 2006 spill of nine gallons of highly enriched uranium found pooling near an elevator shaft at NFS prompted immediate action. Closing the factory for seven months, NRC completed an investigation resulting in a licensing change legally subject to a public review. The required notification never became public, however, when all documents relating to the affair were classified as Official Use Only (OUO). This information lockdown resulted from an August 2004 policy, also stamped OUO, in which all documents regarding the two plants were automatically to be considered secret. Congress learned of the spill in April from a report on "abnormal occurrences" and demanded more information. The House Energy and Commerce Committee called upon NRC to justify its broad secrecy and to fine-tune its policy distinguishing between information truly security sensitive and publicly releasable information. The Aug. 31 memorandum is part of NRC's response.

The OUO designation is one of the sensitive but unclassified (SBU) categories increasingly used by the government to justify concealing information without clear explanation or justification. OMB Watch and numerous other public interest groups advocating for transparency in government have consistently decried such broad information controls as vulnerable to overuse.

NRC's new policy, which should release nearly 2,000 documents before March 2008, appears to be a good faith effort to balance security concerns with public accountability and disclosure. Whether it will serve as an example for NRC and other agencies how to shift away from the post-9/11 secrecy obsessed policies remains unclear. The memo does not change the policies for nuclear reactors and ultimately impacts only two facilities.

NRC held two public meetings in Erwin, TN, to discuss the NFS incident, providing safety assurances and unveiling a new website for public education purposes. The agency

intends to continue monitoring NFS beyond the core inspection program.

Don't Go into the Water: It's Not the Jellyfish, It's the Sewage

Jellyfish aren't the reason U.S. beaches are being closed — it's sewage, and legislation in the Senate and House seeks to ensure that people know when sewage is in their water.

The Raw Sewage Overflow Right-to-Know Act (H.R. 2452), introduced by Reps. Tim Bishop (D-NY) and Frank LoBiondo (R-NJ) on May 23, requires sewage treatment facilities to notify the public, public health officials and any other downstream "affected entities" when there is a sewage overflow within 24 hours of the incident. A Senate companion bill (S. 2080) was introduced by Sen. Frank Lautenberg ☼ (D-NJ) on Sept. 20.

The long-standing but little-known problem of sewage spillage in waterways is a major cause of illnesses stemming from waterborne contaminants. American Rivers, a national advocacy organization, estimates that over 850 billion gallons of raw sewage are released every year. Rainstorms easily overwhelm sewage systems, and broken or clogged pipes contribute to the 23,000-75,000 raw sewage overflows every year. Federal clean water funding has plummeted under the Bush administration, and the already strained sewage systems further deteriorate every year. EPA estimates between 1.8 million and 3.5 million people become sick due to recreational contact with sewage-contaminated water. With no national requirement for public notification, the majority of states do not have regulations or policies in place, and most Americans have no idea when it is not safe to be in the water.

The Sewage Overflow Right-to-Know Act requires that the public be afforded the same notifications that state environmental agencies already receive and increases current reporting requirements. Applicable to publicly owned water treatment plants, the act requires:

- Facilities to institute a program to monitor overflows constituting a potential human health hazard and alert facility managers in a timely manner
- Notification of overflow within 24 hours to the public, public health officials and other affected entities
- A report (oral or electronic) to state officials within 24 hours
- A written report to state officials within five days (previously required) of steps taken or planned to reduce the impact and prevent future occurrences and explaining the cause of the overflow with the new specific requirements of duration and volume
- A monthly report of all sewage overflows, (previously required), including a new provision of overflows that do not reach U.S. waters
- Annual summary report to the U.S. Environmental Protection Agency of

overflows not reaching U.S. waters

The bill, a positive step toward increasing public awareness of toxins in the environment, is missing one important element according to public access advocates — easy access to the detailed reports submitted to government officials. Public access to the Toxics Release Inventory database has been a crucial element to the success of pollution prevention efforts around the country. Without an extensive public database for sewage overflows, the collected information could go nowhere and get used by no one. OMB Watch supports the clarification that all reported information will be compiled into a database that is publicly accessible and usable.

A hearing for H.R. 2452 is scheduled for Oct. 5.

Lobby and Ethics Reform Bill Becomes Law

On Sept. 14, President Bush signed into law the Honest Leadership and Open Government Act, S. 1. The new law amends some provisions of the federal Lobbying Disclosure Act (LDA) to make the relationship between lobbyists and lawmakers more transparent by requiring increased public disclosure of funds spent by lobbyists and of the actions of members of Congress. Because of rumors that President Bush would veto the measure, it was sent to him after Labor Day to avoid a veto while Congress was in recess.

After signing the bill, President Bush stated, "I am concerned that there are potential loopholes in some of the earmark reforms included in this bill that would allow earmarks to escape sufficient scrutiny. This legislation also does not address other earmark reforms I have called on Congress to implement, such as ending the practice of putting earmarks in report language."

After S. 1 was signed into law, Senate Majority Leader Harry Reid (D-NV) commented, "This important law will help change the way that business is conducted in Washington — banning gifts and travel from lobbyists and companies who hire lobbyists, dramatically increasing public disclosure of the activities of lobbyists, slowing the revolving door between Congress and the lobbying world, requiring transparency in the earmark process, and increasing penalties for corruption."

All lobbying activity beginning January 1, 2008, will be subject to the new rules, including increased disclosure of lobbying activities by paid lobbyists, more restrictions on gifts for members of Congress and their staff, new restrictions on lobbying after working in the government, and greater transparency in the internal legislative process, such as earmark disclosure. As *Congressional Quarterly* explained, "Life in the Senate is about to change."

The Honest Leadership and Open Government Act is a first step to enhance government

fairness and transparency. The next step is implementation. Officials in charge of creating draft forms and guidance to meet new lobbyist reporting requirements have been working since the end of August and should be finished by the end of November. The Federal Election Commission (FEC) will also have to conduct a rulemaking to implement the new bundled campaign contributions requirement.

Congressional officials and law offices must be ready to handle technical questions. For example, a few days after the bill was signed into law, the *Politico* reported on the demand for lawyers who will have to explain the new changes. "While money and politics watchdog groups applauded the new ethics law signed by President Bush last week, bigger cheers rang out in the tight-knit community of lawyers who are experts on campaign finance and lobbying regulations."

One of the most significant successes for government transparency is the required online posting of lobbying materials. Through a searchable and downloadable database, the Clerk of the House and Secretary of the Senate are required to make the information required in the lobbying registrations and reports publicly available for free over the Internet. This information will be kept for six years and also be linked to FEC databases.

A few important changes relevant to nonprofits:

- Organizations that engage in federal lobbying activities will now have to report quarterly as opposed to semiannually
- The registration threshold for these organizations dropped to $10,000 quarterly, which could increase the number of organizations that now must report their federal lobbying activities
- If an organization contributes more than $5,000 to a coalition and actively participates in the planning, supervision or control of the coalition's lobbying activity, the organization's name, address and principal place of business must be disclosed by the coalition
- Reporting organizations have to certify that they have not provided a gift or travel to a member of Congress or staff in violation of House or Senate rules

IRS Ends Two-Year Probe of California Church's Anti-War Sermon

All Saints Episcopal Church in Pasadena, CA, recently announced that the Internal Revenue Service (IRS) investigation which began in June 2005 has now been closed. The IRS will not revoke the church's tax-exempt status because of a 2004 anti-war, anti-poverty sermon delivered by its former pastor Rev. George F. Regas on the Sunday before the 2004 presidential election. However, the IRS concluded that the church in fact intervened in the election. While churches and other tax-exempt organizations are prohibited from endorsing or opposing political candidates, the 2004 sermon did not

urge anyone to support either President Bush or Sen. John Kerry ☼ (D-MA).

All Saints released the Sept. 10 letter from the IRS, which concluded without explanation that "the Church intervened in the 2004 Presidential election campaign. We note this appears to be a one-time occurrence and that you have policies in place to ensure that the Church complies with the prohibition against intervention in campaigns for public office." In response, the church has demanded an investigation of the IRS and an apology.

The church has asked the Treasury Department to determine whether the investigation was politically motivated and whether officials from the Justice Department had become involved in the matter. Through Freedom of Information Act requests, e-mails obtained by the church prove that Justice Department officials were involved in the case before the IRS made any formal referral.

The unfortunate impact of this finding is that it increases uncertainty about what is and is not allowed for charities and religious organizations, who are left unsure of when the IRS may come knocking at their door after public discussion of important social issues. The *Los Angeles Times* reports that "[Rev. J. Edwin Bacon Jr.] predicted that the vague, mixed message from the IRS after its nearly two-year investigation of the All Saints case would have a continued 'chilling effect' on the freedom of clerics from all faiths to preach about moral values and significant social issues such as war and poverty." Leaders of all faiths preach about social issues to get congregants to understand and act on religious teachings. The IRS must provide some guidance and explain which activities violate the rules against intervening in a political campaign.

All Saints is located in the district of Rep. Adam Schiff ☼ (D-CA), who has expressed support for the church. In 2005, Schiff unsuccessfully sought a Government Accountability Office (GAO) investigation into the IRS' scrutiny of churches and other nonprofits, including All Saints. The *Los Angeles Times* quoted Schiff as saying, "They thought that All Saints would fold up the tent and admit it was wrong . . . but instead they found a church that would stand up for itself."

The All Saints Sept. 23 press release states, "In response to a letter closing the two-year old IRS examination, All Saints Church, Pasadena announced today that it has formally referred the numerous procedural and legal errors of the exam to the Commissioner of the Internal Revenue Service and demanded correction and an apology."

Nonprofits Challenge Two Florida Laws Regulating Voter Registration

Nonprofit groups have launched two separate efforts to challenge voter registration laws passed by the Florida legislature that would suppress voting, especially among minority populations. First, the U.S. Department of Justice has been asked to reject a recently

passed law that would discourage nonprofit voter registration drives by making it difficult to collect and submit completed registration forms in batches. Second, a lawsuit was filed Sept. 18 challenging a requirement that all voter registration applications match Social Security or driver's license numbers. When spelling errors or other glitches occur, voters are required to go through a complicated process that discourages voting.

Voter registration, and the proper role for nonprofits in that process, has been the source of heated debate in Florida for the last several years. The Florida legislature began to revise voter registration regulations after 2004. During that year, third-party registrants, the majority of which were charitable organizations, signed up an unprecedented number of Florida voters.

On Sept. 6, the Brennan Center and the Advancement Project sent a letter appealing to the Civil Rights Division of the U.S. Department of Justice to reject the third-party registration provisions, which would make it more difficult for third parties, including charities, to conduct voter registration drives. The new requirements were passed as part of a larger election bill signed by Florida Governor Charlie Crist (R) in May that includes funding for optical scan voting machines that provide a voter-verified paper trail. Similar restrictions for third-party registration were declared unconstitutional by a federal court in Florida last year in *League of Women Voters v. Cobb*.

Like the legislation overturned by the courts last year, the new law imposes fines on charities for each voter registration not submitted within ten days of its completion. For each late registration, a nonprofit conducting a voter registration drive would be fined $50. If a nonprofit fails to turn in a completed registration by the book closing deadline, the fine increases to $100. According to the Florida Department of State, the book closing deadline is normally the 29th day before an election. For example, Oct. 6, 2008, is the book closing date for Florida's 2008 general election. If a nonprofit completely fails to turn in completed registrations, the fine is $500 per registration. For charitable organizations that have registered hundreds of voters in past campaigns, these fines represent a strong disincentive to conduct voter registration drives in the future. In a recent statement, the Florida chapter of the League of Women Voters said the provisions are "anti-voter" and "stifles voter registration efforts by grassroots organizations."

The Brennan Center and the Advancement Project are protesting the provisions on the grounds that they will have a retrogressive effect on the voting rights of minorities in Florida. According to the Voting Rights Act, Florida has to demonstrate to the Department of Justice that any law regulating their voting process does not have "the effect of denying or abridging the right to vote on account of race or color" through a process of "preclearance." In their letter, the Brennan Center and the Advancement Project argued that because minorities in Florida are twice as likely as whites to register through third parties, the provisions will negatively affect the electoral participation of Floridians who are minorities.

In a separate challenge to Florida's voter registration laws, a Florida chapter of the

NAACP and a Miami-based nonprofit group called Haitian-American Grassroots Coalition filed a federal lawsuit on Sept.18 asking a U.S. District Court to overturn a Florida law that requires all voter registration applications to be matched with either a Social Security number or driver's license number. The Florida legislature's rationale for passage of the law was that the new requirement is necessary in order to comply with the Help America Vote Act (HAVA).

However, HAVA does not require this methodology to verify voter registrations. In fact, one federal court has found it to be unconstitutional. In *Washington Association of Churches v. Reed*, the Brennan Center sued to prevent implementation of a similar procedure. The group won a preliminary injunction in August 2006, and in March 2007, the court issued an order blocking enforcement of the law. The plaintiffs argued that the Washington state law violated HAVA, as well as the Voting Rights Act and the National Voter Registration Act.

In the current lawsuit, the plaintiffs argue that as a consequence of not "matching," perhaps due to misspellings or typos, "voters will not be allowed to cast a valid ballot unless they overcome a series of burdensome bureaucratic hurdles that deprive them of their fundamental right to vote." According to the lawsuit, 20,000 registrations were denied or delayed in 2006 due to the matching process. The groups that filed the lawsuit are receiving legal support from the Brennan Center.

Sec. 303 of HAVA requires states to develop computerized databases of registered voters with unique identification numbers. However, states cannot impose illegal preconditions. A Brennan Center issue brief says, "Federal law asks states to try to match registration information to other government databases in order to validate the unique number assigned to every individual in the statewide registration system. However, the law allows states to set flexible standards for determining when a match is found. And federal law requires states to register an eligible voter even if the state cannot locate matching information elsewhere."

In a statement quoted in *The Miami Herald*, the president of the Florida State Conference of the NAACP, Adora Obi Nweze, expressed her frustration with Florida election laws. "With the elections approaching, we should be doing everything we can to ensure that eligible citizens can register to vote and have it count. But Florida's Draconian registration law won't give many citizens that chance." Nweze continued, "We are particularly concerned about the impact of this law on African Americans with unique names and spellings."

In a statement released in response to the lawsuit, Florida Secretary of State Kurt Browning expressed confidence in the legality of the legislation and asserted, "If a discrepancy arises, every Florida voter has the opportunity to provide verification of eligibility."

Holy Land Jury Deliberates When Aid is Support for Terrorism

On Sept. 20, a Texas jury began deliberations on criminal charges of supporting terrorism brought against the Holy Land Foundation (HLF) and five of its leaders, nearly six years after the charity was shut down and its assets seized by the U.S. Department of Treasury. The two-month long trial was the first opportunity the charity had to hear the evidence against it and present evidence in its own defense. The government did not claim HLF provided direct support of Hamas or a terrorist group. Instead, it argued that charitable aid that provides a public relations benefit to Hamas is a crime, even though the local charities involved are not on any government lists of terrorist organizations. A conviction on these facts will leave many international aid organizations in the impossible position of guessing about the political beliefs of their grantees and the potential political impact of their programs.

The defense argued that HLF and its leaders did not provide support to Hamas and are being prosecuted for their political beliefs and associations on the basis of faulty evidence. HLF and five of its leaders were indicted in 2004 on charges of providing material support for terrorism, money laundering and conspiracy. At the trial, the prosecution said HLF sent $12.4 million in aid to local charities, known as zakat committees, in the West Bank and Gaza Strip.

The government argued that HLF officials knew the zakat committees were controlled by Hamas and directed aid to families of suicide bombers and prisoners. Most of the government evidence consisted of documents, videos and surveillance materials seized from HLF offices and supporters' homes. Some show the defendants making speeches supporting Palestinian rights or participating in events where Hamas officials were present. One video involved a defendant acting in a skit and pretending to kill an Israeli. A defense attorney pointed out that many of these events occurred before 1995, when Hamas was designated as a terrorist organization by the U.S. government and constitute protected First Amendment political speech.

Prosecution witnesses included:

- FBI Special Agent Robert Miranda, who said HLF used known Hamas activists to speak at fundraising events. On cross-examination, he admitted that these speakers were not listed as terrorists, and it was not illegal to have them as speakers. Miranda also testified that family connections establish a link between some HLF leaders and Hamas. Defendant Ghassan Elashi's cousin is married to a high-ranking Hamas leader who is on the government lists.
- FBI Special Agent Lara Burns testified about an HLF letter referring to the zakat committees as "ours" and said that HLF contacts with the committees were Hamas leaders. On cross-examination, Burns admitted that most of these individuals are not on any government watch list.
- Two Israeli agents were allowed to testify anonymously in a closed courtroom.

One, called "Avi," is an agent in Shin Bet, the Israeli domestic security agency. He testified that Hamas funding comes primarily from international groups like HLF and that the zakat committees are staffed by known Hamas members. He said the Israeli military found materials praising suicide bombers in searches of zakat committee offices.

The defense presented evidence to discredit prosecution witnesses and establish that HLF's funds were spent for charitable purposes. Defense attorney Nancy Holland asked why the zakat committees were not listed by the government if they really are linked to terrorism. They also showed a video of staff from HLF's Gaza office delivering food to the family of an ambulance driver killed while attempting to assist a child wounded in a shoot-out between Israelis and Palestinians. The HLF paperwork referred to him as a "martyr."

The five defense witnesses were:

- Edward Abington, former U.S. consul general in Jerusalem and a second-ranking intelligence official in the State Department. He testified that while posted in the Middle East, he received daily intelligence reports from the CIA and never was told zakat committees had links to Hamas. He said Israeli intelligence is unreliable. He also described visits to zakat committee offices and described conditions in refugee camps.
- Attorney and former member of Congress John Bryant, who represented HLF between 1997 and 2000. He testified about his attempts to get guidance from the FBI and State Department on what groups were legal for HLF to fund; he got no response to his inquiries. He was never told HLF could not work with zakat committees.
- George Washington University Professor Nathan Brown, who said the testimony of "Avi" relied too heavily on press accounts and other documents without any context. He supported Abington's assertion that posters praising suicide bombers were not evidence of terrorist ties, since, on a trip to the Palestinian territories, "every blank wall was plastered with posters of martyrs," noting that Hamas is a political party with broad public support.
- Former HLF administrative assistant Natalia Suleiman, who testified about food aid and clean water programs the organization operated in Turkey, Albania, Jordan and Lebanon, as well as the West Bank and Gaza Strip. She described the expense documentation process.
- Former HLF accountant Mohammad Wafa Yaish testified that HLF operated its programs without regard to political affiliation and that employees were not allowed to visit political websites while at work.

In the closing arguments, the issues boiled down to whether the defendants' political beliefs and activities transform charitable aid into material support for terrorism and whether the public can rely on government watch lists to know who it is legal to do

business with.

Comments Urge IRS to Take Time with Form 990 Revisions

On Sept. 14, the Internal Revenue Service (IRS) closed comment on its proposed revisions to Form 990, the annual information return filed by nonprofits. A host of organizations have weighed in with extensive recommendations, and many are calling on the IRS to delay implementation until a second draft can be published for further comment and nonprofits have time to adjust their recordkeeping systems to track the new information that will be required. OMB Watch's comments focused on flaws in proposals for reporting advocacy-related activities. Other organizations, such as the Alliance for Justice, addressed problems with proposed collection of governance information that is beyond the IRS' regulatory authority. The IRS is expected to act on the comments by the end of 2007.

Advocacy Related Issues

The proposed reporting of advocacy-related activities is primarily in proposed Schedule C, which combines reporting related to lobbying and political campaign activities. OMB Watch, as well as the Alliance for Justice, the Center for Lobbying in the Public Interest (CLPI), the National Council of Nonprofit Association (NCNA), and the National Committee for Responsive Philanthropy, called for separating Schedule C into two parts: one for 501(c)(3) organizations on lobbying activities, and another for other types of nonprofits that covers both political campaign and lobbying activities.

The OMB Watch comments said, "Proposed Schedule C is a trap for the unwary. Mixing lobbying and political campaign activities in one form is likely to cause substantial confusion, especially when the form does not clarify what direct and indirect political campaign activities are....The likely result is that permissible nonpartisan voter education and mobilization activities will be reported here, generating unnecessary burdensome disclosure." The comments warned that the combined Schedule will confuse the public and result in inaccurate reporting.

The IRS was also called on to drop a Schedule C question asking 501(c)(3) organizations that do not use the expenditure test to measure their lobbying limit and to determine if their lobbying makes them ineligible for tax-exempt status. The OMB Watch comments called this an "unfair question." The CLPI comments said, "Given that there is no statutory or regulatory definition of the amount of activity that would constitute a 'substantial part' of an organization's activity and case law only provides limited guidance, we believe this question would place filers in the untenable position of having to speculate on how the IRS would assess their overall activities."

Both OMB Watch and CLPI objected to a proposed requirement to report lobbying payments to non-employees in functional expense categories as part of the core Form

990. OMB Watch told the IRS, "Not only does this impose an unnecessary burden on nonprofits, it is unclear how to allocate such expenses." The instructions for completing this section create a more serious problem, which is a definition of lobbying that is far more expansive than current IRS regulations. It includes "legislative liaison" work, which is not defined, as well as advocacy before administrative bodies and the executive branch. Because of these flaws, OMB Watch and CLPI both called on the IRS to drop this proposal.

The Alliance for Justice (AFJ) comments objected to Schedule C lobbying reporting requirements for non-501(c)(3) organizations, such as action organizations exempt under 501(c)(4), labor unions and trade associations. AFJ said, "There is no statutory authority for this significant expansion of the reporting obligations of IRC § 501(c)(4) and other IRC § 501(c) organizations, nor is there any tax-administration reason for requiring such organizations to maintain records and report on their lobbying activities. Unlike non-electing IRC § 501(c)(3) organizations, which may engage only in an insubstantial amount of lobbying, there is no limit on how much other IRC § 501(c) organizations may spend on lobbying nor is there any restriction on the kinds of lobbying activities they may undertake."

Many groups also objected to a proposal to require groups to report the number of volunteer hours for political campaign activity. OMB Watch said, "This requirement has no regulatory basis that we can see, is impractical if not impossible to comply with, and would discourage civic participation by forcing nonprofits and their volunteers to keep time sheets."

General Issues

Independent Sector's (IS) comments "identify many areas that need significant revision." The group called on the IRS to separate questions about governance practices that are required and those that are recommended. Both IS and the NCNA noted that one size does not fit all, and many of the governance practices identified by the IRS may not be appropriate for small organizations and could impose undue administrative burdens.

AFJ's comments provide a detailed explanation of the flaws in these additional governance questions. They say, "With limited exceptions, these questions address policies and procedures which are not required by federal or state law or regulation. Moreover, while some of these policies and procedures may be useful for some organizations, they are not universally beneficial and may, in some instances, be counterproductive.... These problems should be sufficient to deter the Service from inserting itself into the area of organizational governance and management. It is also significant that the Service has little or no experience or expertise in determining appropriate mechanisms for nonprofit governance and that Congress itself has refrained from entering into this arena."

Expanded Reporting and Inconsistent Definitions of Political Activity

The AFJ comments also pointed out that "the expanded reporting of political activities in the redesign relies on confusing and inconsistent definitions which, in some critical ways, are inconsistent with current interpretations of the IRC." Attorney Rosemary Fei of Silk, Adler and Colvin in San Francisco told the IRS there is a "lack of clarity of the term 'political campaign activity' as used in the draft forms, instructions, and Glossary." Her comments recommended that the IRS adopt the definition it uses for 501(c)(3) organizations for those purposes in order "to demonstrate compliance with the 'primary activity' requirement that applies to their tax-exempt status....Starting from a single, relatively clear definition will enhance transparency and promote compliance by providing a reporting framework that is compatible with the practice and understanding of the full range of relevant organizations."

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In This Issue

Bush Administration Delays Import Safety Changes While Congress Debates Solutions

The Bush administration and several of its regulatory agencies have been reluctant to address the safety of consumer goods as more recalls of harmful toys and contaminated foods occur. They seem content to delay substantive changes that could improve product safety. Congress, meanwhile, is trying to sort through the many legislative proposals to restore regulatory capacity to agencies and fix the fragmented U.S. import system.

In July, President Bush created by executive order an Interagency Working Group on Import Safety (IWG) and charged it with 1) reviewing or assessing current domestic and

foreign approaches for ensuring the safety of products, 2) identifying ways that importers can enhance product safety, and 3) surveying practices of federal, state and local government agencies to identify best practices and improve agency coordination. Recommendations for improvements were to be submitted to the White House within 60 days of the order unless the chair chose to extend the deadline.

On Sept. 10, the IWG transmitted to Bush an initial report that did not make recommendations. Instead, it proposed a model for a cost-effective, risk-based approach to be followed by an action plan to be issued in mid-November. The letter of transmittal accompanying the report, addressed to Bush and signed by Health and Human Services Secretary Michael Leavitt, who chairs the IWG, dismissed a substantially increased regulatory role for agencies. Since the "federal government cannot and should not attempt to physically inspect every product entering the United States," the model the report proposes increases responsibility of U.S. importers and foreign governments to ensure product safety.

Several agency representatives testifying before Congress during the first week of October used the pending work of the IWG to deflect criticisms from Congress. Representatives from the U.S. Department of Agriculture (USDA), the U.S. Food and Drug Administration, and U.S. Customs and Border Protection, among others, testified before a joint subcommittee hearing of the House Ways and Means Committee Oct. 4. Each cited the work of the IWG as important to its efforts to address import safety, particularly the issuance in November of the action plan. When asked specific questions by committee members about staffing, the agency representatives avoided direct answers and spoke about the IWG recommendations and action plan to come to help them identify adequate resources. Rep. Sander Levin ☼ (D-MI) accused the witnesses of using the IWG "as cover" to avoid their responsibilities. Several members wondered why there was no sense of urgency among the agencies.

Congress, meanwhile, is sorting through legislative proposals to address product safety issues domestically and internationally. For example, the Subcommittee on Consumer Affairs, Insurance and Automotive Safety of the Senate Committee on Commerce, Science and Transportation held a hearing Oct. 4 on S. 2045, the CPSC Reform Act of 2007. The bill would increase funding, staffing and authority for the Consumer Product Safety Commission (CPSC), ban lead in children's products, and raise the amount of civil penalties CPSC can impose on companies for unsafe products.

According to a BNA article ($), the current CPSC commissioners took opposite positions on S. 2045 before the subcommittee. Acting Chairman Nancy Nord supported parts of the bill but opposed provisions expanding CPSC authority and increasing penalties on businesses. Commissioner Thomas H. Moore supported the bill, especially provisions increasing CPSC enforcement tools so that manufacturers and importers know they will be held accountable.

On Oct. 9, the House passed several consumer protection bills. One bill (H.R. 2474) raises the cap on civil penalties CPSC can levy to $10 million, from $1.825 million. Another, H.R.

1699, requires manufacturers of durable goods to include product registration cards that allow companies to more easily track purchases and provide recall notices. These are two more examples of the many legislative proposals Congress is considering.

While federal agencies are slow to respond and Congress tries to define workable solutions, product recalls of a range of domestic and foreign products continue. In one case, the Centers for Disease Control and Prevention said 29 people in eight states had *E. coli* infections from eating contaminated hamburger, according to a *Washington Post* story.

The meat was produced by Topps Meat Co., and it was eighteen days after the contamination was discovered before USDA notified the public about the contamination and issued a recall of 21.7 million pounds of hamburger. USDA explained the delay as necessary for agency officials to conduct more complete tests on the hamburger that led to the hospitalization of a Florida teenager in August. USDA did not issue the recall until the contamination was confirmed by New York officials, who conducted their own tests on suspect beef. Topps Meat went out of business Oct. 6 due to the economic hardship imposed by the recall.

States Sue Bush Administration over New Children's Health Insurance Requirements

Several states have sued the Bush administration over new policies governing the State Children's Health Insurance Program (SCHIP). The suits follow broad opposition from state public health experts and congressional Democrats and Republicans who urged the administration to abandon the new policies. The suits also come as Congress attempts to reauthorize SCHIP after a presidential veto.

On Oct. 1, New Jersey sued the Department of Health and Human Services (HHS) seeking relief from new administration policies regarding federal approval of SCHIP eligibility requirements. The state filed the complaint in the U.S. District Court in New Jersey.

On Oct. 4, four other states sued HHS in a joint suit. Those states — New York, Maryland, Illinois and Washington — filed their complaint in the U.S. District Court in Manhattan. Their complaint is similar to that of New Jersey.

The Center for Medicare and Medicaid Services (CMS), a division of HHS, announced the new policies in an Aug. 17 letter to state health officials. CMS issued the new policies to reduce the chance state plans would extend SCHIP coverage to individuals who may be eligible for private coverage. Opponents of extending SCHIP eligibility often refer to this as "crowd-out."

The SCHIP program and the CMS letter carry federalism implications. The SCHIP program grants states discretion in constructing plans most appropriate for their populations. SCHIP intends for states to maintain discretion over the eligibility level for citizens based on

factors which may vary among the states, such as cost of living. However, SCHIP also grants CMS the authority to approve or disapprove state plans.

Currently, each state and the District of Columbia set their own eligibility requirements as a percentage of the poverty level. Children in families earning below or up to the set percentage are eligible for medical coverage under the SCHIP program.

The new CMS policies target those states that set their eligibility requirements above 250 percent of the poverty level. The new policies require those states to meet several criteria in order to obtain federal approval from CMS.

Among other things, states must now: prohibit SCHIP coverage for at least one year after individuals lose or withdraw from private coverage; assure at least 95 percent enrollment for eligible individuals whose family income is below 200 percent of the poverty level; and assure "children in the target population insured through private employers has not decreased by more than two percentage points over the prior five year period."

For states that have already received CMS approval for plans extending eligibility to children in families with incomes above 250 percent of the poverty level, the new policies require resubmission of plans that fulfill the new criteria. If states fail to do so, CMS "may pursue corrective action," according to the letter.

The states argue the new policies are overly burdensome and would reduce SCHIP eligibility. For example, CMS has approved SCHIP plans for New Jersey on eight occasions, yet the new policies may lead CMS to disapprove a revised plan. In its complaint, New Jersey finds the 95 percent enrollment criteria to be particularly burdensome: "Even under Medicare, which has nearly universal eligibility and automatic enrollment, the participation rate is less than 95 percent."

The states argue the new CMS policies outlined in the letter should be ruled to have no effect, citing violations of both the SCHIP statute and the Administrative Procedure Act (APA). In order to make its case, the states first argue the letter constitutes a "rule" as defined by the APA.

The APA requires rules to go through a prescribed process including the publication of a notice of proposed rulemaking in the *Federal Register* and an opportunity for public comment. If agencies violate these requirements for rules, as the states argue CMS has in this instance, a court may invalidate the rule.

The states make additional arguments as to why the new policies should be invalidated. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

Citing its arguments, the states ask the respective courts considering their cases to grant

relief from the new policies and preclude CMS from pursuing "corrective action."

Since releasing the letter in August, CMS has been broadly criticized for its attempts to impose new requirements on states. Two national groups representing state healthcare professionals, the American Public Human Services Association and the National Association of State Medicaid Directors, have requested CMS abandon the new policies. A bipartisan group of 44 senators also requested CMS rescind the letter or, "at the very least," subject the new policies to the proper rulemaking procedures described in the APA. Senior Democratic members of the House Energy and Commerce Committee wrote to HHS Secretary Michael Leavitt expressing concern over the proposed changes and have requested further information from HHS.

Both the House and the Senate are considering legislation that would legally prohibit CMS from implementing the new policies. The two bills, S. 2049 and H.R. 3555, await consideration in their respective committees.

Another bill aimed at reauthorizing and expanding the SCHIP program would invalidate the new policies, according to a press release from the House Energy and Commerce Committee. That bill, which was passed by both chambers but vetoed by President Bush, will be reconsidered in Congress in the coming days. (For more, see a related story in this edition of the *Watcher*.) In its current form, the bill would prohibit CMS from enacting policies that would "Impose (or continue in effect) any requirement, prevent the implementation of any provision, or condition the approval of any provision under any State child health plan" based on the argument SCHIP programs may lead to decreased enrollment in private plans.

House Energy and Commerce Committee Proposes Climate Change Legislation Framework

The House Committee on Energy and Commerce and its Subcommittee on Energy and Air Quality issued the first in a series of white papers that will outline designs for complicated climate change legislation and regulation. The first white paper, released Oct. 3, outlines a design for a cap-and-trade program covering major greenhouse gases (GHG) that would form the cornerstone of comprehensive federal climate change legislation.

In a letter to all the committee members, John Dingell (D-MI) and Rick Boucher (D-VA), chairs of the committee and subcommittee, respectively, announced the series of papers to "focus the discussion in the Committee as we move to the development and eventual passage of comprehensive climate change legislation. It is worth noting that while the use of white papers is not a policy-making tool frequently used by the Committee, this topic in its scope and complexity is unlike any we have confronted and time is of the essence."

The white paper addresses key components of a climate change program as well as specific elements of a cap-and-trade program. Some of the components outlined in the paper

include:

- The U.S. should reduce its greenhouse gas emissions between 60 and 80 percent by the year 2050;
- The federal program should be an economy-wide, mandatory reduction program;
- A cap-and-trade program should be the main component of this reduction program; and
- The program should obtain the maximum emissions reduction "at the lowest cost and with the least economic disruption."

Carbon dioxide, methane, nitrous oxide, and fluorinated gases are the four gases the program will cover. These gases are produced by electricity generation, transportation, industrial processes, and commercial, residential and agricultural sectors. The white paper identifies these sectors of the economy as those that need to be covered by the climate change program.

Cap-and-trade systems are common market-based approaches to regulating pollutants. According to the committee's paper, one advantage of this type of program is the certainty that the targeted reductions will be reached. Other methods, such as setting standards, may limit the rate of pollution that can be emitted by a source but do not address total pollution limits (a cap), so the amount of pollution may increase as the number of sources increases. Another benefit of a cap-and-trade program is the economic incentives it creates for industries to find the least expensive method of achieving the required pollution reductions. Companies that can achieve reductions at relatively low costs can then sell (or trade) their pollution permits to other companies.

Cap-and-trade programs require accurate accounting of emissions levels and an understanding of the place in the chain of economic activity that is the best point to track the emissions. To use this type of emissions reduction strategy successfully, any legislation must recognize that the sectors of the economy are very different. Thus, it may make sense to allow trading at the point where a fuel is produced or at a point further "downstream" in the chain of economic activity.

The white paper addresses these complexities and describes how the cap-and-trade program should cover each economic sector. For example, for electricity generation, the generators would become the point of regulation where emission caps and trading allowances are set. In the transportation sector, however, because emissions come from so many mobile sources like cars, planes and trucks burning petroleum-based fuels, the point of regulation might be vehicle manufacturers or further upstream to petroleum refiners and importers.

In addition, the paper recognizes that multiple approaches are needed to address the complexities associated with regulating GHGs. The committee plans to issue more white papers that will address additional elements of the cap-and-trade approach, carbon sequestration and other complementary approaches. For example, the paper states that the

federal government should "distribute allowances" (the pollution permits), but it does not outline whether these initial allowances are to be sold or would be free. Presumably, these and many other details will be addressed in subsequent white papers.

The committee also plans to hold hearings on the white papers. No timetable for hearings or for introducing legislation was put forward by the committee. There are other congressional committees with jurisdiction over individual parts of the issues contained in the design framework, and several other legislative proposals have already been introduced, so it is unlikely that legislation will pass soon.

EPA Cut Corners in TRI Rule

The U.S. Environmental Protection Agency (EPA) came under tough scrutiny at an Oct. 4 hearing of the House Energy and Commerce Subcommittee on Environment and Hazardous Materials for reducing the reporting standards of the Toxics Release Inventory (TRI) in December 2006.

The hearing focused on the Toxic Right-To-Know Protection Act (H.R. 1055), which would restore the TRI program, and the Environmental Justice Act of 2007 (H.R. 1103), which would codify a 1994 executive order requiring agencies to consider environmental justice issues.

John B. Stephenson, director of the Government Accountability Office's (GAO) Natural Resources and Environment Division, testified that EPA deviated in several ways from the agency's rulemaking procedures. "EPA did not follow guidelines to ensure that scientific, economic, and policy issues are addressed at appropriate stages of rule development." Stephenson testified that EPA failed to conduct a proper internal review of all the changes pursued in the rulemaking and rushed an economic analysis that was only finalized days before the rule was officially proposed.

Despite being required under Executive Order 12898 to analyze the environmental justice impacts of the rule, GAO concluded EPA had failed to adequately perform such a review. Stephenson reported that prior to the rule being proposed, "EPA did not complete an environmental justice assessment before concluding that the proposed TRI rule did not disproportionately affect minority and low income populations." Stephenson's testimony also explained that after congressional pressure forced EPA to later review the environmental justice impact that "EPA assumed that although minority and low-income communities disproportionately benefit from TRI information, this fact was irrelevant to its environmental justice analysis."

The GAO used new Google Earth mapping applications to illustrate the significant environment justice impacts on communities. Focusing on the Los Angeles area, the maps displayed a strong correlation between the location of facilities that would report less

information and minority and low-income communities.

GAO found that the failure to follow rulemaking guidelines stemmed from interference from the Office of Management and Budget (OMB). "EPA's deviations from its guidelines were due, in part, to pressure from the Office of Management and Budget to significantly reduce industry's TRI reporting burden by the end of December 2006." Apparently, OMB intervened late in the rulemaking process and re-introduced a provision to raise the reporting thresholds, which EPA personnel had already eliminated as a pursuable option. This late inclusion meant that the option received less review and more rushed analysis during the rulemaking process.

Molly A. O'Neill, Assistant Administrator for Environmental Information and Chief Information Officer at EPA, testified that the new TRI reporting thresholds "provided incentives to encourage pollution prevention and improved waste management." In response to the GAO conclusions that substandard analysis was conducted, O'Neill testified that all requirements had been met during the rulemaking.

Subcommittee Chair Rep. Albert Wynn ☼ (D-MD) questioned O'Neill about the agency's assertion that the reduced reporting would create incentives to reduce pollution. O'Neill explained that EPA believed that facilities would strive to reach the lower pollution levels in order to avoid the TRI reporting, hence driving reductions in pollution. Stephenson countered that if such incentives did exist, then it made more sense to leave the threshold at 500 pounds and get even more pollution reductions. O'Neill was unable to cite any study or analysis conducted by EPA to support the hypothesis that the new thresholds would create reductions in pollution.

On the hearing's second panel, several environmental justice advocates noted the importance of TRI information to communities. Jose Bravo, Executive Director of Just Transition Alliance, testified on behalf of the Communities for a Better Environment and stated that reports using TRI data have led to elimination of toxic pollution at some facilities. Bravo said, "This is tragic, because TRI has been so useful in identifying and prioritizing pollution sources, because reporting is so easy to do, and because the act of reporting itself makes companies much more aware of their toxics use."

Alan Finkelstein, an Assistant Fire Marshal from Strongsville, OH, testified about the importance of TRI information when planning for emergencies. "One of the first things that we learn in fire school is the importance of preplanning for incidents. Accessing TRI chemical data is just one piece of the puzzle for preplanning." Finkelstein acknowledged that TRI was not designed for emergency responders, but concluded that when planning for emergencies, you want to use all information available, and as such, the TRI has become an important tool in the emergency responders' arsenal.

Small business representatives including Thomas Sullivan, Chief Counsel for Advocacy in the Office of Advocacy at the Small Business Administration, and Andrew Bopp, Director of Public Affairs for the Society of Glass and Ceramic Decorators, testified that the TRI

reporting changes represented an important reduction in the regulatory burden faced by small businesses. Though GAO's analysis indicates the changes would only save reporting facilities an estimated $900, both Sullivan and Bopp reported that for small businesses, such amounts were much more important and represented several work days taken away from other money-making activities.

House Moves to Reform Expansive Surveillance Authority

On Oct. 9, the House introduced two bills to reform the Protect America Act (PAA), passed in haste before Congress' August recess. PAA grants the government the authority to wiretap anyone, including U.S. citizens, without court approval as long as the "target" of the surveillance is reasonably believed to be located outside the country.

The Responsible Electronic Surveillance that is Overseen, Reviewed, and Effective Act of 2007 (RESTORE Act) (H.R. 3773) was introduced by Reps. John Conyers (D-MI), chairman of the House Judiciary Committee, and Silvestre Reyes, chairman of the House Intelligence Committee.

The RESTORE Act would require a finding of probable cause for surveillance targeting American citizens, including Americans located overseas. The legislation would also permit a blanket order for surveillance of multiple foreign targets to be granted by the Foreign Intelligence Surveillance Court but would require the Justice Department Inspector General to regularly report on the use of blanket orders and the number of U.S. persons' communications collected in the orders' use. The Justice Department Inspector General would also be required to audit the Terrorist Surveillance Program and other warrantless surveillance programs.

"Earlier this year, President Bush signed a short-term surveillance law that exposed innocent Americans' phone calls and emails to warrantless intrusion," stated Conyers. "Speaker Pelosi immediately asked us to fix this problem and to ensure court oversight while preserving our ability to fight against foreign threats. This bill shows that it is possible to protect civil liberties and fight terrorism at the same time."

President Bush reacted to the RESTORE Act on Oct. 10. "While the House bill is not final, my administration has serious concerns about some of its provisions, and I am hopeful that the deficiencies in the bill can be fixed," said Bush on the South Lawn of the White House. "The final bill must meet certain criteria: It must give our intelligence professionals the tools and flexibility they need to protect our country. It must keep the intelligence gap firmly closed, and ensure that protections intended for the American people are not extended to terrorists overseas who are plotting to harm us. And it must grant liability protection to companies who are facing multi-billion-dollar lawsuits only because they are believed to have assisted in the efforts to defend our nation following the 9/11 attacks."

The civil liberties community predominately supports the RESTORE Act with some

reservations regarding its allowance of blanket orders for overseas surveillance. "We welcome the [RESTORE Act] as an important first step towards restoring civil liberties protections lost in August," stated Kate Martin of the Center for National Security Studies. "The RESTORE Act contains important privacy protections the administration has unreasonably opposed. However, Fourth Amendment rights and national security can only be fully protected with individualized warrants."

Mark Agrast of the Center for American Progress said that H.R. 3773 "would begin to restore checks and balances to the means by which the government conducts electronic surveillance of the international communications of Americans."

The American Civil Liberties Union (ACLU), however, opposes the RESTORE Act. "The RESTORE Act does not require individualized court orders for anything collected under the new surveillance program," stated Caroline Frederickson of the ACLU. "The program can collect any communication as long as one leg of it is overseas, leaving open the distinct possibility--and probability--that the other leg is here in the U.S. and is an American. If Americans' communications are swept up by this new, general program warrant, there is no requirement that a court actually review whether those communications are seized in compliance with the Fourth Amendment."

The ACLU instead fully supports the Foreign Intelligence Surveillance Modernization Act of 2007 (H.R. 3782), introduced by Rep. Rush Holt ☼ (D-NJ). The bill reaffirms that the Foreign Intelligence Surveillance Act is the exclusive means for collecting foreign intelligence and requires individualized warrants for foreign intelligence collection activities.

The House Judiciary Committee passed the RESTORE Act today, Oct. 10, by a vote of 20-14, and the House Intelligence Committee passed the bill, 12-7. The legislation is scheduled to go to the floor of the House the week of Oct. 15. No Senate bills have been introduced, but there is great concern within the civil liberties community that a Senate bill may include retroactive immunity for the telecommunications industry, a provision that is strongly advocated by the White House and is excluded from the two House bills. The Senate Intelligence Committee is scheduled to mark up an expected bill on Oct. 18.

Secrecy Surrounds Interrogation Practices

After Alberto Gonzales took over as Attorney General at the Justice Department in February 2005, the Department issued secret memoranda justifying extreme interrogation techniques, reported the *New York Times* in early October. The importance of such secret opinions and the lack of independent oversight was magnified on Oct. 9 when the U.S. Supreme Court refused to review a case involving the alleged secret rendition and torture of a German citizen.

The Office of Legal Council (OLC) issued the memoranda supposedly stating that the

combined effects of particularly harsh interrogation tactics are not in violation of the law or international treaties against torture, nor are certain extreme tactics, possibly including waterboarding (i.e., simulated drowning) or sleep deprivation. The *Times* reported that the memo's finding was issued in response to Sen. John McCain's (R-AZ) Detainee Treatment Act prohibition on cruel, inhuman and degrading treatment and would not force any changes in the Central Intelligence Agency's (CIA) interrogation tactics.

The OLC has the responsibility for issuing advisory opinions regarding the legality of executive branch activities. It has come under the spotlight due to its role in attempting to provide the legal foundations for the administration's counter-terrorism programs, including the National Security Agency's spying program and the CIA's rendition program and interrogation procedures.

In 2002, the OLC issued a memorandum limiting the definition of torture to that which causes pain akin to "organ failure, impairment of bodily function, or even death." This memo was later withdrawn by the OLC in 2004, after it created a firestorm of controversy and was replaced with a memo finding, "Torture is abhorrent both to American law and values and to international norms." The secret OLC memos reported by the *Times* appear to revise this 2004 memo.

The executive branch's questionable practices are made more troubling by the lack of oversight being exercised in this area by the courts, as evidenced by the Supreme Court's refusal to hear the case of Khaled el-Masri. Masri was allegedly subject to extraordinary rendition by the CIA, in which he was captured and transferred for interrogation purposes to countries that permit the practice of torture. The government claimed that Masri's lawsuit could not move forward due to state secrets, which allows the executive branch to declare certain materials or topics exempt from disclosure or review due to reasons of national security. A three-judge panel of the Fourth Circuit unanimously upheld the use of the state secrets privilege, and this decision will now stand after the Supreme Court's denial to review the decision.

The Supreme Court's decision underscores the lack of oversight and accountability of the executive branch's legally questionable counterterrorism programs. The OLC, an office which is now highly deferential to the views of the White House, offers secret legal memoranda for the executive to engage in questionable interrogation practices, and due to the state secrets privilege, the courts are unable to review the merit of the OLC's opinions. In essence, the OLC is given the unchecked legal authority to declare the legality of interrogation practices and rendition programs, in addition to the administration's other secret national security programs.

Some members of Congress advocate increasing Congress's oversight powers over intelligence agencies to alleviate such concerns. Sen. Daniel Akaka ☼ (D-HI) introduced the Intelligence Community Audit Act of 2007 (S. 82), which would give the Government Accountability Office the power to oversee intelligence agencies. In a letter to the Senate Intelligence Committee, the Director of National Intelligence opposed S. 82, stating that it

"could risk upsetting the historic balance struck between the two branches of government in national security matters." Given the current lack of oversight and accountability of the executive branch's national security programs, the balance between the branches clearly needs to be re-struck.

What You Don't Know Might Be More than You Think

Often, the first step in addressing any environmental or health issue is making sure the public is properly notified and informed. Several recent examples illustrate governmental failures, which too often occur, to perform even this basic informational task.

In environmental issues, the old saying, "What you don't know, can't hurt you," gets turned on its head, because without knowing about potential exposures to toxic chemicals, members of the public are powerless to protect themselves and may well get hurt. Government has numerous responsibilities, both formal regulatory requirements and more fundamental ethical obligations, to keep people informed about potential health risks they or their children may face. Unfortunately, when government fails in its notification responsibilities, the rest of the environmental protection process suffers and often fails because the public is not sufficiently engaged. Three recent situations demonstrate the importance of public notification and awareness and the impact of insufficient information on environmental protection efforts.

Toxic Schools

Fox News reported in late September that the Information Technology High School in Queens, NY, is built on a toxic site, and that no one was informed of this fact. Information Tech opened in 2003 on the leased site of a former metal plating warehouse. Though tests show no air contamination, an expert review of the tests found thresholds too high for comfort. Parent and citizen groups are outraged that the city cut them out of determining whether or not the school is safe. "The city may have done its due diligence, but because it was hidden from us, I don't have full confidence," said Ivan Valle, who might be pulling his ninth-grade son from the school.

City councilmen James Gannaro and Eric Gioia have accused the city of negligence in allowing public schools to be built on toxic property without disclosure. A loophole in state law exempts schools in leased buildings from public and environmental reviews. For any new school construction or addition plan, the School Construction Authority (SCA) must provide public notification of the proposed site, do an environmental review and obtain City Council approval of the plan. Because leased buildings are not city owned, and therefore, any renovations are not considered city construction, they are exempt from these requirements, a policy upheld by New York state courts.

Unfortunately, Information Tech is not the only school of concern related to this issue. New York Lawyers for the Public Interest (NYLPI) became aware of the city's use of the loophole

with the Soundview Education Campus in the South Bronx. The local community board was not informed about the site's previous use or any potential health risks associated with the location of the school. The community only discovered the issue because, after problems with odors from the site, a resident approached construction workers and found out that the location used to be a weapons manufacturing factory. NYLPI's research indicates that five out of 18 proposed leased sites have potential problems. Legislation is pending to change the law and make policies for leased buildings consistent with those that are city-owned.

Missing Superfund Site

The U.S. Environmental Protection Agency (EPA) failed to keep the communities near the Ringwood Mines site in New Jersey properly informed about the contamination and health risks associated with the site. In fact, for almost a decade, the EPA sent the wrong message. With the site's removal from the Superfund program in 1994, the agency essentially told residents that the site had been cleaned up to an acceptable level. But in 2004, the EPA, for the first time in the history of the Superfund program, re-listed a site — Ringwood Mines.

The former iron mine was Ford's dumping ground for manufacturing wastes, including paint sludge, and was also a municipal landfill for a short stint until leaching to nearby water was detected in 1976. After 11,000 tons of sludge were removed and two five-year reviews were conducted showing restricted contamination, it was de-listed from Superfund's National Priority List. The reviews, which were supposed to be subject to public examination, were never disclosed, and the public notice of the delisting was not run in any local newspapers. Since being re-listed in 2004, another 24,000 tons of sludge have been removed from the site.

EPA's Office of Inspector General released a Sept. 25 report criticizing the agency's inadequate clean-up plan for the 500-acre site. Sens. Frank Lautenberg (D-NJ) and Robert Menendez (D-NJ) and Rep. Frank Pallone ☼, Jr. (D-NJ) requested the investigation when the site was re-listed.

Air Fresheners

Despite the widespread use of product labels to keep people informed about health concerns ranging from nutritional content to toxic chemicals, the EPA and the Consumer Product Safety Commission (CPSC) have resisted the idea of labeling air fresheners. In the first study of the toxicity of American air fresheners, the Natural Resources Defense Council (NRDC) found 86 percent of tested products to contain phthalates — more than half with two or more types of phthalates, which may have a more toxic cumulative effect.

Phthalates are chemicals suspected to cause reproductive problems and birth defects and are associated with allergies and asthma. There are no labeling requirements for products containing phthalates, so consumers do not know when they are exposed. In addition to phthalates, air fresheners also harbor other chemicals of concern, including volatile organic

compounds (VOCs).

Air fresheners are used in 75 percent of U.S. households, and sales have increased 50 percent in the last four years, ironically fueled by associating scented air with a clean environment. NRDC, Sierra Club, the Alliance for Healthy Homes and the National Center for Healthy Housing filed a petition to EPA and CPSC on Sept. 19 to start comprehensively testing air fresheners, ban phthalates from all consumer products, require labeling and require manufacturers to research the human toxicity of phthalates.

These three examples illustrate that environmental and public health notification failures occur at all levels of government. A system with stronger incentives for proper and timely public notification and more substantive oversight is imperative on all levels of government: federal, state and local. Without the right to know about health risks, the government is stripping members of the public of their ability to act and protect themselves.

Congress Avoids Tough Questions of FY 2008 War Funding

President Bush and Congress continue to deny the fiscal realities of prosecuting two simultaneous wars that cost about $12 billion per month. By classifying the president's FY 2008 $193 billion war funding request an "emergency supplemental" and stifling discussion of war financing, Congress sidesteps the critical task of setting and adequately funding national priorities.

By the standards set forth by the executive branch, spending requests must meet the following criteria to be considered "emergency":

1. Necessary expenditure — an essential or vital expenditure, not one that is merely useful or beneficial;
2. Sudden — quickly coming into being, not building up over time;
3. Urgent — pressing and compelling, requiring immediate action;
4. Unforeseen — not predictable or seen beforehand as a coming need; and
5. Not permanent — the need is temporary in nature

The first criterion is a matter of debate. When Congress approves a budget resolution, it sets a spending limit which appropriators must abide when allocating spending levels for all federal agencies. That Congress and the president have classified the $193 billion war supplemental as "emergency" presumes that the Iraq war is, in fact, a "necessary expenditure" — far from a consensus opinion. The allocation of $193 billion underneath a $955 billion budget limit would be a true test of the necessity of the spending, yet Congress has obviated this debate by extricating war spending from the normal budget process.

The wars in Afghanistan and Iraq fail the tests of being sudden and unforeseen. The conflict in Afghanistan has been prosecuted for nearly six years, while the Iraq war saw its fourth

anniversary in March. The president has stated his intention to keep over 130,000 troops deployed in Iraq until at least March 2008. Further, continued violence makes prospects for near-term military withdrawal from Afghanistan untenable.

The classification of war spending as an emergency supplemental allows appropriators to sidestep discretionary budget limits and hence the attendant thorny decisions regarding which and by how much program funding will be reduced. Congress can also maintain the veneer of consequence-free spending by restricting discussion about the source of revenues that will be required to fund the two wars.

When a trio of House legislators — House Appropriations Chair David Obey (D-WI), Chair of House Appropriations Subcommittee on Defense John Murtha (D-PA), and Rep. Jim McGovern (D-MA) — attempted to throw light on the proposition that war spending is not without consequence, they were quickly sidelined by congressional leaders hoping to avoid an explicit discussion of who exactly should pay for the wars. Within hours of their proposal to charge a surtax to fund the wars, House Speaker Nancy Pelosi (D-CA) punctured any hope of consideration of revenue sources:

> "Just as I have opposed the war from the outset ... I am opposed to a war surtax."

On the other side of the aisle, House Minority Leader John A. Boehner (R-OH) declared identifying revenue sources as "the most irresponsible public policy [he had] seen in a long, long time."

A debate about a war surtax, however, would make stark the set of options from which legislators must chose in order to continue war funding. They can pay for the wars today through taxation; they can place the financial burden on our children and grandchildren and finance the wars by taking on more debt; or they can curtail spending on school lunch programs, bridge and road repair, space exploration, or other domestic investments. Congress has instead refused to engage in actively setting and adequately funding national priorities.

The apparent erroneous classification of the president's latest war funding request as "emergency supplemental" spending has relieved Congress of making difficult spending decisions. House leadership's dismissal of Obey's call for a war surtax underscores the unwillingness of Congress to identify and debate the choices that must be made in order to continue to devote such large sums of money to prosecuting the wars in Iraq and Afghanistan.

Congress, President Spar Over Children's Health Insurance

Congress overwhelmingly approved the State Children's Health Insurance Program (SCHIP) reauthorization at the end of September, with $35 billion in new funding that would provide health care coverage for about four million more uninsured children. As

expected, President Bush vetoed the reauthorization, and the House is scheduled to hold what promises to be a close override vote on Oct. 18.

SCHIP was started in 1997, and it provides health care primarily for uninsured children in families whose incomes are too high to qualify for Medicaid. Under this bill, about 70 percent of families who would gain SCHIP coverage earn less than twice the poverty level, which is $40,000 for a family of four, according to the Urban Institute.

Both the Senate and the House approved the bill by wide margins. The House voted 265-159 to pass the bill President Bush vetoed. All but eight Democrats, and 45 Republicans, voted for it, while 11 members did not vote at all. This total is short of the two-thirds majority needed to override the president's veto. The Senate supported the SCHIP reauthorization by a veto-proof majority, 67-29.

Despite Congress's votes and overwhelming public support for the bill, Bush vetoed SCHIP reauthorization on Oct. 3. This opposition to children's health care programs is not a new policy for the president. The Bush administration also recently issued a rule severely restricting which states can give SCHIP coverage. Several states have sued the administration over the rule, and the bill passed by the House and Senate would replace it with more inclusive guidelines (See a related *Watcher* article on the state lawsuits).

Only a few votes in the House will make the difference between sustaining the president's veto or overturning it and taking the first step toward forcing the bill into law. Since a two-thirds majority of voting members is required to overturn a veto, approximately 15 to 25 House members will have to switch their votes. A large coalition of advocacy groups and labor unions has launched a campaign to pressure members of the House to overturn the president's veto and enact the SCHIP bill. Democratic leaders in the House have announced the vote will be held on Oct. 18.

Some House members have already pledged to change their votes. Rep. Dan Boren (D-OK), who voted against it, has said he will now support it, and Rep. Bobby Jindal ☼ (R-LA), who did not vote, said he would support the bill. If the House is able to override the veto, it is likely the Senate will follow suit as the initial vote passed the bill by a margin large enough to override the veto.

In an encouraging sign, Bush has backed down from his position that he would veto bills that provided more funding than he requested in his budget, including the SCHIP bill. During his weekly Saturday radio address, Bush said he would consider accepting more funding but would likely need Congress to compromise as well. Democratic leaders have said repeatedly they will not reduce the $35 billion funding increase currently in the bill.

Research Questions Cost-Efficiency of Privatization

Public debate over government contracting has centered largely on issues of accountability.

But recent scholarship on the *efficiency* of using contractors to deliver government services shows that a broader discussion is warranted. The assumptions about the relative efficiency of government contracts are on shaky ground, and cost measurements show no clear advantage to private contractors.

Holes in the Theory

The belief that private contractors perform more efficiently than government agencies rests on the expected effects of competition and private ownership. But privatization advocates often fail to examine the extent to which these conditions pertain in contracting markets. In his book *You Don't Always Get What You Pay For: The Economics of Privatization*, Professor Elliott Sclar, director of the Center for Sustainable Urban Development (CSUD) at Columbia University's Earth Institute, takes a critical look at contract markets and performance. As it turns out, the conditions needed for efficient contracting are often not present or are costly to obtain.

Sclar found governments often buy services in uncompetitive markets. In contract markets where there are few buyers or sellers, prices can be out of line with the benefits of a purchased service. Governments often buy things nobody else does, such as garbage collection or sewer maintenance. Companies may collude with each other, or only a small quantity of suppliers may be able to compete for a contract.

Contracts themselves are often very complex and expensive to monitor. Sclar found government agencies fail to write contracts appropriately, with clear definitions for the purchased goods. Governments also typically ask for goods or services that are not immediately available on the market. Companies have to make a service to order, and governments need to expend resources to ensure they get what they paid for. Sometimes, Sclar found, the contracted services may just be too complex to oversee efficiently.

Contracting relationships are also jeopardized by conflicts of interest and informational imbalances. For example, long-term contracts are particularly hard to administer. Sclar found contractors may begin by providing a cost-efficient service, but later on, they may be in a position to leverage market power over an agency and charge high prices.

No Clear Cost Savings to Contracting

Sclar's analysis, which was drawn from case studies of privatization, seems to be accurate even when contractor performance in entire sectors is measured. Many surveys of certain types of privatization have shown no clear advantage to privatization.

In one study, where all published econometric analyses of city water and waste production services were compiled, no strong link was found between how the service was provided (by contractor or by government workers) and how much it cost. Other factors were much more important in determining costs, including market structures, industrial organization and the capacity of government to hold contractors accountable for performance.

Another study of contracting also found no discernible savings when governments used

private contractors to administer prisons. While half of all private prisons surveyed may have generated cost savings, a quarter resulted in losses, and the final quarter showed no change. A 2002 study produced similar findings with regard to contracting out administrative staffing for child welfare programs.

Recent experiments with privatization on a large scale have also produced unsatisfactory results. The state of Texas gave a comprehensive contract for the administration of nearly all social benefit services. But severe service delays developed, and the state had to end the contract for many of the services it outsourced.

At the federal level, an ongoing effort to contract out tax collection services has suffered from massive inefficiencies. Government workers have been shown to be nearly four times as efficient as the contractors in collecting past due debts. Indeed, the only tenable argument made for tax privatization is that it is politically difficult to secure enough funding to hire government workers to do the same job. The House passed a bill to repeal this program on Oct. 10.

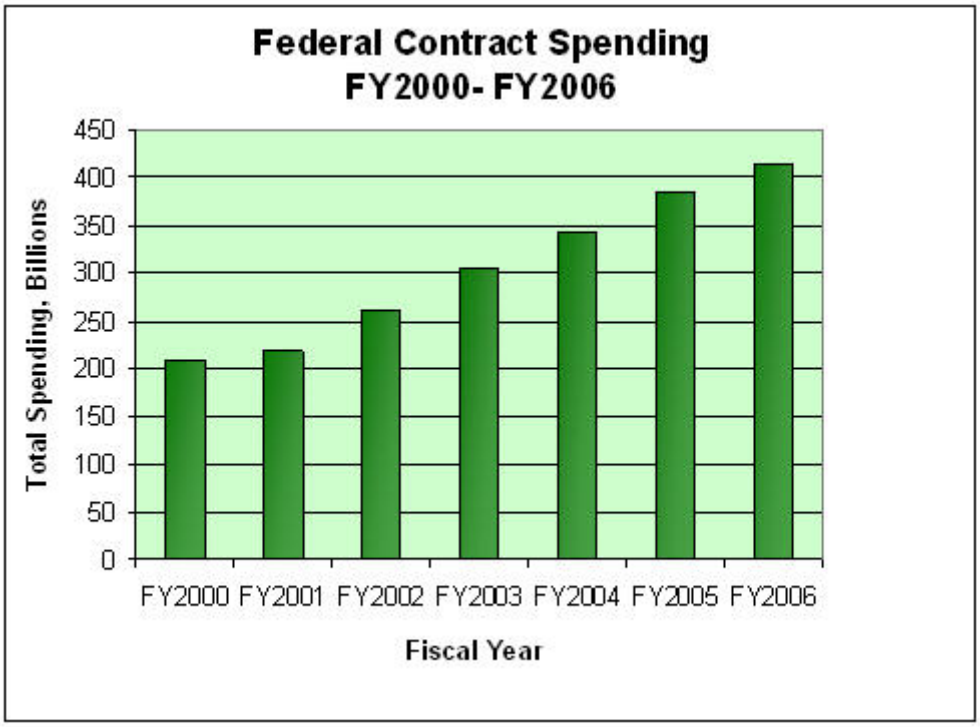
A Pragmatic Approach to Contracting

Most of the academic literature shows government contracting is a sensitive business that requires diligence, planning and management resources, and that it may be unsuited to certain goods and services. Additional rules for overseeing contracting processes may be necessary to ensure agencies prepare properly for contracting, and weigh all options for service provision. In Massachusetts, for example, a commission evaluates proposals for using private contractors prior to implementation.

In a separate paper, Sclar found the commission saved money in Massachusetts by preventing inefficient contracting. He concluded:

> The privatization law has created an atmosphere where state agencies are forced to think like private firms as opposed to assuming that a private provider working under contract will automatically solve any problem at a lower cost. It compels state agencies to think through the pitfalls that lie ahead and prods them to be sure they are making the highest and best use of scarce resources in difficult fiscal times. It avoids the squandering of public funds on untested ideas that has plagued privatization efforts in so many other places.

When agencies do not take it for granted that contracting is always efficient, they should be better prepared to manage contracts and may be more willing to reform service delivery systems by more effective means than privatization. At the very least, this research shows that policymakers have good reason to examine the cost-efficiency of the rapidly expanding federal contracting industry — which has doubled in size in the last five years. Any review of contracting practices should determine the conditions under which privatization is a viable way of improving government performance.



Internet Access Tax: The Immodest Moratorium

With a federal moratorium on state and local Internet access taxes set to expire on Nov. 1, Senate Commerce, Science and Transportation Committee Chair Daniel Inouye (D-HI) withdrew a bill on Sept. 27 that would extend the tax moratorium rather than face the likelihood members would approve a Republican-backed permanent moratorium. Inouye said a compromise among those seeking an extension of the moratorium and those proposing a permanent ban had not yet been worked out. There has been no formal action in the House to date, other than a full Small Business Committee hearing on Oct. 3 on the potential negative impact on small businesses of allowing the Internet tax moratorium to expire.

The Internet tax moratorium issue is being debated on the national level, but it would impact the revenues of states and localities. Nine states — Hawaii, New Hampshire, New Mexico, North Dakota, Ohio, South Dakota, Texas, Washington and Wisconsin — started imposing Internet access taxes similar to the taxes that appear on monthly telephone bills in the mid-90s. Then in 1998, Congress barred for three years any new state and local taxes on Internet access providers who bundle telecom products to consumers, including e-mail and digital subscriber line (DSL) services. The ban was extended until late 2003, then lapsed for over a year, during which time no states acted to institute new taxes. In 2004, Congress extended the moratorium through Nov. 1, 2007.

The sentiment is almost universal in Congress that this tax moratorium should be extended again, but there are different opinions about the length of the extension. Many believe it is

necessary to encourage continued investment in the high-speed lines crucial to making new online activities possible, particularly video. But changing Internet usage has complicated the issue, slowing the pell-mell rush to extend or make permanent a moratorium that has not slowed the United States' steady descent in the global rankings of broadband penetration.

Senate Commerce Committee Ranking Member John McCain (R-AZ) and the Don't Tax Our Web coalition (an industry-funded coalition composed of telecommunications giants including AT&T Inc., Google Inc., Time Warner Inc., as well as the business-friendly U.S. Chamber of Commerce, National Association of Manufacturers, and American Legislative Exchange Council) seek to prohibit Internet access taxes permanently. The paradox regarding Internet access taxes is captured by McCain: "If Americans want to know what their access bill will look like if this moratorium expires, all they need to do is look at their phone bill. Taxes and government fees add as much as 20% to Americans' telephone and cellphone bills. We can't let that happen to the Internet, which is likely the most popular invention since the light bulb." Perhaps McCain forgets that access to telephones has not been hindered by long-accepted state and local taxes.

Those opposing a permanent ban, led by the U.S. Conference of Mayors, the National Governors Association, the Council of State Governments, the American Federation of State, County, and Municipal Employees, and the National Association of Counties, worry about the estimated $11.7 billion that state and local coffers would lose annually and question the pre-emptive nature of the current federal law. They further claim because technology is changing, freezing tax policy in this area makes little sense. As Jean Kinney Hurst, head of tax and revenue policy for the California Association of Counties has said, "A permanent ban seems frankly completely irresponsible. We don't know what's going to happen with technology." Given this uncertainty, these groups endorse a four-year extension of the ban at this time.

According to an August report from the Center on Budget and Policy Priorities, the current ban allows Internet access providers to escape a host of general taxes that other businesses must pay, such as sales taxes on equipment purchases. In addition, the taxes imposed by the nine states mentioned earlier have not adversely affected household subscriptions to access the Internet or the availability of broadband access in those states. Furthermore, each of the 14 developed nations that outrank the U.S. in broadband access have taxes on Internet access services — and at rates many times higher than the 4-9 percent applied by the nine states in the U.S. The U.S. ranked in the top five globally in broadband access prior to the ban in 2001, but has dropped to 15 out of the 30 Organization for Economic Cooperation and Development (OECD) nations in just six years.

Unfortunately, the debate in Congress has hitherto involved surprisingly little examination of a singular and immodest moratorium enjoyed by a robust, thriving, well-capitalized and mature sector of the American economy. Typical of the rhetoric on the issue in Congress is this view, expressed by Rep. Anna G. Eshoo (D-CA): "There would be a revolution in the country if every time you went online you had to pay a tax. The dome of the Capitol would

cave in."

The debate will continue, but history shows that even if it is not resolved by Nov. 1, dire consequences will not follow. As a Senate Commerce Committee staffer noted last month, recalling the moratorium's one-year lapse in 2004: "As far as I can tell, the world didn't stop spinning."

Conference Focuses on E-mail Frustration Felt by Congress and Advocacy Groups

On Oct.1, the Congressional Management Foundation (CMF), a nonpartisan nonprofit organization working to improve the effectiveness of Congress, held a forum on constituent communications with Congress. The goal of the conference was to "identify ways to make it easier for citizens to express their views to Congress in an effective way and for congressional offices to manage and get value from the communications they receive." The massive amount of e-mail Congress receives from constituents was the main topic of discussion. Both nonprofit advocacy groups and congressional staffers agreed that the current approach to e-mail communications works for neither side, but they were unable to find common ground on solutions. CMF will release a draft report in early 2008 on the conference and its research on the topic, with the goal of fostering a new model of constituent communications with Congress.

E-mail communications have provided advocacy groups and citizens with a cheap and easy way to communicate with their representatives in Congress. In 2004, according to a CMF chart, Congress received over 200 million e-mails, up from 50 million in 1995. In a survey CMF conducted of congressional staff, nearly eighty percent agreed that the Internet has made it easier for Americans to engage in public policy.

In his conference presentation, Doug Pinkham of the Public Affairs Council argued that Internet and e-mail technologies have given rise to a boom in grassroots activity by both companies and nonprofits. Looking ahead, Pinkham believes grassroots advocacy, and the constituent communications to Congress that come with it, will only increase. According to Pinkham, "Public policy issues are becoming increasingly high stakes, which motivates all sorts of groups to weigh in. At the same time, many of these issues — from trade promotion authority to stem cell research to environmental restrictions — are also becoming increasingly complex, which means that there will be an even more urgent need in congressional offices to figure out 'what the voters really want' back home."

Congressional staffers, however, are finding it difficult to manage and respond to the mass amount of e-mail they receive on a daily basis. Congressional staffer Judson Blewett, from the office of Sen. John Cornyn ☼ (R-TX), identified a set of problems he sees in the current approach to e-mail communications. Blewett testified, "Logistically speaking, many of these problems seem to fall into a set: 'insufficient man hours available.' They also all seem to fit into a 'complete lack of standards between Congress and advocacy groups' box as well. I

think that co-operation and a set of rules or procedures between advocacy groups and Congressional offices is critical to resolving this problem."

Alan Rosenblatt of the Center for American Progress Action Fund discussed the issue of e-mail communications from the perspective of the advocacy community. He argued that this type of dialogue with Congress, on behalf of citizens, is a critical means for advocacy organizations to try to realize their objectives. Rosenblatt observed, "Perhaps the biggest problem in this morass is that Congress, more often than not, seeks to manage their communications with constituents, often at arms' length. But e-mail offers an enormous opportunity to deepen relations with constituents....It is very sad that this golden opportunity often is seen as a problem."

In its summary of the testimony, CMF identified four implications from the conference of importance to the advocacy community.

- *Quality is more important than quantity* (Because congressional offices prioritize personalized messages over bulk e-mails they perceive not to be "real", advocacy groups would likely benefit from encouraging constituents not to send e-mails with the exact same message.)
- *The organization behind a grassroots campaign matters* (Congress pays attention to the messenger as well as the message. Consequently, campaigns where the leading organization fails to identify itself are unlikely to have impact.)
- *Grassroots organizations should develop a better understanding of Congress* (Better understanding of how congressional offices manage e-mail and other communications would allow advocacy organizations to convey their ideas more effectively.)
- *There is a difference between being noticed and having an impact* (E-mail communications affect an organization's reputation with congressional members and staffers. Aim for influence, not annoyance.)

Nonprofits File Comments on Proposed Electioneering Communications Rule

On Oct. 1, comments were due to the Federal Election Commission (FEC) on its proposed new rules to make the agency's regulations consistent with the U.S. Supreme Court decision in *FEC v. Wisconsin Right to Life* (WRTL II). That case held that paid broadcasts that cannot be reasonably interpreted as appeals to vote for or against a federal candidate must be allowed to air in the period before federal elections. These broadcasts were restricted by law. The FEC will hold a hearing on Oct. 17, and it plans to vote on a final rule by the end of November, in time for the presidential primaries.

The FEC's Alternative 1 would require sponsors of grassroots, non-electoral broadcasts to file disclosure reports on their funding sources to the FEC, while Alternative 2 would not require disclosure. In the comments the FEC received, the disclosure issue is the main point

of contention. OMB Watch submitted comments opposing the FEC disclosure of permissible electioneering communications (Alternative 1), saying, "There is no justification for burdening broadcasts that are unrelated to federal elections with FEC reporting obligations. The WRTL II opinion made it clear that where there is doubt, it must be resolved in favor of the speaker." Under Alternative 1, if a labor union, corporation or nonprofit spends more than $10,000 in a calendar year on grassroots lobbying communications, it would have to disclose the date and amounts of payments made for the communications and the name and address of donors who contributed more than $1,000. If an organization uses a separate segregated fund (SSF) for these ads, the donors to that fund would have to be reported. The comments OMB Watch submitted expressed concern that this "leaves a nonprofit with two bad choices: either disclose donors for the entire organization, or have the difficult job of separate fundraising for the SSF."

Independent Sector offered similar concerns about the disclosure proposal. The organization argued that "following complicated FEC reporting regulations would discourage, and would effectively prevent most charities from running issue ads during election periods. The reporting requirements would be an unnecessary obstacle for communications that are actually grassroots lobbying advertisements."

Those who favor maintaining the disclosure requirements, led by the Campaign Legal Center, argue that the FEC has every right to require disclosure because the Supreme Court only addressed whether the paid broadcast is permissible, not whether it should be disclosed. Hence, the FEC has no restrictions in calling for disclosure. However, the OMB Watch comments point out, "Congress has not authorized the FEC to regulate grassroots lobbying through disclosure requirements. In fact, earlier this year Congress clearly rejected proposals (supported by OMB Watch) to extend the Lobbying Disclosure Act to cover grassroots lobbying." Additionally, the IRS already collects information from charities on grassroots lobbying activities.

Another issue of contention in the proposed rulemaking is whether the FEC should have a general rule along with safe harbors or one specific rule. The rulemaking proposes a general rule and two limited safe harbor exclusions. OMB Watch argued, "The proposed general rule would exempt communications that are 'susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.' We do not believe this is the best approach, since the proposed general rule is too vague, and the proposed safe harbors are overly restrictive."

In 2006, OMB Watch, the U.S. Chamber of Commerce, the AFL-CIO, Alliance for Justice and the National Education Association filed a petition with the FEC seeking a rulemaking for an exception to the electioneering communication rule that exempts grassroots lobbying activity. Both the comments the Chamber of Commerce and OMB Watch submitted support the 2006 suggested general rule. It said to be exempt the broadcast must:

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

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

But the broadcast *could not*:

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

Alliance for Justice also warns against the requirement in the rule that the communication must satisfy all four "prongs" of the safe harbor in order to be exempt. This approach would be inconsistent with the understanding that there can be as-applied challenges. "By making every element a condition of protection, the Commission would undermine the administrative and constitutional benefits attributable to adopting a safe harbor in the first place, and we urge the Commission to adopt a more flexible approach to the safe harbor."

The safe harbors also do not account for non-legislative issue advocacy, public service announcements or other broadcasts that may be unrelated to elections. The American Cancer Society expresses its concern with public service announcements. "Charities and the communities they serve can benefit from these individuals helping to disseminate mission-related information. We would like to ensure that these practices do not run afoul of any federal election laws."

Congress Misses Oversight Opportunity on Charities and Anti-Terrorist Financing Laws

Both houses of Congress have now approved S. 1612, a bill that expands penalties for violations of economic sanctions against countries like Iran and designated terrorist organizations. The bill also expands the scope of prohibited activity to include vaguely defined conspiracy and aiding and abetting language that could lead to unpredictable results for the unwary. While penalty increases were needed to address violations by companies like Chiquita, which paid a designated terrorist organization for protection in Colombia, passage of the bill without review of how the economic sanctions laws negatively impact humanitarian aid, development and human rights programs could prolong what is seen as a bad situation. OMB Watch is among the nonprofits that are calling for congressional oversight of the difficulties charities face.

S. 1612, the International Emergency Economic Powers Enhancement Act (IEEPA), was approved by the House on Oct. 2, after the being approved by the Senate in June. It increases fines for violations of economic embargoes declared by the president, from $50,000 to $250,000, or twice the amount of the illegal transaction. It also expands criminal penalties for intentional violations or for helping support violations by others with fines up to $1 million and prison terms up to 20 years. The definition of criminal activity is

expanded from a prohibition on willful or attempted violations to include any conspiracy to violate the law or aiding or abetting an unlawful act. These terms are undefined and could criminalize behavior far removed from the actual illegal act, such as charitable relief provided in disaster areas where terrorist groups operate or bankers with an indirect role in a financial transaction.

The bill went through Congress relatively quickly. It passed the Senate after a hearing that only included Bush administration officials, and there was no hearing before the House Foreign Affairs Committee. OMB Watch wrote to the House Democratic leadership asking for a delay on the vote on S. 1612 until the Foreign Affairs Committee could investigate how the IEEPA has affected the charitable sector. The appeal noted that use of IEEPA to prevent terrorist financing through charities may have made sense as a short-term, emergency solution in 2001 but is not a good long-term strategy. Although the bill passed, the call for oversight continues. Key questions for Congress include:

- How has Treasury treated charities under Bush's Patriot Act executive orders?
- Why does Treasury refuse to meet with charities about ways to release frozen funds for genuine charitable programs?
- Why is there no independent review of designation of charities?
- Why do charities get shut down, but companies like Chiquita pay fines that are small relative to their assets?

The potential for penalties for unintentional violations could be a problem for both charities and businesses. In a floor statement before the House voted on the bill, Rep. Donald Manzullo ☼ (R-IL) expressed concern that small businesses may be assessed penalties for "unintentional, accidental or inadvertent violations." No changes were made to provide protection in these situations. Instead, the Departments of Commerce and Treasury sent Manzullo assurances that they will not abuse their new authority. In the long term, more formal protection may be needed, as information about errors in evidence used to shut down charities has come to light in the recent Holy Land Foundation trial in Texas.

Background on IEEPA

Charities and other entities are subject to asset seizure under Patriot Act amendments to IEEPA, which give the president discretion to declare an emergency for "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." President Bush used these powers on Sept. 24, 2001, granting the Treasury Department (among other powers) the ability to freeze the assets of all persons the Secretary of the Treasury determined ". . . assist in, sponsor, or provide financial, material, or technological support for . . . such acts of (foreign) terrorism . . . or to be otherwise associated with those persons listed in the Annex to this order." (Executive Order 13224, 66 Fed. Reg. 49079 (2001), at Sec. 1(d)(i), (ii).) The threshold for asset seizure is low. Under the Patriot Act revisions to IEEPA, the Treasury Department can freeze an organization's assets pending an investigation into possible associations with a designated terrorist group.

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In This Issue

While Feds Dither, States Move to Regulate Greenhouse Gases

The Kansas Department of Health and Environment (KDHE) has rejected an air permit for proposed power plants due to the threat of the resulting greenhouse gas emissions. The decision makes Kansas the latest state to take proactive steps to stem greenhouse gas emissions while federal agencies and Congress delay action and White House officials continue to question climate science.

On Oct. 18, KDHE denied a permit for the Sunflower Electric Power Corporation to build two large coal-fired power plants near Holcomb, KS. The plants would have combined to

emit 11 million tons of greenhouse gas emissions annually, according to KDHE.

In a statement announcing the decision, KDHE Secretary Rod Bremby said, "I believe it would be irresponsible to ignore emerging information about the contribution of carbon dioxide and other greenhouse gases to climate change and the potential harm to our environment and health if we do nothing." Kansas Governor Kathleen Sebelius (D), who has been described as a conservative Democrat, has expressed her support for the decision to reject the permit.

The controversy over whether KDHE should grant the permit had become a watershed moment for environmental policy in Kansas. While Sunflower Electric lobbied vigorously for its permit, the idea of two more major sources of greenhouse gas emissions raised the ire of many Kansans.

Now, KDHE's decision is being framed as a watershed moment for American environmental policy. The decision by KDHE to deny an air permit on the grounds that greenhouse gas emissions pose a serious danger to public health and welfare is the first of its kind.

Other states are also using regulatory strategies to attempt to control greenhouse gas emissions. California has approved a program that would allow the state to regulate greenhouse gas emissions from vehicle tailpipes. In December 2005, California petitioned the U.S. Environmental Protection Agency (EPA) for permission to enact its program, as the state is required to do under the Clean Air Act.

However, EPA has yet to issue a decision on the California petition. California is expected to file suit against EPA the week of Oct. 29 in an attempt to force EPA to grant its request, *The Los Angeles Times* reported. If EPA grants California's request, at least 11 other states could begin implementing similar greenhouse gas emission programs.

States are pushing hard for greenhouse gas emission regulation now more than ever, partially in response to an April U.S. Supreme Court decision in which the court found greenhouse gas emissions could be considered an air pollutant under the Clean Air Act, an assertion previously rejected by the Bush administration.

Although more than six months have passed since the high court's decision, EPA has yet to announce its plans to regulate greenhouse gases under the Clean Air Act. An EPA official has reportedly indicated the agency will pursue a regulatory scheme similar to that of California and the other states, wherein the agency would set targets to reduce emissions over time, according to BNA news service (subscription). More information on EPA's plans may surface when the agency releases its annual Regulatory Plan later in 2007.

Congress has only recently begun to make progress on greenhouse gas emission legislation despite the issue being a major tenet of the Democrats' campaign during their sweeping 2006 election victory. For example, on Oct. 18, Sens. Joseph Lieberman (I-CT) and John Warner (R-VA) introduced the America's Climate Security Act (S. 2191). The legislation

would establish a cap-and-trade system in which greenhouse gas emitters could buy, sell and trade emission credits. The total level of emissions allowed under the system would decrease over time. The proposed legislation received mixed reviews from environmental advocates. A subcommittee of the Senate Environment and Public Works Committee is scheduled to begin considering the legislation on Oct. 24.

Meanwhile, White House officials continue to make attempts at slowing greenhouse gas emission policies by questioning the underlying science. Many climate scientists, including those on the Nobel Prize-winning Intergovernmental Panel on Climate Change, have endorsed the notion of preventing warming of the earth by two degrees Celsius or 3.6 degrees Fahrenheit. President Bush's top science advisor, White House Office of Science and Technology Policy Director John Marburger III, said the goal "is going to be a very difficult one to achieve and is not actually linked to regional events that affect people's lives," according to *The Washington Post*.

Bush Administration Tries to Reverse Old-Growth Forest Protection Plan

The U.S. Bureau of Land Management (BLM) is trying to dismantle a 1994 landmark management plan that balances logging, endangered species and old-growth forest protections. BLM wants to revise the Northwest Forest Plan (NWFP) to allow logging on nearly one million acres of old-growth forest area included in the plan that protect habitats for species such as the northern spotted owl, salmon and other old-growth-dependent species. The proposed revisions ignore scientific recommendations, and the process appears to have been manipulated by Bush administration officials in Washington.

According to the National Center for Conservation Science and Policy (NCCSP), the U.S. Fish and Wildlife Service (FWS) in the early 1990s drafted but never approved a recovery plan to protect under the Endangered Species Act the northern spotted owl, threatened by extensive logging of old-growth forests. In 1994, the Clinton administration used the NWFP as the *de facto* recovery plan for the owl. In 2003, FWS was sued to force completion of a recovery plan.

In 2006, FWS convened a diverse group to develop a recovery plan, although the group was unable to reach consensus on specific habitat provisions. According to NCCSP, "Rather than send the draft recovery plan out for scientific peer review to resolve these disagreements, the draft recovery plan was rejected by high ranking officials within the Bush administration as not 'flexible' enough to allow the Forest Service and Bureau of Land Management to push through forest plan revisions that reduced old-growth protections." Officials in Washington ordered the group to develop a plan that didn't rely on the network of protected forests even though there was no scientific basis for the change in the conservation approach embedded in the NWFP.

There are a variety of forest management decisions tied to the recovery plan and the NWFP.

On Aug. 10, BLM released for public comment a Draft Environmental Impact Statement (EIS) for the Western Oregon Plan Revisions, part of the NWFP. According to an Oct. 18 *New York Times* article, the revisions call for a three-fold increase in logging in western Oregon. Logging interests and local governments, which share in the proceeds of timber sales, believe the revisions restore "the rightful primacy of logging on these tracts."

Scientists and environmental groups, however, argue that the revisions change the priorities established in the NWFP and will harm species dependent on old-growth areas for survival and threaten salmon stocks. Since the owl recovery plan is linked to the NWFP, scientists fear the revisions will dismantle habitat protections included in the plan. For example, 113 scientists sent a letter to Department of Interior Secretary Dirk Kempthorne on Oct. 2 requesting he withdraw the revisions to the recovery plan and "assemble a team of scientists to redraft a recovery plan based on best available science."

In addition, the scientists requested that the participation by Bush administration officials in the rejection of the recovery plan be reviewed. Kempthorne commissioned a review of Endangered Species Act decisions as part of reforms to improve how FWS handles these decisions. The need for the review was sparked by the improper influence of Julie A. MacDonald, a former deputy assistant at FWS, in how certain decisions were made. (See *The Watcher* article of May 15.) MacDonald was part of the Washington [DC] Oversight Committee that rejected the 2006 draft recovery plan.

According to NCCSP testimony before the House Committee on Natural Resources May 9, this Oversight Committee ordered the group to develop an alternative to their conservation-based plan, one that did not rely on a network of forest habitat reserves. The new alternative "was not based on sound science but was designed to give the Forest Service and the BLM the discretion to exempt public forests from the NWFP."

The Oversight Committee also ordered the group to change the scientific studies used as the basis of the recovery plan and to "de-link the recovery plan from the Northwest Forest Plan," according to the testimony.

The result of the process described above is BLM's Draft EIS. In addition to increasing logging in western Oregon generally, the plan would double the area of old-growth forests allowed to be logged, according to a summary of the draft written by NCCSP. It also eliminates the forest reserve approach to protecting habitat and designates logging as the primary value of BLM land, according to Oregon Heritage Forests (OHF), an association of conservation groups. The plan would also allow logging closer to rivers and streams, potentially affecting drinking water as well as sedimentation and water temperature, both of which affect native fish stocks. "Shockingly, the BLM claims minimal or no effect on fish, floods and sediment despite a massive increase in clearcut logging," OHF writes on its website.

The Draft EIS is open for public comment until December 10, 2007.

Report Finds Extensive Noncompliance with Clean Water Act Rules

A new report has found thousands of facilities are out of compliance with the requirements of the Clean Water Act. The report blames declining support for environmental enforcement during the Bush administration as a major cause of the regulatory violations. The U.S. Public Interest Research Group (U.S. PIRG), a nonprofit organization working on environmental policy and public outreach, published the report titled *Troubled Waters: An Analysis of 2005 Clean Water Act Compliance*.

According to the report, more than 3,600 facilities — or 57 percent of the national total — accounted for more than 24,400 violations of the Clean Water Act in 2005. The report also finds many of the violations to be "egregious." The report states, "Major facilities exceeding their Clean Water Act permits, on average, exceeded their permit limits by 263%, or nearly four times the allowed amount." PIRG also makes available on its website data on facilities by state.

The primary regulatory framework for enacting the Clean Water Act is the National Pollutant Discharge Elimination System (NPDES). Any facility, including an industrial, commercial and agricultural source seeking to discharge waste into U.S. waters must first obtain a permit. The permit system sets limits on the amount of waste that facilities can discharge and allows regulators to monitor pollution by requiring discharge reporting.

The U.S. Environmental Protection Agency (EPA) is responsible for administering the NPDES program but may also delegate responsibility to the states upon request. Currently, 45 states have EPA-approved NPDES programs, according to the report. However, EPA still bears some responsibility, the report says: "In general, once a state is authorized to administer a part of the NPDES program, EPA no longer conducts these activities. EPA still maintains an oversight role and retains the right to take enforcement action against violators if the state fails to do so."

The report chides the Bush administration for enacting policies that ease requirements for polluters and for failing to prioritize environmental enforcement. In 2003 and 2007, the Bush administration issued policies that undermine the ability of EPA to enforce the NPDES system, according to the report. One policy attempts to redefine "waterway" as it pertains to the Clean Water Act. "EPA has acknowledged that the 2003 policy alone could remove federal Clean Water Act protections from 20 million acres of wetlands, or about 20% of the wetlands in the lower 48 states," according to the report.

The report also blames declining budgets for EPA's growing inability to enforce Clean Water Act regulations. "From 1997 to 2006, EPA's total budget has declined 13 percent, when adjusted for inflation," the report says. The report also cites President Bush's requested cuts in the proposed FY 2008 budget to the Clean Water State Revolving Fund — a federal program that helps local governments improve water treatment and clean water practices —

as illustrative of the administration's declining support for clean water protections.

The report comes as EPA faces scrutiny for what critics deride as lax enforcement practices. A recent *Washington Post* investigation finds EPA is failing to pursue criminal prosecutions of some of the nation's worst polluters and repeat offenders. According to the article, "The number of environmental prosecutions plummeted from 919 in 2001 to 584 last year, a 36 percent decline."

The U.S. PIRG report also mentions a recent EPA Inspector General investigation, which found that even when EPA identifies polluters exceeding their NPDES permit limits, the agency is neither thorough nor timely in pursuing corrective action.

The report concludes with recommendations that U.S. PIRG believes would enhance facility compliance with the NPDES program. The recommendations include reversing the 2003 and 2007 policies, revoking the permits of repeat violators, easing requirements for citizen suits against polluters under the Clean Water Act, and expanding information reporting to enhance the public's right to know about the status of its waterways.

Senate Bill Grants Immunity to Telecom Companies, House Bill Stalled

The Senate Intelligence Committee recently passed a bill that would grant retroactive immunity to telecommunications companies involved in the National Security Agency's (NSA) warrantless wiretapping program. The same week, the House pulled a bill that would increase judicial oversight and accountability over the administration's surveillance efforts.

On Oct. 18, the Senate Intelligence Committee passed the FISA Amendments Act of 2007 by a vote of 13-2. The strong vote reflects an agreement reached between Democratic members of the Intelligence Committee and the administration. The bill would provide immunity for any telecommunications company if the attorney general certifies that the company was not involved in a particular lawsuit or that, in response to a request authorized by the president, the company assisted the government in counterterrorism operations between Sept. 11, 2001, and Jan. 17, 2007.

There are currently approximately 40 lawsuits involving telecommunications companies allegedly assisting the NSA's warrantless wiretapping program. All of these suits would potentially be thrown out if the Senate bill becomes law.

"While neither side got everything we wanted, at the end of the day, we believe we've accomplished what we set out to do — allow for necessary intelligence collection while maintaining critical privacy protections for Americans," stated Sen. Jay Rockefeller (D-WV), chairman of the Intelligence Committee.

An amendment introduced by Sens. Ron Wyden (D-OR) and Russ Feingold (D-WI) passed

in committee 9-6. It would require the government to receive a warrant in order to target an American citizen overseas. The White House stated it would not accept a bill which included such a requirement, and Republican members of the committee opposed it.

"Unfortunately, the Committee adopted a problematic amendment today, which if not modified, will make it more difficult to vote our bill out of the Senate," stated Sen. Kit Bond (R-MO), vice chairman of the Senate Intelligence Committee. "I am hopeful, however, that we will be able to reach a compromise on this issue when we get to the floor."

Wyden and Feingold were the only members on the committee who voted against the bill. "The bill, which I voted against, does nothing to protect the rights of innocent Americans communicating with people overseas and it includes unjustified retroactive immunity for those alleged to have cooperated with the Administration's illegal warrantless wiretapping program," stated Feingold. "As a member of the Senate Judiciary Committee, as well as Intelligence Committee, I will continue to fight for the rights of Americans and to protect the Constitution and the rule of law."

Feingold was referring to the fact that the FISA Amendments Act of 2007 next heads to the Senate Judiciary Committee, where Sens. Patrick Leahy (D-VT) and Arlen Specter (R-PA), chairman and ranking member of the committee, respectively, have expressed opposition to immunity for the telecommunications industry, without receiving records on the NSA spying program. A number of public interest groups have called on the committee to hold a public hearing on the bill.

Additionally, Sen. Christopher Dodd ☼ (D-CT) said that he would issue a hold on the bill. "I will do everything in my power to stop Congress from shielding this President's agenda of secrecy, deception, and blatant unlawfulness."

Meanwhile, in the House last week, the Responsible Electronic Surveillance that is Overseen, Reviewed, and Effective Act of 2007 (RESTORE Act) (H.R. 3773), previously described in the *Watcher*, was abruptly pulled by the leadership just before an expected floor vote due to a parliamentary maneuver by the Republicans.

The Republicans attempted to introduce an amendment that would have stated that the requirement to receive a court order does not apply if the target of surveillance is Osama bin Laden or related terrorist organizations. The Democratic leadership dismissed the maneuver as a tactic to impede the bill's progress, claiming that the bill already provides such authority. But House leadership started losing support, and the bill was pulled.

The RESTORE Act is expected to be considered the week of Oct. 22. Republicans are expected to attempt a similar maneuver and possibly try to include retroactive telecommunications immunity, which is not currently a part of the bill.

California Restores TRI Reporting for the State

When California Governor Arnold Schwarzenegger (R) signed the California Toxic Release Inventory Act of 2007 (Assembly Bill 833) into law on Oct. 13, California became the first state to pass legislation to undo the U.S. Environmental Protection Agency's (EPA) December 2006 weakening of the Toxics Release Inventory (TRI). The new state law establishes the threshold for detailed reporting at 500 pounds of a listed toxic chemical, which was the original threshold for the TRI program before EPA changed the regulations to reduce the reporting burden on companies.

Similar legislation was introduced and passed last year, only to be vetoed by Schwarzenegger. The signed version lacked certain components from the previous effort, such as provisions requiring the creation of a user-friendly website and analyzed data. However, Assembly member Ira Rushkin (D-21st), who authored the bill, was happy with the outcome. As quoted in the San Jose Mercury News , Rushkin said, "Hiding information from the people is reprehensible. I am very pleased that the governor agrees."

The federal regulatory policy changes, which went into effect in January, increased the threshold mandating detailed reporting of toxic pollution under the TRI program, from 500 pounds to 5,000 pounds, so long as less than 2,000 pounds were released directly into the environment. The change enables facilities to pollute much more before having to disclose specifics. Under the new threshold, facilities only need to report the chemical name and certify that the amount produced was under the threshold. The detailed report, which was formerly required, calls for disclosure of actual amounts of pollution and whether the chemical was released into the air, water or land.

California has long been ahead of the national curve in ensuring that its residents know about toxins in their environment.

- In 1986, the same year Congress passed the Emergency Planning and Community Right-to-Know Act (EPCRA) that established TRI, California voters passed Proposition 65, the Safe Drinking Water and Toxic Enforcement Act, which requires public notice if a toxic chemical is present in a product, in a workplace or is present in the environment.
- In 1990, the state enacted the "full" pesticide use reporting system, which created the most detailed database in the nation, possibly even in the world.
- Creating the most comprehensive statewide school requirement, the Healthy School Act of 2001 mandated all schools to record, track and provide notification of any toxic pesticide used within their grounds.

While several states have independently established a public toxic reporting system like TRI, most utilize the TRI program and its thresholds for the basic reporting structure, even if they have additional reporting requirements that go beyond the TRI program. As a result, these state programs, including California's, were automatically affected by the changes to the federal policy. New Jersey's Release and Pollution Prevention Report (RPPR) program

maybe the only state pollution reporting program designed such that the federal TRI changes did not create the loss of information faced by other states. New Jersey's RPPR already required detailed reporting similar to the federal TRI program but at a lower threshold. Despite the impact on state pollution programs, California remains the only state to pursue action against the federal policy changes, reclaiming the program standards at the state level.

There are federal efforts underway to restore the TRI program, as companion bills in the House (H.R. 1055) and Senate (S. 595) have both received hearings and await markup and votes.

CIA Investigates Its Own Watchdog, the Inspector General

In a disconcerting development, the Central Intelligence Agency (CIA) is investigating its own watchdog, the Inspector General of the CIA. Sens. Jay Rockefeller (D-WV) and Kit Bond (R-MO), chairman and vice chairman, respectively, of the Senate Intelligence Committee, Sen. Ron Wyden (D-OR), and other members of Congress expressed concern that such an investigation compromises the independence and integrity of the CIA's Office of the Inspector General (OIG).

On Oct. 12, the *New York Times* and *Los Angeles Times* reported that the OIG was being investigated by the CIA director, Gen. Michael Hayden. Hayden appointed a team to investigate the work of the Inspector General, John Helgerson.

Inspectors general offices function as supervisory bodies for agencies, investigating agency activities for possible mismanagement, waste, fraud or abuse. Oversight of inspectors general is an authority that belongs to Congress, not the very agencies being reviewed by the OIGs. The concern is that agency interference, in this case the CIA director's investigation, will impinge on the traditionally independent role of the OIG in providing objective review of the operations of the agency it monitors.

Wyden wrote a letter expressing his concerns to the Director of National Intelligence, Michael McConnell. "It is unacceptable for any agency head, deliberately or otherwise, to interfere in the independence of an Inspector General or his office," wrote Wyden. "Inspectors General often force government agencies and personnel to confront uncomfortable facts, but this is an essential part of their role and should be accepted by all agencies, including the CIA. People who know they are doing the right thing are not afraid of oversight."

The *New York Times* reported that the investigation comes at a time when the OIG is investigating the detention and rendition practices of the CIA. There is concern that such an investigation may be an attempt to temper the findings of the OIG.

This action of the CIA director ties into a larger pattern within the Bush administration of

curtailing the power and independence of inspectors general. Earlier this year, OMB Watch reported that the NASA Inspector General was the subject of investigations by Congress for allegedly creating a hostile work environment and developing inappropriately close relations with the chief counsel of NASA. OMB Watch also reported on the General Service Administration's (GSA) efforts to cut the funding of its Office of Inspector General, possibly in retaliation for the OIG's uncovering of nefarious practices at GSA.

Transparency in the Election Spotlight

Popular thinking tells us that for any trend, fad or heavily pursued activity, the pendulum will eventually swing back the other way. As we approach the 2008 elections, this may well be the case for government transparency, which, after years of increasing government secrecy, appears to be getting greater attention than ever before.

Elections often seem driven by the hottest or "sexiest" issues of the moment, too often involving more rhetoric and sensationalism than substantive issues of government policy. Most years, government transparency is considered far too dull an issue about the mundane day-to-day operations of government to attract much attention from candidates or voters. But as the presidential primaries approach, there are several indications that this year could include a much higher profile for government transparency as an issue.

The Reason Foundation has spearheaded an effort involving more that three dozen public interest groups to get presidential candidates to sign the Oath of Presidential Transparency. The oath commits signers to running the "most transparent Administration in American history," should they be elected, as well as fully implementing the Federal Funding Accountability and Transparency Act (FFATA) of 2006. Thus far, three candidates signed the pledge — Sens. Barack Obama (D-IL) and Sam Brownback (R-KS), and Rep. Ron Paul (R-TX), though Brownback recently announced that he is dropping out of the race. Obama — who co-sponsored the FFATA legislation, which requires a searchable database on government spending — stated, "Every American has the right to know how the government spends their tax dollars, but for too long that information has been largely hidden from public view."

In the 10Questions Presidential Forum, a new experiment in online democracy sponsored by MSNBC and bloggers in cooperation with the *New York Times*, transparency has become a top issue that site users want asked of presidential candidates. The site allows users to submit video questions for presidential candidates and then has visitors of the site vote on which questions are most important to them. A user-submitted question on transparency is currently among the top two questions receiving votes.

Interest in transparency also extends to Congress, as demonstrated by the Earmark Transparency Pledge. The pledge, organized by the Americans for Prosperity, commits signers to voluntarily disclose online a "regularly updated list of every earmark and/or targeted tax benefit that I request." The pledge effort is supported by the Sunlight

Foundation, Taxpayers for Common Sense and OMB Watch.

Participation and follow-through in such transparency efforts by members of Congress could play a larger roll during the next election as some voters pledge to cast their votes for members who vote to make Congress more transparent. Joshua Tauberer of GovTrack.us began a Transparency Vote campaign, in which participants agree to "pledge my vote to my senator & representative in 2008 if they vote for or sponsor a transparency initiative recommended by The Open House Project." The campaign has 273 pledges and seeks to reach 10,000 by January. The Open House Project, a collaborative effort by government information experts, congressional staff, nonprofit organizers and bloggers, has developed attainable reforms to promote transparency in the House of Representatives.

House Conservatives Sink SCHIP

Despite a considerable lobbying campaign by supporters, House Republicans blocked an effort to override President Bush's veto of a five-year, $35 billion funding increase for the State Children's Health Insurance Program (SCHIP) that would have provided an additional 4 million uninsured children with health insurance.

The final vote was 273-156, which fell 15 votes short of the necessary two-thirds majority. Only two Democrats voted to sustain the veto; the rest were Republicans.

In the two weeks leading up to the override vote, advocacy groups, health care providers, labor unions, and many other organizations launched an extensive grassroots lobbying campaign to pressure members of the House to vote to pass the bill. Americans United for Change, MoveOn.org, Service Employees International Union, American Federation of State, County, and Municipal Employees, and Families USA sponsored a multi-million dollar paid-media campaign involving television, radio and print ads across the country. Other organizations, including members of the Emergency Campaign for America's Priorities held hundreds of grassroots rallies across the country, and tens of thousands of citizens phoned or e-mailed their congressional representatives in support of the SCHIP bill.

Although the veto was sustained, there was improvement from the last time the bill was voted on earlier in October in the House. The previous vote on the same bill received a 265-159 vote. Had a two-thirds majority been achieved, the Senate would also likely have voted to override the veto, as it had previously approved the bill by the required two-thirds majority (69-30).

House Speaker Nancy Pelosi (D-CA) said the House is preparing a new version of the SCHIP reauthorization. She said the new bill will provide insurance for the same number of children (10 million) as the last version but will contain different eligibility restrictions to address concerns raised by House Republicans. Opponents of the bill primarily argued that

it offered insurance to families with incomes that were too high.

SCHIP is a health insurance program for children in families who make too much money to qualify for Medicaid but not enough money to afford private health insurance. The SCHIP bill the president vetoed would have provided insurance for mostly low-income children. According to the Urban Institute, about 70 percent of the families whose children would have received coverage had an annual income of approximately $40,000 or less.

The vetoed bill was a reauthorization of the SCHIP program, which expired on Sept. 30. The program's authorization was temporarily extended through Nov. 16 in the continuing resolution passed by Congress shortly before the fiscal year began on Oct. 1. According to *CongressDaily*, House leaders have said another continuing resolution may be necessary to keep the program going until Congress and the president can agree to a compromise five-year reauthorization. A temporary reauthorization will force Congress and the president to address SCHIP funding at least once more this session.

Your Voice is Still Needed!
Visit the OMB Watch Action Center to contact your representative to tell them to support the reauthorization of SCHIP!

AMT: Prospects for Reform and the PAYGO Challenge

In the coming weeks, Congress will come to grips with what is arguably the most important tax issue of the year, the Alternative Minimum Tax (AMT). In the very near future, House Ways and Means Committee Chair Charles Rangel (D-NY) will propose a "patch" to avoid a steep increase in the number of taxpayers liable under the AMT, as well as what he calls "the mother of all tax bills" — his long-awaited measure to repeal the AMT. In the Senate, the picture is more muddled amid rancorous debates in the Finance Committee, where AMT legislation presents the biggest challenge yet to the pay-as-you-go (PAYGO) principles adopted by Congress early this year.

When the 110th Congress opened in January, Rangel made clear that repealing the AMT was his top priority — he initially aimed to release his proposal in May but has yet to do so. Indeed, the almost universal sentiment in Congress is that the AMT should be indexed, overhauled or repealed at some point, as Rangel would like to do. But delays and lack of consensus on what an overhaul would consist of or how to offset the huge costs of repeal have stalled action.

The AMT was originally intended to ensure that the 155 wealthiest Americans — who had taken advantage of deductions and others means to avoid paying income tax entirely — paid their fair share in taxes. The AMT taxed only 20,000 taxpayers when it was adopted in 1969. The number of Americans paying it has skyrocketed in the years since. Because it is not indexed for inflation and its scope was enlarged considerably by the cuts in individual

income tax rates from 2001 to 2006, three million taxpayers a year now pay the AMT.

The Tax Policy Center estimates that the tax threatens to encompass an additional 19.9 million Americans in 2008, raising their taxes by an average of $3,264 annually. If the Bush tax cuts expire as scheduled at the end of 2010, 39 million taxpayers (roughly 35 percent) will be hit by the AMT in 2017. If the tax cuts are extended, the number jumps to 53 million taxpayers (close to 50 percent).

Efforts to keep that from happening and to limit the tax to the three million who paid it in 2006 via a one-year patch would cost an estimated $55 billion in lost revenue. Operating under restored PAYGO rules, which require new mandatory spending or tax cuts to be financed by offsetting spending cuts or tax increases, Congress is at pains to find a way to pay for this cost, much less the vastly greater cost of repealing the AMT entirely. Repeal of the AMT would cost roughly $840 billion over the next ten years in the unlikely event that the Bush tax cuts are allowed to expire; the cost is closer to $1.6 trillion if they are not. Neither of these options for AMT is cheap. On Oct. 17, according to *CongressDaily*, Senate Finance Committee Chair Max Baucus (D-MT) and other members of the panel discussed the idea of waiving the PAYGO rules for AMT, enraging deficit hawk Sen. Kent Conrad ☼ (D-ND), who called the discussion "unbelievably irresponsible."

Offsets sufficient to pay even for the relatively modest patch are not in great supply, and almost all of them can be tarred as a tax hike of some sort, complicating PAYGO compliance efforts. $66 billion in offsets already approved this year by the House Ways and Means and the Senate Finance committees for other bills are off the table. Still available and under discussion are closing the capital gains loophole on "carried interest" earned by private equity managers, limiting executive compensation deferral, taxing stock options based on book value, and toughening rules on tax shelters. Of these, only the carried interest option could come anywhere near paying for a one-year patch.

Action in Congress on the AMT issue has stalled this year over how, and whether, to achieve PAYGO compliance and the complexities of the Rangel bill. That bill, still not released to the public, is rumored to consist of a permanent, revenue-neutral repeal of the AMT, comprising an increase in the top ordinary individual tax rate, a corporate rate cut, elimination of major corporate deductions, and an expansion of the Earned Income Tax Credit, child tax credit, and other tax breaks for 90 million people. But during the week of Oct. 15, two important developments occurred which could break the stalemate.

First, Rangel conceded that time had run out this year for a vote on his broad tax reform package and that he would propose a one-year "patch" of the AMT. And Senate Finance Committee Ranking Member Charles Grassley (R-IA) refined his long-held view that "repeal of the AMT should not be offset because it is ... unfair to expect taxpayers to pay a tax they were never intended to pay, and it is even more unfair to expect them to continue paying for that tax once we get rid of it." He reportedly said he "would welcome a compromise that indexed the AMT threshold to protect the vast majority of taxpayers, while raising taxes on the wealthy to defray the budgetary impact," in compliance with PAYGO

requirements.

But the issue of whether the AMT bill will be offset is not settled. The Senate Finance Committee's heated discussion last week about offsets did not end in consensus. What's more, Baucus may have support from most committee members to waive PAYGO requirements for the $55 billion AMT patch in exchange for offsetting a similarly-sized two-year extension of popular tax credits that expire in 2007. The Committee is scheduled to meet again on Oct. 23. Congress is under pressure to act because the Internal Revenue Service begins printing tax forms in November and says it would need at least six weeks to reprogram its computers to account for any changes in law.

Labor-HHS Appropriations to Test Bush Veto Threats

Congress is nearly ready to send President Bush the first appropriations bill of the FY 2008 budget cycle — almost one full month overdue. The Senate is scheduled to vote today, Oct. 23, on the $150 billion Labor-HHS-Education appropriations bill. Once that version is conferenced with the House version (which passed in July 276-140), it will be sent to the president, where it may face a veto.

The Labor-HHS bill funds a wide array of human needs programs, from Head Start and the National Institutes of Health to the Occupational Safety and Health and Administration and college loan programs. In his budget, President Bush requested drastic cuts to many of these programs. For more details on those proposed cuts, see the Coalition on Human Needs' analysis.

President Bush has threatened to veto this appropriations bill and eight others, mostly over concerns they appropriate more funding than he requested. The president requested a total of $933 billion for FY 08 discretionary spending, while Congress proposed $956 billion. The $23 billion difference represents less than one percent of the $2.9 trillion total congressional proposal, and pales in comparison to the recent $196 billion supplemental funding request for the wars in Iraq and Afghanistan.

Of the multitude of amendments offered during debate on the bill, two unrelated budget process measures were offered. Sen. Wayne Allard (R-CO) offered an amendment to institute mandatory, automatic cuts to programs covered under the bill should they receive an "ineffective" rating by the Office of Management and Budget's Program Assessment Rating Tool (PART). This amendment was a dangerous proposal that would have transfered appropriating power to the executive branch and would have wreaked havoc with implementation of program services as budgets could be cut randomly throughout the year outside of the regular appropriations process. Fortunately, the amendment was soundly defeated 68-21.

In addition, Sen. John Cornyn ☼ (R-TX) attempted to offer his version of a perennially bad idea — sunset commissions — to the Labor-HHS spending bill. Sunset commissions were

particularly in vogue in 2006 as many conservatives in Congress attempted to institute policies that would have given the executive branch power to establish unelected commissions that could have created proposals to restructure or eliminate government programs and agencies and then fast-tracked those proposals through Congress. Cornyn's proposal was withdrawn when a point of order was raised against it, but he vowed to continue to raise the issue.

Democratic leaders in the House and Senate have announced they will send this bill to the president on the heels of a close veto override vote on a bill reauthorizing the State Children's Health Insurance Program. It is likely this bill will test whether the president will make good on his veto threat and how much support is present in Congress for diverging from Bush on appropriations bills generally.

The Labor-HHS appropriations bill will probably be the most difficult spending bill to pass this year. It is the second-largest appropriations bill, and the congressional versions have the biggest funding difference compared to the president's requests, with the Senate version being about $11 billion more. If Congress can pass this bill over the president's intended veto, it can probably pass other bills over the president's objections. This would pressure the president to negotiate with Congress over the remaining appropriations bills he has also threatened to veto.

Alternatively, a stalemate over Labor-HHS means no end in sight for the FY 08 budget fight. Congress could give in to the president's demands for budget cuts, or it may attempt to package popular appropriations bills with unpopular ones. Either way, smaller amounts of funding for social programs are more likely if the Labor-HHS appropriations bill is not enacted the first time around.

Like the children's health insurance debate, many of the funding proposals threatened with a presidential veto enjoy significant public support. A poll by the American Federation of State, County, and Municipal Employees and US Action found about two-thirds of Americans favor the congressional funding proposals for Head Start and cancer research included in the bill.

No Conviction, Mistrial for Holy Land Foundation

On Oct. 22, a federal jury in Texas deadlocked on all charges against the Holy Land Foundation (HLF) and most of the charges against five of its leaders. All were accused of supporting terrorism. The former board chair and endowment director, Mohammed el-Mezain, was acquitted of 31 of 32 charges against him, with the jury deadlocking on the remaining charge. The government has indicated that it will retry the case. It will face the same problems it faced in this trial: secret evidence that unraveled when subjected to scrutiny and the fact that none of the charities HLF was accused of funding are on government lists of terrorist organizations.

One juror later told the Associated Press that the jury was split on charges against the chief executive, Shukri Abu Baker and former chairman Ghassan Elashi, who were seen as the leaders, but most found little evidence against el-Mezain, former fundraiser Mufid Abdulqader or HLF's New Jersey representative, Abdulrahman Odeh. The juror, 33-year-old William Neal of Dallas, said the case "was strung together with macaroni noodles. There was so little evidence."

The unusual case had an unusual ending. The jury reported that it had reached a verdict on Thursday, Oct. 18, but Judge Joe A. Fish, who presided over the trial, was out of town. At a hearing the next day, a substitute judge sealed the verdict until Monday morning. When the forewoman read the verdict Monday morning, she said the Holy Land Foundation and Abdulqader were found not guilty on all counts, and el-Mezain and Odeh were acquitted on most counts.

But when Fish polled the jury, three members said they did not agree with those verdicts. As a result, the judge sent them back for further deliberations. After almost an hour, 11 of 12 jurors said they could not reach a unanimous decision, and Fish declared a mistrial on the deadlocked counts. The jury forewoman told the Associated Press, "When we voted, there was no issue in the vote. No one spoke up any different. I really don't understand where it is coming from."

The defendants were charged with money laundering, material support of terrorism and conspiracy. The jury had a complicated job, with the six defendants facing up to 36 counts each, requiring 197 separate decisions on guilt or innocence. The jury instructions and verdict form were so large Fish said, "It looks like the phone book for a small city." They deliberated for 19 days, what appears to be a Texas record.

The government case against HLF has changed since December 2001, when the group was designated as a supporter of terrorism, shut down and had its assets frozen. At that time, President Bush, accompanied by Attorney General John Ashcroft and Treasury Secretary Paul O'Neill, issued a statement that read, "Hamas has obtained much of the money that it pays for murder abroad right here in the United States, money originally raised by the Holy Land Foundation." However, by the time of the trial, prosecutors no longer claimed HLF provided support to Hamas or paid for violent acts. Instead, prosecutors admitted all the money went for charitable aid but said the local charities that delivered the aid to Palestinians were controlled by Hamas, which got a public relations benefit as a result.

If HLF had been convicted for working with local charities that are not listed as terrorist organizations, no U.S. charity could protect itself from prosecution by using government watch lists for guidance about who to work with. In addition, ensuring that all funds are spent only on aid would provide no legal protection. Legal expert David Cole of Georgetown University Law School told the *New York Times*, "It suggests the government is really pushing beyond where the law justifies them going."

Other reactions to the case include a statement from Muslim Advocates, the charitable arm

of the National Association of Muslim Lawyers, which said, "American Muslims also believe that our justice system works best when laws are applied fairly. The Justice Department's tactics in this trial, however, did not meet this standard. In an Aug. 15, 2007 letter to then-Attorney General Alberto Gonzales, Muslim Advocates and the National Association of Criminal Defense Lawyers objected to the Department's public release of a list of over 300 American Muslim individuals and organizations labeled as 'unindicted co-conspirators' but who had neither been charged with a crime nor legal recourse to challenge the allegation. This disclosure violated the Department's own policies, as well as principles of fair play and equal treatment. We are still awaiting a response to that letter. If the federal government decides to retry this case, Muslim Advocates urges the Justice Department and its prosecutors to abide by constitutional principles of fairness, due process, and equal treatment under the law."

Whistleblower Case Reveals Possible Political Campaign Intervention

Three former Oral Roberts University (ORU) professors filed a lawsuit on Oct. 2 in Tulsa, OK, against the university, alleging they were wrongfully fired after they reported the private school's involvement in a local political race. They claim that ORU President Richard Roberts directed former government professor Tim Brooker to use his students and resources to support the 2005 mayoral campaign of Tulsa County Commissioner Randi Miller. This use of university resources would violate the institution's tax-exempt status. Roberts has denied wrongdoing but was granted a leave of absence on Oct.17. The Internal Revenue Service (IRS) has notified ORU that it is conducting an investigation into the matter.

Former professors John Swails, Tim Brooker and Paulita Brooker's lawsuit outlines a series of events, beginning with Tim Brooker's claim that in December 2005, Roberts instructed him to support the campaign of Miller, a county commissioner running for mayor. According to the complaint, "Roberts instructed T Brooker that it was time to utilize the talent and resources of T Brooker and his students in political races. ... T Brooker resisted, explaining to Roberts the implicit improprieties and the clear boundaries required by state and federal law, including IRC section 501(c)(3); as well as the great danger of 'turning neighbors into enemies'." During a later meeting with Roberts, Brooker again warned against getting involved in the campaign. However, the suit claims that Roberts insisted, and eventually the school began to promote Miller by requiring students in a government class to work on the campaign. Brooker was told that his students "should be glad to work for Randi Miller for free."

In May 2006, the IRS notified the university about an investigation of its campaign activities. The *Tulsa World* reported that "a spokesman for ORU, confirmed that ORU was first contacted by the IRS in a letter May 3, 2006." The letter stated that the IRS was investigating "whether we participated in political programs inappropriately for a 501(c)(3)

organization." Roberts allegedly told Brooker to accept full responsibility for the political involvement and was told to cover up Roberts' instructions to become active in the campaign. The university provost signed an affidavit, which Brooker says he wrote and that the university intentionally changed in order to clear the president. As a cover-up, the university took certain steps to punish Brooker publicly. ORU refused to pay an $18,000 salary for teaching summer school, and according to the lawsuit, "[Brooker] endured retaliatory and punitive conduct, and was subject to public humiliation generated by Defendants on local and national levels."

The professors also said their dismissals came after they gave the board of regents a copy of a report documenting moral and ethical violations of Roberts and his family. This document, titled "Scandal Vulnerability Assessment," was filed in the court case on Oct.12. According to the lawsuit, a student working for the Miller campaign came across this damaging information written by Stephanie Cantese, Roberts' sister-in-law. "This compendium itemized numerous and substantial acts of misconduct and improprieties by the Defendants, ORU, and Roberts." The material was handed over to Brooker, and he passed it on to his supervisor Swails, another plaintiff in the case. Afterward, Brooker, Swails and Paulita Brooker were fired.

Jack Siegel of the blog Charity Governance "would not be surprised if IRS auditors descend like biblical locusts on ORU and its books and records. This case raises all the classic issues that come with the intermediate sanctions — allegations of lavish travel, personal use of exempt organization assets, large expenditures on clothing, and unreimbursed home decorating expenses."

Nonprofits Briefed on Myths and Facts of the Financial War on Terror

Nonprofits concerned with the impact of counterterrorism programs on charities were briefed on the larger context of the "financial war on terror" by Professor Ibrahim Warde, author of the new book *The Price of Fear*, at an Oct. 19 luncheon in Washington, DC. Warde argued that the series of financial crackdowns initiated by the U.S. government since the attacks of Sept. 11, 2001, have had virtually no impact on terrorism because they are based on a fundamental misconception of how terrorism works. He proposed reforms that would avoid collateral damage, including the negative impact on charitable programs.

Warde opened his presentation with a history of how U.S. financial sanctions programs were expanded by President Bush after 9/11 to first target Al Qaeda, then Hamas and Hezbollah, followed by remittance networks (hawalas) and mainstream Islamic charities in the U.S. These sanctions were often used indiscriminately, causing collateral damage with "political, social and economic consequences that have nothing to do with terrorism, but which may endanger American's national interests and the security of the world in the long term."

As an example, Warde cited the November 2001 closure of Al-Barakaat, an international remittance and telecommunications company, which was accused of sending $15-25 million a year to Al Qaeda. The closure was announced with great fanfare by President Bush, but the accusations were later disproved, and the company was exonerated. Warde also said closure of charities has been counterproductive, as it has been perceived as attacking Islam or picking on the poor and defenseless; Warde said this kind of collateral damage only increases terrorist support networks.

Addressing the role of money in spreading terrorism, Warde said U.S. policy is driven by the false assumption that "money is the lifeblood of terror." He said, "If money is the oxygen of terror, and if the financial war on terror is such a success, how could we explain that since 9/11, international terrorist attacks have increased substantially (+56% in 2003, +300% in 2004, +400% in 2005, +40% in 2006), and that the main targets of the financial war (Al-Qaeda, Hamas and Hezbollah) have proven so resilient?"

Warde said the actual cost of carrying out terrorist attacks is low, citing Scotland Yard estimates that the 2005 London subway bombings cost less than $1,000. The assumption that there is a finite stash of terrorist money is unfounded, he said, noting the myth that Osama bin Laden has $300 million has been proven to be false (bin Laden had been disinherited by his family and his assets in Sudan were seized by the government prior to 9/11). Instead, "money will appear whenever there is support for terror," making the battle for hearts and minds the right priority.

The political aspects of the economic sanctions system are also criticized by Warde, who says sanctions appear to be a costless way of impacting other governments without military intervention, but their use has escalated to the point of diminishing returns. Often, action is the result of frustration. However, the collateral damage is rarely considered, where average people suffer but rulers are strengthened. The bureaucratic factor is another overlooked aspect of the financial war on terror. Use of the flawed "crime for profit" template in the ideologically-driven terrorist context has built anti-money laundering bureaucracies and led to cultural and linguistic dysfunctions when strategies applied to Latin American drug lords are applied to Islamic terrorists. Instead, Warde said the sanctions system should differentiate between money laundering (dirty money being "cleaned") and money soiling (clean money given to terrorists).

Warde told the group reforms are possible if false assumptions can be addressed and there is a better understanding of different financial cultures. He proposed more emphasis on winning hearts and minds and better integration of terrorist financing policies with overall foreign policy goals. Quoting the 9/11 Commission report, Warde said, "There was almost no intersection between those who understood financial issues and those who understood terrorism."

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In This Issue

CPSC Reform Efforts Progress as Agency Woes Continue

Congress is working toward passage of legislation that would expand the resources and regulatory authority of the Consumer Product Safety Commission (CPSC). The bill would also address the continuing problem of lead-contaminated children's products by effectively banning the heavy metal's presence in toys and other goods. Senior administration officials are working to derail the legislation.

On Oct. 30, the Senate Commerce Committee approved by voice vote the CPSC Reform Act of 2007 (S. 2045). Sens. Mark Pryor (D-AR) and Daniel K. Inouye (D-HI), chairman of the committee, are the lead sponsors of the bill.

Recent high-profile regulatory failures have highlighted the need for expansion of CPSC's

authority and resources. CPSC has been the subject of media and congressional scrutiny as recalls involving lead-contaminated children's products have spiked in 2007. As of Nov. 5, CPSC has announced 78 recalls accounting for more than 15 million products. In 2006, CPSC announced only 17 recalls accounting for less than three million products.

One recall announced on Oct. 31 involved a Halloween party favor called Ugly Teeth. The product — fake teeth painted black, white, orange and brown — contains "excessive levels of lead," according to a CPSC press release.

The bill would dramatically expand the budget and staffing of CPSC. The bill would, by 2014, double the agency's budget and increase staffing levels to 500, from current levels of approximately 420. Even with these efforts, staffing levels would still fall short of the peak employment — 978 full-time employees — of the 1970s.

The bill would also expand the agency's regulatory authority by officially limiting to trace amounts the presence of lead in children's products and enabling the agency to levy stiffer civil penalties against violators of federal regulations. To ensure greater safety, the bill would require children's products to be certified by "a nongovernmental independent third party qualified to perform such tests."

The bill also includes a provision which would prohibit CPSC from issuing regulations that would preempt state or local regulations. Lawmakers included this provision in response to a recent trend in federal rulemaking in which federal regulators prohibit state or local regulators from developing rules stricter than those issued by the federal government. The federal preemption efforts often denied people the right to sue companies for damages if they were injured by faulty products. One such rule involving mattress flammability was issued by CPSC. The CPSC Reform Act would nullify the preemption provision in that rule.

Progress on the bill came despite opposition from the White House and a CPSC commissioner. CPSC's acting chair, Nancy Nord, wrote to Pryor and Inouye outlining her concerns with the legislation. One of Nord's primary concerns is that the legislation would impose too many new mandates on CPSC. CPSC's other commissioner, Thomas Moore, supports the bill.

Alan Hubbard, a leading economic advisor to President Bush, also voiced opposition to the bill on behalf of the White House. The White House has denied coordinating its lobbying efforts with Nord.

Nord's opposition to the bill caused some leading Democrats to call for her resignation. House Speaker Nancy Pelosi (D-CA), along with members of both the House and the Senate, has publicly asked Bush to dismiss Nord. Public interest organizations such as the Campaign for America's Future and Public Citizen have also called for Nord's resignation.

Strikingly, Nord's ouster would carry unintended consequences. CPSC has been working with only two of its three commissioners since July 2006. The commission is currently

conducting official business under a temporary extension of its voting quorum. If Nord were to resign, CPSC would have only one commissioner and would be unable to promulgate regulations or force mandatory recalls.

Nord and CPSC suffered another black eye on Nov. 2 when a *Washington Post* investigation revealed Nord and former Chair Hal Stratton have taken nearly 30 trips financed by some industries that CPSC is responsible for regulating. According to the investigation, "The airfares, hotels and meals totaled nearly $60,000, and the destinations included China, Spain, San Francisco, New Orleans and a golf resort on Hilton Head Island, S.C."

The trips may be a violation of federal regulations of government employee travel. Nord has requested that the Office of Government Ethics investigate the matter.

The *Washington Post* published a follow-up story on Nov. 6 indicating that nine of the industry-financed trips were paid for by companies that had business before CPSC. Moreover, the newspaper found that on at least one trip paid for by a regulated industry, the agency's ethics officer traveled with the commission chair as a guest. On another trip, the written approval for the trip came after the trip had been taken.

Senate Majority Leader Harry Reid (D-NV) has indicated he will attempt to find room for floor consideration of the CPSC Reform Act this year, according to the *National Journal* (subscription). It is not clear how the recent revelations about industry-financed travel for CPSC decision makers might influence the legislation.

According to an Associated Press story, President Bush's Interagency Working Group on Import Safety is expected to release a report Nov. 6 that will call for enhanced CPSC recall powers for defective products and a certification program for companies with good product safety track records among its recommendations. It's unclear what effect the report might have on the CPSC legislation.

House members have introduced a companion bill, the Consumer Product Safety Modernization Act of 2007 (H.R. 4040). A subcommittee of the House Energy and Commerce Committee is scheduled to consider the bill Nov. 6. Like the Senate bill, the House version has bipartisan support and is expected to pass the chamber.

Vice President Reemerging in Regulatory Review Meetings

Representatives from the office of Vice President Richard Cheney have been involved in three current administration rulemakings. Their presence is indicative of a recent trend in which Cheney has involved his office in high-profile regulations.

The White House Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) reviews all the significant proposed and final regulatory actions of non-independent federal agencies. During the review process, OIRA often conducts meetings to

solicit the opinions of outside stakeholders. A representative from the issuing agency must also be invited to the meetings.

Throughout the Bush administration, OIRA has frequently conducted such meetings and generally met with industry lobbyists and members of the regulated communities. OIRA also often engages representatives from other White House offices such as the Council on Economic Advisors or the Office of Science and Technology Policy to assist in the review process. However, until recently, representatives from Vice President Cheney's office have rarely been included.

On Oct. 25, OMB held a meeting with members of the Climate Policy Group, a coalition of public power utilities. A representative from the Office of the Vice President (OVP), as well as officials from the U.S. Environmental Protection Agency (EPA) and Departments of Agriculture, Energy and Transportation, attended. The coalition submitted material regarding greenhouse gas reduction policy. Although the nature of the meeting is not disclosed on the OMB website, attendees likely discussed the rulemaking EPA is preparing to initiate to reduce greenhouse gas emissions.

A representative from OVP attended four meetings regarding Department of Homeland Security (DHS) regulations of chemical plants. Those meetings were held between June and September and included representatives from the National Propane Gas Association, the American Trucking Association, and other industry groups. The consultation between the government officials and the industry groups helped shape the final regulation which the agency announced Nov. 2, BNA news service reports (subscription).

The regulation sets thresholds for quantities of certain chemicals which, if possessed by a chemical plant, would require the plant to submit information in order to allow DHS to assess the risk of a potential terrorist attack on the plant. The final regulation lists fewer chemicals than DHS's initial proposal announced in April. That proposal did not include thresholds but would have required reporting if plants held listed chemicals in "any amount."

In June, a representative from OVP attended a meeting on EPA's proposal to revise the standard for ozone. Representatives from the Chemical Industry Institute and the Auto Alliance, a coalition of major automakers including Ford, GM and Toyota, also attended. Later that month, EPA announced its proposal to tighten the standard slightly, but critics assailed the proposal for being too lenient. Industry groups, including those lobbying the White House, wanted EPA to maintain the current standard. EPA's board of independent scientific advisors recommended a standard tighter than EPA's ultimate proposal.

The influence of OVP in these three recent rulemakings marks a recent trend in the Bush administration. According to information posted on the OMB website, OIRA has held more than 540 regulatory review meetings since February 2002. A representative from OVP has been present at only 11, about two percent. However, eight of those 11 meetings have

occurred since February, including the four meetings on the DHS chemical security rule.

Based on the meetings a representative from OVP has attended, Cheney is focusing his attention on environmental and homeland security rules. The 11 meetings pertained to eight separate rulemakings, four of which were for EPA rules, and three of which were for DHS rules. The rulemakings are also those expected to have a significant impact on the economy, as the regulations on greenhouse gas emissions, chemical security and ozone likely will.

The recent surge in involvement of representatives from OVP harkens back to the presidencies of George H.W. Bush and Ronald Reagan, both of whom formed regulatory review panels headed by their respective vice presidents, with the intent of undermining public health and safety regulations. Reagan formed the Task Force on Regulatory Relief, headed by then-Vice President Bush, and Bush formed the Council on Competitiveness, headed by Vice President Dan Quayle.

Those panels operated similarly to the current groups of OMB, OVP and agency officials that meet with industry representatives. However, the Quayle Council became more involved in review of individual rules. For example, in 1991, the Quayle Council responded to industry requests by manipulating EPA's program for granting permits under the Clean Air Act, easing requirements for polluters. At the time, Rep. Henry Waxman ☼ (D-CA) said, "There is unmistakable evidence that White House officials, spearheaded by Vice President Dan Quayle ... are working with industry to undermine implementations of the new clean air law."

Today, critics levy similar charges that the White House weakens regulations at the behest of industry. Furthermore, both panels operated behind closed doors, disclosing little information to the public, much like current regulatory review meetings.

Under President Clinton, the role of the Quayle Council was quickly quashed. On the first day of office, Clinton terminated the Council and indicated that all reviews would be conducted by OIRA, not the vice president's office. A few months after that, Clinton issued Executive Order 12866, which set out a new process for the White House review of regulations. While E.O. 12866 still named the vice president as the arbitrator between OIRA and agency conflicts, it was clear that the reviews — and any meetings related to regulations under review with non-governmental entities — would be carried out by senior OIRA officials.

President George W. Bush ended the formal involvement of the vice president in the regulatory review process. In February 2002, Bush amended E.O. 12866 to remove most mentions of the vice president and further reduced the office's role in federal rulemaking. However, the pendulum now seems to be swinging back toward greater involvement of the vice president.

Congress Told of FDA's Lax Inspection of Foreign Drug Makers -- Again

The Government Accountability Office (GAO) recently told Congress that the U.S. Food and Drug Administration (FDA) inspects an estimated seven percent of foreign drug manufacturing facilities. GAO can only provide an estimate because FDA doesn't know how many foreign facilities are subject to inspection due to inaccurate and uncoordinated databases that have vastly different estimates of the number of drug makers subject to the foreign drug inspection program. At this inspection rate, it would take FDA more than 13 years to inspect all existing facilities one time, assuming no additional facilities were added to the list.

FDA has the responsibility to safeguard the supply and effectiveness of drugs sold in the U.S. and requires both domestic and foreign drug makers to register with the agency. FDA is required to inspect domestic manufacturers every two years, but there is no requirement for inspecting foreign manufacturers. According to GAO, FDA inspections varied from 190 to 295 foreign establishments annually between Fiscal Years 2002 and 2007.

GAO's health care director, Marcia Crosse, testified Nov. 1 at the House Committee on Energy and Commerce's Subcommittee on Oversight and Investigations hearing on the FDA's foreign drug inspection program. According to her testimony, GAO told Congress in 1998 that FDA's foreign drug inspection program had serious flaws in the management of its inspection data and that "it lacked a comprehensive automated system for tracking this important information."

The databases FDA currently uses for the inspection program, Crosse reported, were not designed for this kind of data tracking. As a result, one database reports that about 3,000 drug manufacturers were registered to sell drugs in the U.S. in FY 2007, while another indicates that drugs from more than 6,800 foreign manufacturers were imported that year.

Furthermore, according to the testimony, the foreign inspection program faces a unique set of problems: "FDA does not have a dedicated staff to conduct foreign inspections and relies on those inspecting domestic establishments to volunteer." FDA inspectors do not arrive at the foreign facilities unannounced, and they have to rely on English-speaking employees at the facilities because FDA does not generally provide translators.

Other witnesses at the hearing described how the system of inspecting U.S. manufacturers and of approving drugs — those manufactured domestically — remains "the gold standard" to which other countries aspire; however, the number of drugs and drug ingredients imported is increasing rapidly while FDA's capacities decline. For example, in his written testimony, William K. Hubbard, a former FDA associate commissioner in the drug program, described this dismal picture:

- FDA's inspection rate for imported drugs (and drugs ingredients) when they arrive

at a U.S. port is around 1%, which means that the vast majority of imported drugs do not receive an FDA inspection upon entry into this country.
- The chances of an imported drug being sampled and tested at entry to this country is even lower; in fact, of the millions of drug shipments arriving from foreign countries last year, only 340 samples were taken for laboratory testing.
- Although there are approximately 3,000 foreign drug manufacturers registered with the FDA, only 341 were inspected last year. And even that number is misleading, as most of those inspections were so-called "preapproval inspections" for drugs about to be approved by FDA for marketing. The number of good manufacturing compliance inspections was perhaps two dozen or so.

Hubbard and other witnesses called for increased staff, more resources to fix FDA's poor information systems, and improved inspection approaches.

Andrew C. von Eschenbach, Commissioner of FDA, acknowledged the challenges the agency faces in the growing global market for drugs. Specifically, he reported that upgrading FDA's information systems is one of his top priorities and outlined the many efforts underway at FDA to improve those systems.

In addition, he outlined several cooperative arrangements with international organizations to share information and improve inspection systems globally. As other federal officials have done in recent congressional testimony, von Eschenbach referred to President Bush's Interagency Working Group on Import Safety (IWG) as the entity charged with developing a system to ensure the safety of imported goods. As OMB Watch recently reported, these officials have used the work of the IWG to deflect congressional criticism of federal agencies' poor performance on import safety issues and to delay action until the release of the IWG report expected later in November.

GAO's Crosse summed up the urgency of the problem, however, in her concluding observations on the similarities between the current situation and GAO's description nine years ago when she wrote, "[U]ntil FDA responds to systemic weaknesses in the management of this important program, it cannot provide the needed assurance that the drug supply reaching our citizens is appropriately scrutinized, and safe."

Senate Judiciary Committee Skeptical of Telecom Immunity

As the Senate considers legislation to address the president's surveillance powers, the Senate Judiciary Committee registered concern regarding the recent compromise brokered in the Senate Intelligence Committee to grant the telecommunications industry immunity for alleged illegal assistance with the National Security Agency's (NSA) warrantless surveillance of American citizens. Sens. Patrick Leahy (D-VT) and Arlen Specter (R-PA), respectively, chairman and ranking member of the Senate Judiciary Committee, stated that immunity did not appear to be necessary, and that those alleging harm should have their

day in court.

As reported in the previous edition of the *Watcher*, the Senate Intelligence Committee passed the FISA Amendments Act of 2007 (S. 2248) by a vote of 13-2. The bill included provisions that would provide immunity for any telecommunications company that, in response to a request authorized by the president, assisted in counterterrorism operations between Sept. 11, 2001, and Jan. 17, 2007, or if the attorney general certifies the company was not involved in the activities addressed by a particular lawsuit.

To date, approximately 40 lawsuits have been filed involving telecommunications companies allegedly assisting the NSA's warrantless wiretapping program. All of these suits would likely be thrown out if the Senate bill becomes law.

Upset with the blind agreement to grant blanket immunity, OMB Watch and the civil liberties community called for the Senate Judiciary Committee to hold public hearings on the issue before moving forward in considering the legislation. In heeding such advice, the committee held a hearing receiving testimony from, among others, Kenneth Wainstein, Assistant Attorney General at the Department of Justice.

With most of the hearing centering around debates over immunity, Leahy opposed the S. 2248 legislation because of its inclusion of immunity provisions. "The Congress should be careful not to provide an incentive for future unlawful corporate activity by giving the impression that if corporations violate the law and disregard the rights of Americans, they'll be given an after-the-fact free pass."

Specter also registered concern with the immunity provisions and argued for granting indemnity to the telecommunications companies involved in assisting the government's warrantless surveillance activity. This would permit the lawsuits to proceed but would hold the government liable for payment of damages. "I doubt very much that the cases will be proved," stated Specter, "but if plaintiffs can prove them, I think they ought to have their day in court."

Wainstein argued that the immunity provisions were necessary because the telecommunications companies were "operating on good faith, on assurances from the government. If there is fault here, it's the fault in the legal analysis and the decisions made by the government." Moreover, Wainstein said, such lawsuits would interfere with the government's ability to cooperate with telecommunications companies in the future by instilling in companies a clear incentive to be risk-averse.

Sen. John D. Rockefeller (D-WV), Chair of the Senate Intelligence Committee, argued similar points in a *Washington Post* column defending his committee's inclusion of immunity in S. 2248. "Companies are being sued, which is unfair and unwise. As the operational details of the program remain highly classified, the companies are prevented from defending themselves in court. And if we require them to face a mountain of lawsuits,

we risk losing their support in the future."

Leahy dismissed such arguments for immunity at the Judiciary Committee hearing, explaining that immunity would deprive those allegedly harmed from having their day in court. Leahy fully expects the government will invoke the state secrets privilege for any lawsuits brought against it and thereby get the cases dismissed. This would leave the lawsuits against telecommunications companies as the only opportunity for having the matter heard by courts.

The Senate Judiciary Committee is expected to consider and vote on S. 2248 before the Thanksgiving recess.

California Moves Forward with Greenhouse Gas Reporting

On Oct. 19, the California Air Resources Board (CARB) released a draft rule that would create an extensive mandatory greenhouse gas reporting system and held a public workshop to review the proposal on Oct. 31. The Global Warming Solutions Act of 2006 (A.B. 32) requires CARB to adopt regulations creating a greenhouse gas registry by Jan. 1, 2008, putting in place what appears to be the country's most comprehensive and sophisticated greenhouse gas registry.

The proposed regulations were developed with input from public and private stakeholders, state agencies and the general public. Modeled after the California Climate Action Registry (CCAR), a voluntary greenhouse gas reporting program started in 2001, the regulations detail which industrial sectors will report, what the reporting and verification thresholds and requirements will be, and how calculations will be made. Approximately 800 facilities will be required to report greenhouse gas (GHG) emissions, which CARB estimates will represent 94 percent of California's total carbon dioxide production from stationary sources.

Similar to other reporting registries, such as the Toxics Release Inventory, the GHG reporting will be annual (first reporting year is 2008) by facility with requirements to identify the parent company. Companies will be required to report carbon dioxide, nitrous oxide and methane emissions produced from on-site stationary source combustion and some fugitive emissions. The system will also require certain industrial sectors to report process emissions. Carbon dioxide emissions from biomass-derived fuels will be separately identified. Some industries have more specific requirements, such as mandatory hexafluoride and hydrofluorocarbons reporting for the electric power sector.

The following industries will be subject to the regulations:

- Electric generating facilities
- Electricity retail providers
- Power marketers

- Oil refineries
- Hydrogen plants
- Cement plants
- Cogeneration facilities
- Industrial sources that emit over 25,000 metric tons per year of carbon dioxide from stationary source combustion (Food processing, oil and gas production and mineral processing)

Hospitals and primary and secondary schools would be exempt.

The regulations seek to create a program with substantial oversight and assistance. The program will utilize online reporting with user-friendly interfaces, potentially compatible with other criteria pollutant reporting such as the Climate Registry, a non-governmental organization coordinating a common GHG registry between states, tribes and provinces in North America. CARB's regulation establishes staggered reporting deadlines to ease the administrative burden and enable staff to better assist reporting facilities with any questions or problems. Facilities will also have to get third-party verification that reports are accurate and comply with international standards on an annual or triennial basis.

Though the proposed rule does not specifically direct the creation of an online searchable database, California state law requires all emissions reporting to be publicly accessible. Therefore, it is likely that the GHG reporting inventory will be made publicly available in an online searchable database.

At least four other states (CT, ME, NJ, WI) have, albeit more limited, mandatory GHG reporting requirements. Another 38 states have committed to create similar programs with the voluntary Climate Registry. California's program appears to be the most ambitious effort to track the exact sources of GHG emissions.

After the public comment period, final review of the proposed regulations will begin on Dec. 6. Federal legislation creating a national greenhouse gas inventory is pending.

National Research Council Recommends Greater Openness

The National Research Council of the National Academies issued a report in October calling for policies to improve government openness with regard to scientific information. The report stressed that certain government policies developed after 9/11 overly restrict access to scientific information and thereby harm scientific progress and national security.

The fundamental issue addressed by the National Research Council in *Science and Security in a Post 9/11 World* is how to "bridge the legitimate concerns of the national security community with the need to maintain open and vibrant research universities." The report discusses a number of post-9/11 policies that have restricted access to potentially sensitive information and examines the rationale behind such efforts. The report notes, however, that

"these concerns do not justify the use of extreme measures that could serve to significantly disrupt the openness that has characterized the U.S. scientific and technology enterprises."

One particularly important policy examined in the report is the creation of over 100 new Sensitive But Unclassified (SBU) information categories. Most of the new SBU categories have been created by individual federal agencies without broader consideration, planning or approval from Congress. The explosion in these SBU categories, which are used to restrict access to government information, has resulted in the inability to adequately share information both within the federal government and with state and local governments. This problem of information sharing carries over into scientific research and data.

Stressing that the "success of U.S. science and engineering has been built on a system of information sharing and open communication," the report recommended comprehensive reform of the SBU information categories. "Research administrators ... described the difficulty of anticipating and implementing the requirements for SBU information and recommended that SBU should be largely (if not fully) eliminated."

The National Research Council also cited a survey by the Association of American Universities and Council on Government Relations for examples of interference by government in scientific research. The survey of 20 institutions from 2003 to 2004 found 138 attempts by the government to restrict publication or to prevent foreign-domestic participation in research.

The National Research Council conducted the report at the behest of the House Committee oo Science and Technology and the White House Office of Science and Technology Policy, the National Science Foundation and the National Institutes of Health.

Consumer Products Expose Children to Toxic Chemicals

If you are worried about products exposing you or your children to toxic chemicals, don't look to the federal government for much help. The government, to a large extent, does not require companies to test chemicals for possible health effects before using them in consumer products, nor does it require that such products be fully labeled with chemical ingredients. In the absence of such government activity, public interest groups and the media have stepped into the role of testing and informing the public.

The Environmental Working Group's (EWG) cosmetic safety database Skin Deep provides a comprehensive guide to toxicity in personal care products, with ingredient information and safety assessments for almost 24,000 products. On Nov. 1, EWG released the survey results of children's product use, which found that every day, the average child is exposed to 27 chemicals that have not been found safe for children. Even "gentle" and "non-irritating" products were part of the problem, with approximately 80 percent containing ingredients linked to allergies.

Children are much more vulnerable to toxins than adults, as children eat, drink and breathe proportionally more than adults. With still developing organs and immune systems, their bodies experience more harm and are less able to detoxify themselves. "Body burden" testing, or biomonitoring, the burgeoning practice of testing people for the presence of industrial chemicals, confirms children's much greater burden. The first family body burden testing in 2004 discovered that some children had up to seven times the chemical exposure as their parents, and a concurrent investigation by EWG found an average of 200 toxic chemicals in umbilical cord blood.

Body burden testing was showcased in CNN's Oct. 23 and 24 special report "Planet in Peril," a four-hour exploration into global environmental degradation. The show reported on the Hammonds, a family of four in Oakland, CA, who, after participating in the first family body burden tests, found that their children, ages five and one and a half, tested much higher for chemical exposure than their parents. The youngest child had levels of a certain class of flame retardants — polybrominated diphenyl ethers (PBDEs) — three times higher than the level that causes thyroid problems in rats. Correspondent Anderson Cooper also participated in a body burden assessment and tested positive for over 100 chemicals, including DDT, which was banned in the United States in the 1970s.

Unfortunately, even knowing the levels of toxic chemicals in our blood often leaves us to guess about possible health risks, as the government has done little research into the effects of such exposures. Dr. Leo Trasande at the Center for Children's Health and the Environment at the Mount Sinai Medical Center in New York City, who conducted Cooper's body burden test, noted that the lack of information is cause for alarm. "Rates of asthma, childhood cancers, birth defects and developmental disorders have exponentially increased, and it can't be explained by changes in the human genome," noted Trasande. "So what has changed? All the chemicals we're being exposed to."

Despite having the authority to demand greater testing and labeling, as well as resources for more comprehensive studies about the impacts of chemical exposures on health, the federal government has been slow to take action. Companion bills in the Senate (S. 2082) and House (H.R. 3643) introduced by Sen. Hillary Clinton ☼ (D-NY) and House Speaker Nancy Pelosi (D-CA), respectively, would increase funding for Centers for Disease Control and Prevention biomonitoring projects. Sen. John Kerry ☼ (D-MA) is also reportedly considering a bill to increase FDA regulation of personal care products and cosmetics.

Lobbying and Ethics Reforms Being Implemented

President Bush signed the Honest Leadership and Open Government Act of 2007 (HLOGA), S.1, on Sept. 14; revised House ethics rules took effect in March. The focus of these reforms has now shifted to implementation of the changes. Congressional officials have started developing the new forms and guidance that will be used by lobbyists to comply with the law. The Federal Election Commission (FEC) has proposed new regulations to implement campaign contribution bundling disclosure requirements. From lobbyists to

lawyers, nonprofits, and members of Congress themselves, all parties in Washington have begun preparing for these and other adjustments to their current practices.

Implementation of lobbying and ethics rules changes is an immense undertaking, impacting registration and reporting requirements under the Lobby Disclosure Act of 1995 (LDA). The LDA contains new rules for gifts to members of Congress, new congressional travel rules, new coalition lobbying disclosure requirements and much more. Lawyers who can explain the intricacies of the new law are in high demand. The House and Senate ethics committees have handled more than 1,000 questions from lobbyists and congressional staffers seeking guidance.

Even as the law and new rules are being put into practice, there are news reports about efforts of lobbyists and lawyers to find loopholes in the law. According to the *Washington Post*, "[A]bout 100 members of Congress and hundreds of Hill staffers attended two black-tie galas, many of them as guests of corporations and lobbyists that paid as much as $2,500 per ticket." Companies cannot buy the tickets, but reportedly purchase tickets and donate them back to the charity sponsors with the names of the recipients they want to attend the galas.

Travel rules

House members, senators, and their staff may accept travel funded by an entity that employs a lobbyist for a one-day event or fact-finding trip with pre-approval from the House or Senate ethics committees. *USA Today* reported how this exemption has allowed House members to continue to travel on lobbyists' dime. "In all, 22 House Democrats and three Republicans accepted nearly $40,000 in travel under that exemption, according to reports filed with the House ethics committee."

Members of Congress also now need to rethink paying for travel when campaigning for re-election. The FEC has proposed new regulations to implement air travel provisions which require presidential and Senate candidates to pay charter rates for campaign travel on noncommercial aircraft. House campaign travel on private aircraft is also prohibited except if the plane is owned by the lawmaker or his or her family.

Bundled Campaign Contributions

One of the most controversial parts of the new law requires registered lobbyists who bundle multiple campaign contributions totaling more than $15,000 to file reports every six months. This includes individual lobbyists, lobbying firms, corporations, unions, and associations. On Oct. 30, the FEC approved a Notice of Proposed Rulemaking (NPRM) on Reporting Contributions Bundled by Lobbyists, Registrants and the PACs of Lobbyists and Registrants. The FEC asked for feedback on various questions, including whether the requirements for disclosure should extend beyond registered lobbyists to include money bundled by other employees of a lobbying organization. The FEC also proposed to apply the bundling disclosure requirement to campaign money bundled by a political action

committee connected to a lobbying organization, "lobbyist/registrant PACs".

The FEC also left open the timing of the reporting requirement by offering two alternatives. One would require political committees to disclose quarterly any bundlers who gather more than $15,000, and the second would mandate semiannual reports that would aggregate bundling totals from the previous two quarters. Another issue raised by the proposed rulemaking deals with earmarked campaign contributions. Comments on the NPRM are due by Nov. 30.

Abramoff connections and the White House

Meanwhile, one of the high-profile cases that brought on the ethics and lobbying changes, that of convicted lobbyist Jack Abramoff, continues to be in the limelight. A recent letter sent to the White House from Rep. Henry Waxman (D-CA), chairman of the House Oversight and Government Reform Committee, requested more documents relating to Abramoff's activities. The White House material is being withheld because it involves internal White House discussions. More than 3,700 documents have already been supplied outlining that Abramoff and his associates had hundreds of lobbying contacts with White House officials, billed clients more than $24,000 for meals and drinks with those officials, and provided officials with tickets to sporting and entertainment events.

Senate Committee Hears GAO Testimony on New Report on Terrorist Watchlist

An October 2007 report from the Government Accountability Office (GAO) addresses lingering weaknesses in the Terrorist Screening Center (TSC) watchlist. GAO's report provides insight into what further actions can be taken by government agencies to enhance the accuracy of anti-terrorism screening efforts. The GAO report was released just as the Senate Homeland Security and Governmental Affairs Committee held a hearing on the reliability of the Terrorist Screening System.

During the hearing, Sen. Joe Lieberman ☼ (I-CT) commented on the "critical vulnerabilities and weaknesses in the watch list system" saying, "We have a new system in place. It is a great improvement over what existed before. But there are still occasions when that system lets in people who are on the watchlist and keeps out people who shouldn't be on the list." He said, "We need to know that there are clear standards for placing names on it, and of course, for taking them off it."

GAO's report and the testimony of GAO's Eileen Larence, Director of Homeland Security and Justice, helped provide clear insight into how names get on the watchlist. According to Larence, there is a relatively low bar set for watchlist nomination because intelligence agencies do not want to overlook potential threats. The GAO report states that the National Counterterrorism Center (NCTC) collects its information on domestic and international terrorists from several executive branch departments and agencies, such as the CIA,

Department of State, and the FBI. She said the NCTC uses available information and standards of reasonableness to ascertain if suspected individuals have links to terrorist activity. If the FBI's threat assessment determines that no nexus exists between the suspected individual and international terrorism, then the NCTC initiates the process for deleting the record from its database and watchlist.

While all of these improvements may enhance counter-terrorism efforts, the GAO report contends that an up-to-date strategy and a prioritized investment and implementation plan will result in the best use of terrorist related screening. GAO found that the Department of Homeland Security has not updated its strategy or plan for terrorist-related screening activities since 2004. Without such a plan, the federal government cannot fully support a comprehensive and coordinated approach toward terrorist-related screening. A comprehensive strategy or plan, with measurable goals, would make assessments much easier. In addition, GAO officials found that to date, no governance structure with clear lines of responsibility and authority monitors government-wide screening activities. Such monitoring efforts might include assessing vulnerabilities in screening processes, identifying new screening opportunities, and common corrective actions. Until oversight is provided, it seems that many concerns about the TSC watchlist may continue.

However, because all watchlist records are not shared with all screening agencies, the actual effectiveness of the TSC watchlist is compromised. GAO's report reveals that principal agencies that frequently deal with travelers do not have access to all watchlist records, due to computer capabilities, varying organizational missions or mere operational feasibility. GAO concluded that federal departments and agencies have not identified all appropriate opportunities for conducting terrorist-related screening. For instance, Homeland Security Presidential Directive 6 allows private sector employees to be screened against the TSC list, but these screening opportunities remain primarily untapped. Such practices result in the types of errors mentioned by Lieberman.

According to the GAO report, the TSC and other federal agencies are currently taking steps to address practices that have occasionally allowed watchlist persons to pass through screening processes undetected. For example, U.S. Customs and Border Patrol recently created an interdisciplinary working group to ascertain how individuals on the watchlist have gained entry into the U.S. In a similar manner, in April 2007, U.S. Citizenship and Immigration Services entered into a memorandum of understanding with TSC, which if implemented could allow more efficient and through searches of watchlist records during the screening of benefit applicants. Also, the TSC has formed and chairs an interagency working group that helps share best practices amongst various agencies. The GAO report also reveals that the TSC has ongoing quality assurance efforts to identify and correct incomplete or inaccurate records.

Short Colbert Campaign Stirs Election Law Debate

On Oct. 16, Comedy Central comedian Stephen Colbert used his nightly television show to announce that he was running for President of the United States and would file to get on both the Democratic and Republican primary ballots in his home state of South Carolina. The campaign was cut short on Nov. 1 when the South Carolina Democratic Party Executive Committee voted 13-3 to reject his application to get on the ballot. Colbert did not file to run as a Republican because of the party's $35,000 filing fee. The short-lived campaign gave both Colbert and election law experts a chance to examine the ins and outs of federal election law, with Colbert winning the laughs.

Colbert is the first comedian to seek the presidency since Pat Paulsen ran in 1968, before passage of the Federal Election Campaign Act. Soon after Colbert's announcement, election law bloggers and news outlets began speculating whether Colbert's use of his television show to promote his campaign violated federal campaign finance laws, which prohibit corporate contributions to campaigns. The Comedy Central and *Colbert Report* sponsor Doritos (made by Frito-Lay, a division of PepsiCo, Inc.) could both have arguably been sanctioned for illegal contributions.

Colbert separated his South Carolina petition drive from Comedy Central by running it through a barebones Colbert Campaign website. He then consulted the law firm Wiley Rein and showed his audience a copy of their letter, which warned him not to use corporate funds or sponsorship "to directly fund campaign activities." Colbert then said, "In accepting corporate money, I promise to respect federal election laws the same way I respect the must-shower-before-swimming law at the Y.... As a candidate, I am under no obligation to promote the zesty, robust taste of Doritos brand tortilla chips, regardless of how great a snack they may be for lunchtime, munch time, anytime." To ensure compliance with the law, he said Doritos would not sponsor his campaign, just the coverage, which the show called "The Stephen Colbert, Hail to the Cheese, Nacho Cheese Doritos 2008 Presidential Campaign COVERAGE."

This did not satisfy the experts and commentators, who speculated that Viacom, which owns Comedy Central, could still face sanctions from the Federal Election Commission for using its corporate facilities to promote the Colbert campaign on the show. This would be considered an in-kind contribution, unless the campaign itself qualifies for the exemption for news stories, editorials or commentary. It is not clear how comedy and entertainment would fit into that exemption. *Slate* reported that NBC had already taken the cautious approach by stopping *Law & Order* reruns starring actor and Republican presidential candidate Fred Thompson.

Colbert's television show and his announced candidacy demonstrated the intersection of humor and election law. On one episode, Colbert had Center for Responsive Politics' Massie Ritsch on to discuss how Colbert could skirt the campaign contribution limits. The humor highlighted interesting ways to skirt those limits.

Even though the *Los Angeles Times* reported a Republican poll in South Carolina that showed Colbert had the support of 2.3 percent of the voters, the state Democratic Executive Committee voted Nov. 1 to deny him access to the ballot because he failed to show he was a nationally viable candidate. Carol Fowler, the state party chairwoman, told CNNPolitics.com, "He does not appear to be campaigning to win if he is only running in one state."

Colbert did meet South Carolina's other ballot criteria by spending the last weekend in October campaigning in the state, receiving the key to the city from Columbia mayor Bob Coble at a well attended rally. Videos of these events are all available on the Comedy Central website.

On Nov. 5, Colbert announced he was officially dropping his campaign. However, he is encouraging supporters to give to South Carolina schools through donorschoose.org. So far, the campaign has raised $51,938 toward its $100,000 goal. Colbert's announcement ending his campaign also promotes the upcoming release of the *Best of the Colbert Report* DVD.

AMT: Mother of All Tax Bills and Progeny

On Oct. 25, after a gestation period of nearly nine months, House Ways and Means Committee Chair Charles Rangel (D-NY) finally unveiled the Tax Reduction and Reform Act of 2007 (H.R. 3970), his self-described "mother of all tax bills." The Rangel bill is a $930 billion, multi-faceted tax reform package that seeks to abolish the Alternative Minimum Tax (AMT) on a revenue-neutral basis. The measure redistributes the tax burden away from lower- and middle-class taxpayers and toward the wealthy beneficiaries of the Bush tax cuts of 2001 and 2003.

Congressional action on the AMT is urgent. The Bush tax cuts increased the number of people subject to the AMT and the exemptions used under the AMT have not been indexed for inflation. As a result, 23 million taxpayers, up from the current 4.2 million, will have to pay the AMT when they file their 2007 taxes if Congress does not enact a hold-harmless patch freezing the number of Americans paying the AMT before the end of the year.

The Rangel plan's central feature is the permanent repeal the AMT at a ten-year cost of $845 billion. It should be noted this estimate assumes current law — namely the Bush tax cuts — expires. If those tax cuts were extended, AMT repeal cost would nearly double to about $1.5 trillion over ten years. The plan also calls for a $48 billion increase in the standard deduction and a $30 billion expansion of the Earned Income Tax Credit for childless workers. These proposals are paid for mainly by scaling back the Bush tax cuts (the plan would impose a "surtax" of 4.0-4.6 percent for those earning over $200,000 a year), bringing in $832 billion over ten years. It also restores some phase-outs of deductions for the wealthy that would add $29 billion, eliminates the so-called "carried interest" tax loophole for fund managers ($26 billion), and closes another loophole for offshore deferred

compensation for hedge fund managers ($23 billion).

On the business side, Rangel's plan reduces the corporate tax rate from 35 to 30.5 percent, at a ten-year cost of $364 billion. The bill pays for this decrease by ending a raft of corporate tax deductions, from elimination of the domestic manufacturing deduction (adding $115 billion in revenue) to ending the "last-in, first-out" (LIFO) accounting practice ($107 billion), to deferring deduction of unrepatriated income ($106 billion), and other provisions ($71 billion).

A knee-jerk reaction from Republicans to the Rangel plan came swiftly after it was introduced. Vice President Dick Cheney immediately called it a bad proposal filled with "terrible ideas" that would do "an awful lot of damage" to the economy. House Minority Leader John Boehner (R-OH) wrongly criticized the plan as "the largest tax increase ever proposed on the American people."

Some of the opposition to the plan may exist because the plan has a redistributive impact, which means it helps the vast majority of American taxpayers. In the aggregate, it amounts to a modest tax cut for 99 percent of Americans. According to the nonpartisan Tax Policy Center, the plan would trim average federal tax rates by 0.2-1.4 percent for 99 percent of taxpayers in 2008. To pay for this reduction, the top 2.4 percent of taxpayers would pay more in taxes in 2008 should the Rangel plan be enacted. In sum, the major components of the legislation would provide a net tax reduction for 2008; the average tax cut across all households would be $81.

Most observers recognize the Rangel tax bill is fairer than the current tax code. The larger standard deduction and tax credits for low-income workers are paid for by scaling back the excessive Bush tax cuts for the wealthiest people. In addition, it achieves one of the president's goals of tax reform by simplifying the tax code. It repeals the complex AMT and removes many of the code's largest deductions and loopholes. Significantly, the bill is compliant with the congressional pay-as-you-go (PAYGO) rules and shifts no costs onto the national credit card by requiring additional borrowing.

On Nov. 1, the Ways and Means Committee approved the Rangel bill's short-term provisions, H.R. 3996, the Temporary Tax Relief Act of 2007. This legislation consists of an increase in the exemptions from the AMT that keep additional taxpayers from having to pay that tax, as well as a one-year extension of popular tax credits and deductions such as the research and development credit, state and local taxes deduction, and teacher supply deduction, among others. To pay for this, H.R. 3996 changes tax provisions for companies and other financial enterprises by closing the carried interest tax loophole, disallowing deferred foreign income, delaying worldwide allocation of interest, and other provisions. A House vote on the bill is expected on Nov. 8 or 9, with party-line approval likely.

After House approval, the next step would be the Senate, where a pitched battle is expected over adherence to fiscally responsible PAYGO principles. President Bush has already threatened to veto an AMT patch bill that is fully offset, and the thin majority in the Senate

could easily abandon PAYGO principles unless members supporting fiscal responsibility make a stand to not add to the national debt.

While no floor action is expected during the remainder of 2007 on the larger, comprehensive Rangel bill, it could become the frame of reference for the next major tax reform effort, perhaps early in the next presidential administration. The Bush administration has abandoned any plans to propose or enact comprehensive tax reform — a fact not lost on Rangel. In a letter to Treasury Secretary Paulson dated Nov. 2, Rangel urged the administration to show leadership on tax reform, saying that merely criticizing the House plan is not enough to enact reforms. "President Bush has been in office for nearly eight years and yet we have received no bill, no suggestions, and no direction. It is easy to be critical, but if not this bill, what would the administration recommend that we pursue to meet these goals?"

Congress to Send Labor/HHS Appropriations to President While SCHIP Conflict Continues

President Bush is soon expected to veto a congressionally approved version of the Labor/Health and Human Services/Education (Labor/HHS) appropriations bill, which funds an array of human needs programs. It is still uncertain if there is enough support in the House to override the president's veto. Meanwhile, enough Republican opposition remains to a proposed reauthorization of the State Children's Health Insurance Program (SCHIP) that the months-old conflict over the program drags on.

The Labor/HHS appropriations bill is likely to be the first piece of appropriations legislation sent to the president during the Fiscal Year 2008 budget cycle. It will be part of a two-bill package that also includes funding for the Department of Veterans Affairs.

Advocacy groups are pushing to send the package to the president on Veteran's Day (Nov. 12); in order to meet this deadline, the House may vote as early as today (Nov. 6), with the Senate expected to follow shortly thereafter.

The $150 billion Labor/HHS bill funds the Education, Health and Human Services, and Labor Departments, which hold a wide array of human needs programs, from Head Start and the National Institutes of Health to the Occupational Safety and Health Administration and college loan programs. The Senate-passed version contains $8.4 billion more than the president's request, which called for drastic cuts (for more details on the president's proposed cuts, see either the Coalition on Human Needs' analysis or the Center on Budget and Policy Priorities' analysis).

The Senate passed the measure on a 75-19 vote on Oct. 23, while the House passed its version in July, 276-140. The margin of the Senate vote was large enough to override a potential presidential veto, but the House vote fell just short.

The Labor/HHS appropriations bill may get more support by being paired with the $65 billion Veterans/Military Construction appropriations bill, which passed with nearly unanimous approval in both the House and Senate. The programs covered under this bill received a significant boost in proposed funding following the revelation of poor conditions at the Walter Reed Medical Center in Washington, DC.

The president is all but certain to veto the combined bill. Congress will then vote on whether to override the president's veto, which is, despite solid majority support in both chambers, no easy task. It takes a two-thirds majority of voting members in both the House and the Senate to override a veto. Congress has yet to override a presidential veto in 2007, as the House has repeatedly failed to override the president's veto of bills to increase funding for SCHIP.

If Congress does not override the president's veto, it will likely be forced to reduce funding for social programs covered by the Labor/HHS appropriations bill, and other appropriations legislation may also see funding reductions. The president has threatened to veto eight other FY 2008 appropriations bills that he says contain excessive levels of spending.

Regardless of whether or not the dual Labor/HHS-Veterans appropriations bill is enacted, a continuing resolution (CR) will have to be enacted before Nov. 16 to keep funding the federal government.

Conflict over SCHIP Continues

While the showdown over appropriations has unfolded, Congress has attempted to resolve the drawn-out conflict over the $35 billion SCHIP reauthorization through revisions to eligibility standards and funding incentives. But the new parts of the bill did not substantially change which members supported it in either the House or the Senate. It remains unclear how the conflict over the SCHIP reauthorization will be resolved.

The new version of the SCHIP bill retained a funding increase of $35 billion over five years that was paid for by a 61-cent cigarette tax increase. Changes in the new legislation include additional incentives to target funding to low-income children and limited eligibility for children in families whose incomes were below 300 percent of the poverty line (about $60,000 annually for a family of four (see this Center on Budget and Policy Priorities paper for more on the changes)).

The changes were made to attract more Republican support in the House, since many Republicans cited those issues as reasons they opposed they bill when it was first considered. However, the vote in the House and Senate did not significantly shift. The Senate vote was 65-30, and the House vote was 265-142.

Because the initial votes in the House and Senate on the two different versions were so similar, Democrats in Congress may decide not to send this bill to the president. It is

unlikely votes to override a second expected presidential veto will differ from the first.

It is unclear what will happen next to resolve the conflict over the SCHIP bill. Senate negotiators have been working on a bill to attract the 15-20 additional votes needed in the House to override a veto. SCHIP supporters are holding firm on the $35 billion funding level and the cigarette tax-revenue raiser. Although the Bush administration recently claimed to be open to more funding than the meager $5 billion increase the president proposed in his budget, it has now taken issue with the cigarette tax provision. Until the conflict is resolved, the SCHIP program will likely be extended in the next extension of the CR, which is currently being designed to run through Dec. 14.

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In This Issue

More of the Same: Import Safety Panel Leaves Business in Charge

The Bush administration's cabinet-level Interagency Working Group on Import Safety released its final report Nov. 6 on ways to improve the safety of food and consumer products imported into the U.S. The report calls for limited increases in some federal agencies' responsibilities but does little to change the current voluntary regulatory scheme that governs some $2 trillion worth of products, 800,000 importers and more than 300 ports-of-entry.

President Bush created the Interagency Working Group (IWG) on Import Safety by

Executive Order 13439 (E.O.) on July 18 in the midst of recurring recalls and safety warnings about imported food, toys, pet food and toothpaste. According to the E.O., the mission of the IWG "shall be to identify actions and appropriate steps that can be pursued, within existing resources, to promote the safety of imported products." The message from Bush was clear that no additional budget resources would be forthcoming for improved safety. One of the report's "points of clarification" underscores the lack of urgency on the part of the administration:

> Resources — To implement the Action Plan to its fullest extent will require resources. Federal departments and agencies will coordinate, plan effectively and meet these goals by submitting additional funding needs through the normal budget process.

The *Action Plan for Import Safety: A Roadmap for Continual Improvement* contains fourteen broad recommendations and fifty specific action steps. The recommendations are grouped under the principles of prevention, intervention and response. Some of the fourteen recommendations include recognition that improvements to the import safety system are necessary. For example, the report recommends that new and existing standards need to be created and strengthened, certification programs need to be used to improve safety compliance, and enforcement needs to be stronger. Under the enforcement recommendation, one action step is a call for an increase in the Consumer Product Safety Act's civil penalty cap for violators, from $1.8 million to $10 million.

Underlying the *Action Plan*, however, are two philosophical choices that indicate that this is not an urgent attempt to improve the safety of the millions of imported products that reach U.S. shores. First, it is clearly written that these import safety reforms need to be accomplished without disrupting the flow of commerce. For example, a text box in the action plan that precedes the recommendations states, "The recommendations in this Action Plan are designed to promote safety while avoiding restrictions on the flow of international trade." The Plan creates an explicit private-public partnership where government is a business partner rather than a regulator protecting the public.

The *Action Plan* calls for a series of incentives such as an information network and technical assistance programs. Incentive programs can be effective if industry knows that there is a threat of direct regulatory action. However, the incentives in the Plan are coupled largely with voluntary approaches that encourage self-regulation by industry and the development of industry-wide standards.

Second, the *Plan* emphasizes a "cost-effective, risk-based approach" that relies on using market-based and regulatory incentives and deterrents. Risk-based systems require the identification and ranking of risks assuming nothing changes with regard to the business practices and processes employed. Under this approach, the agencies are to identify the points of highest risk and divert resources to intervening and responding to potential dangers. So, for example, the U.S. Food and Drug Administration (FDA), to prevent the intentional contamination of the food supply, would "issue regulations to require companies to implement practical food defense measures at specific points in the food supply chain

where the potential for intentional adulteration resulting in serious adverse health consequences or death to humans or animals is the greatest."

The problem with this risk-based approach is that it is a static analysis and doesn't consider the question of how we might change the existing system that causes the damage in the first place. Are there better ways of producing goods so that the dangers from lead exposure, for example, are prevented? Instead, the *Plan* acknowledges that "the recall process is the principal tool in the arsenal of response mechanisms to protect consumers from exposure to hazardous products." This is an implicit acknowledgement that the prevention approaches outlined in the *Plan* are not capable of preventing hazardous products from reaching U.S. markets, so the agencies need to have mechanisms to respond to accidents.

The *Action Plan* falls short of congressional proposals to improve import safety. As OMB Watch has recently described in a series of articles (for example, here and here) on product safety, Congress is explicitly proposing budget and personnel increases for the major regulatory agencies with jurisdiction over food and consumer products. And there have been consistent calls for banning lead in children's toys.

In a Consumers Union press release issued Nov. 6, the organization criticized the Action Plan. "Furthermore, we see no recommendation about reducing lead in children's products. We support getting toxic lead out of all consumer products, but especially children's toys and other products they use. With lead-tainted products flooding the market, we are disappointed the Administration appears to have missed an important moment to support eliminating this health threat," said Jean Halloran, Director of Food Policy Initiatives.

Bush Fuel Economy Measure Rejected by Court

A U.S. court of appeals has overturned a recent National Highway Traffic and Safety Administration (NHTSA) rule that revised a national standard for fuel economy. Environmentalists hailed the ruling as a victory and framed it as condemnation of the Bush administration's record on fuel economy and global warming.

The Ninth Circuit Court of Appeals in San Francisco announced the ruling on Nov. 15. The suit was brought by the Center for Biological Diversity on behalf of a number of states, cities and public interest groups. Judge Betty Binns Fletcher wrote the opinion of the court.

The decision overturns a NHTSA regulation that would have raised the fuel economy standard for so-called light trucks — pickup trucks, SUVs and minivans — to 23.5 miles per gallon (mpg), from 22.2 mpg, by 2010. The standard for other passenger cars is 27.5 mpg.

Petitioners argued the NHTSA rule was too weak in light of evidence that increased fuel economy can lead to a reduction in the greenhouse gas emissions responsible for climate change. David Doniger, Policy Director of the Climate Center at the Natural Resources Defense Council (NRDC) and an attorney on the case, said in a statement, "This is another

court rebuke to the Bush administration's policy of ignoring global warming."

The court invalidated NHTSA's revision of the standard for light trucks largely because it found NHTSA did not adequately account for the adverse effects of greenhouse gas emissions from tailpipes.

In preparing a cost-benefit analysis for the rule, NHTSA did not evaluate the benefits of reduced greenhouse gas emissions associated with increased fuel economy. The court opinion states, "[NHTSA] cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards. NHTSA fails to include in its analysis the benefit of carbon emissions reduction in either quantitative or qualitative form. It did, however, include an analysis of the employment and sales impacts of more stringent standards on manufacturers."

Because the benefits calculation was underestimated, the basis on which NHTSA made its decision was not accurate. Subsequently, the court found the rule to be "arbitrary and capricious" under the Administrative Procedure Act, which requires agencies to make decisions based on reasonable rationale and factual assertions.

By not accounting for a reduction in greenhouse gas emissions, NHTSA also violated the National Environmental Policy Act (NEPA), the court found. NEPA requires agencies to assess the "cumulative impact" of a rule on the environment in either an environmental assessment (EA) or a more detailed environmental impact statement (EIS).

For the revision to the light truck standard, NHTSA chose to prepare the less detailed EA, claiming the rule would have no significant impact on the environment. "We conclude that the EA's cumulative impacts analysis is inadequate. While the EA quantifies the expected amount of CO2 emitted from light trucks [model years] 2005-2011, it does not evaluate the 'incremental impact' that these emissions will have on climate change or on the environment more generally," the court opinion states. The court also instructed NHTSA to prepare the detailed EIS when revising the rule.

The court also found fault with NHTSA's definition of "light truck." By law, vehicles designed to hold no more than ten passengers and not intended for heavy work or off-road use are to be considered "passenger vehicles." However, NHTSA has excluded SUVs and minivans from the passenger vehicle category and placed them in the light truck category, a decision critics call the "SUV loophole." The court found NHTSA did not adequately provide rationale for excluding SUVs and minivans from the passenger vehicle category. NHTSA will now have to reevaluate its existing policy.

The ruling is a rebuke to the Bush administration's fuel economy policy but also to the work of senior White House officials, including Vice President Richard Cheney. A recent Public Citizen investigation found the NHTSA revision to the light-truck standard was the product of an intense campaign by the vice president's office to weaken the proposal. According to Public Citizen, "Records show that NHTSA played a subservient role to White House and

vice presidential higher-ups. Some meetings appear to have excluded NHTSA staff altogether."

President Bush has also used the NHTSA standard as a sign of his commitment to energy conservation and environmentalism. In his 2007 State of the Union address, Bush said, "We need to reform and modernize fuel economy standards for cars the way we did for light trucks."

The court instructed NHTSA "to promulgate new standards consistent with this opinion as expeditiously as possible and for the earliest model year practicable." The Bush administration has yet to give word on whether it will appeal the decision.

OSHA Issues Personal Protective Equipment Rule

Eight years after proposing it, the Occupational Safety and Health Administration (OSHA) has finalized a worker safety rule. The final rule mandates employers pay for worker personal protective equipment (PPE). OSHA published the rule in the *Federal Register* on Nov. 15, and it is to take effect Feb. 13, 2008.

Currently, 95 percent of worker PPE is paid for by employers, according to OSHA. The new rule would mandate the remaining five percent of covered equipment be paid for by employers. Although the rule would expand employer pay of PPE only marginally, the impacts of the rule will be significant. According to an OSHA assessment, the rule will prevent more than 21,000 injuries. OSHA estimates compliance costs to be $85.7 million annually.

Unions welcomed the rule. In a statement, AFL-CIO President John Sweeney said, "America's working men and women deserve the proper equipment to keep them safe on the job, each and every day."

Representatives from National Association of Manufacturers (NAM) and the U.S. Chamber of Commerce voiced their opposition to the rule to White House officials. On Oct. 23, officials from the White House Office of Management and Budget (OMB) met with representatives from NAM and the Chamber to discuss the rule while it was being reviewed by OMB's Office of Information and Regulatory Affairs (OIRA). According to material submitted to OMB during the meeting, the groups opposed the standard, claiming, "Through employee-employer negotiations, employers already pay for the majority of personal protective equipment used in the workplace. But to mandate that they pay for all of it is pure economic regulation and well beyond the Secretary [of Labor]'s authority."

No official from OSHA or the Department of Labor was present at the meeting. According to Executive Order 12866, Regulatory Planning and Review, a representative of the issuing agency must be invited to review meetings such as the one OMB held on Oct. 23. On Oct. 29, Reps. George Miller (D-CA) and Lucille Roybal-Allard (D-CA) wrote to OIRA Administrator

Susan Dudley expressing concern with the conduct of the meeting. Since then, OSHA officials have indicated a scheduling conflict prevented them from attending.

In advance of OSHA's announcement of the PPE rule, labor groups and occupational health advocates were critical of the length of time OSHA had spent on the rulemaking. The proposed rule was issued in March 1999. A lawsuit from AFL-CIO and the United Food and Commercial Workers International Union, filed in January 2007, prompted OSHA to act. Celeste Monforton, an occupational health expert at the Project on Scientific Knowledge and Public Policy at the George Washington University, said the rule had been in "perpetual limbo" until the unions filed suit. Sweeney, of the AFL-CIO, said, "It is unfortunate that nine years have passed since the rule was proposed."

The delay fit into a pattern of OSHA inaction during the Bush administration. The PPE rule is only the second significant standard issued by OSHA during the Bush administration. (The other concerned exposure to hexavalent chromium.) OSHA has published 25 final rules since Bush took office, most of which have been non-significant.

White House Rejects Krill Protection Rule

The White House has rejected an effort by the National Oceanic and Atmospheric Administration (NOAA) to protect krill, an important marine species abundant in the Pacific Ocean. NOAA's proposed rule is a precautionary measure aimed at protecting krill in the future but was rejected by White House officials for failing to identify a need for the regulation.

On Feb. 26, NOAA announced its intent to amend its Fisheries Management Plan (FMP) for waters in the Pacific Ocean off the west coast to include krill. The amendment, which would take the form of a regulation, would prohibit the fishing of krill up to 200 nautical miles off the coast of California, Oregon and Washington.

Krill are small shrimp-like crustaceans abundant in the Pacific Ocean. Krill are a vital link in the marine food chain and serve as a food source for a variety of marine animals including whales, salmon and some sea birds.

NOAA chose to pursue the krill protection rulemaking at the behest of its Pacific Fishery Management Council (Council). The Council is one of several councils that make recommendations on fishery management for various bodies of water adjacent to the U.S. The Council is comprised of representatives from federal and state government agencies, commercial and recreational fisherman groups, and fishery-dependent businesses.

At its March 2006 quarterly meeting, the Council adopted the amendment to the FMP. NOAA generally follows the advice of the fishery management councils, which regularly recommend amendments to FMPs in order to protect marine ecosystems.

The Council's recommendation and NOAA's ensuing proposed rule were an attempt at a proactive step toward preserving an ecologically and economically valuable marine ecosystem. According to NOAA, krill is not currently fished in U.S. waters off the west coast. However, because of krill's importance in the food chain, "The Council has agreed it is critical to take preventive action at this time to ensure that a krill fishery will not develop that could potentially harm krill stocks, and in turn harm other fish and non-fish stocks."

However, the White House Office of Information and Regulatory Affairs (OIRA) took exception to NOAA's rationale. In a letter returning the rule to NOAA for reconsideration, OIRA Administrator Susan Dudley complained NOAA did not adequately identify the need for regulation since krill is "completely unexploited" and "there are no known plans for exploitation." Dudley also chided the agency for not adequately assessing alternatives to its proposal and for failing to include performance objectives.

The issue is representative of a larger tension between those believing government has a responsibility to intervene to prevent problems and those believing government's role should be reactive or even nonexistent. The Council recognizes "the proposed action would be preemptive and precautionary" but also that the importance of the species warrants government action at an early stage. On the other side, OIRA's rejection is a strong statement of how advocates of limited government view environmental protection: short of outright exploitation, the need for natural resource management does not exist.

OIRA's rejection of the krill rule is also consistent with the views of its administrator. Prior to joining OIRA, Dudley worked for the industry-funded Mercatus Center, an anti-regulatory think tank at George Mason University. Dudley is ideologically opposed to government intervention. Dudley's nomination to head OIRA faced opposition from public interest groups including OMB Watch, Public Citizen, the Natural Resources Defense Council, and the United Auto Workers, which forced Bush to resort to installing her by recess appointment in April.

Under Executive Order 12866, Regulatory Planning and Review, OIRA reviews agency proposed and final regulations before they are released to the public. Usually, OIRA reviews "economically significant" rules (those expected to have an economic impact of $100 million or more) and "other significant" rules (those that interfere with the actions of other agencies, materially alter budgetary impacts, or raise novel legal or policy issues).

The krill rule does not meet any of those criteria. In fact, because krill is not currently fished in the U.S., NOAA believes no economic impact would result. It appears OIRA chose to review this rule for other reasons.

The krill protection rule is the first rule OIRA has rejected during Dudley's tenure. The last time OIRA returned a rule to an agency for reconsideration was December 2005. OIRA does not often resort to outright rejection of an agency rule. Generally, the White House works with agencies early in the development of a rule to ensure the president's priorities are met or during the OIRA review process to make changes. During the Bush administration, OIRA

has returned 28 rules to agencies for reconsideration, many of which were Clinton-era proposals rejected by OIRA in the early days of the Bush administration. OIRA rejected nine rules from Sept. 30, 1993, when President Clinton signed E.O. 12866, to the end of the Clinton administration.

The rejection comes after a protracted OIRA review period. NOAA submitted the proposal to OIRA on May 29. Under E.O. 12866, OIRA is to complete its review within 90 days of receiving the rule from the agency. In consultation with the agency, OIRA may extend the review period once for 30 days. Since OIRA did not complete its review until Oct. 30, the office had exceeded its time limit by more than a month.

OIRA is also delaying the completion of another NOAA rule that would protect the North Atlantic right whale, a critically endangered species, by setting limits on ship speeds in certain areas of the Atlantic Ocean during certain seasons. NOAA submitted its draft of the final rule in February.

Congress Reforming Government Surveillance Authority

Legislation to reform expansive surveillance authority moved forward in both the House and the Senate recently. The House passed the RESTORE Act (H.R. 3773), which would reform the Protect America Act (PAA), passed in haste before Congress's August recess. The Senate Judiciary Committee narrowly passed the FISA Amendments Act of 2007 (S. 2248) without telecom immunity provisions that were included in the Senate Intelligence Committee bill, setting up a confusing situation that makes it unclear which version will be sent to the Senate floor for consideration.

PAA granted the government the authority to wiretap anyone, including U.S. citizens, without court approval as long as the "target" of the surveillance is reasonably believed to be located outside the country. The bill is scheduled to sunset in less than three months, but the House and Senate leadership agreed to reform the bill before then.

The Responsible Electronic Surveillance that is Overseen, Reviewed, and Effective Act of 2007 (RESTORE Act) was introduced by Reps. John Conyers (D-MI), chairman of the House Judiciary Committee, and Silvestre Reyes (D-TX), chairman of the House Intelligence Committee.

The RESTORE Act would require a finding of probable cause for surveillance targeting American citizens, including Americans located overseas. The legislation would also permit a blanket order for surveillance of multiple foreign targets to be granted by the Foreign Intelligence Surveillance Court. However, the Justice Department Inspector General must regularly report on the use of blanket orders and the number of U.S. persons' communications collected in the orders' use. The Justice Department Inspector General would also be required to audit the Terrorist Surveillance Program and other warrantless

surveillance programs.

The bill faced resistance from House Republicans when it was pulled from the floor in October but passed with bipartisan support on Nov. 15 with a 227-189 vote. The White House immediately issued a statement saying, "This evening House Democrats passed legislation that would dangerously weaken our ability to protect the Nation from foreign threats."

Chairman Reyes, however, characterized the RESTORE Act as helping to "restore the balance between security and liberty." In a statement issued after the vote, Reyes explained, "The RESTORE Act puts the FISA Court back in the business of protecting Americans' constitutional rights — after the President and Vice President put that court out of that business six years ago."

The Senate Judiciary Committee voted S. 2248 out of committee on a narrow 10-9 party-line vote. When the Senate Intelligence Committee passed the same bill in October, it included a provision that would provide immunity for any telecommunications company that assisted in illegal counterterrorism operations after Sept. 11, 2001. The Senate Judiciary Committee rejected an amendment by Sen. Russ Feingold☼ (D-WI) to strip out the immunity provision by a vote of 10-7, with two Democrats, Sens. Dianne Feinstein (D-CA) and Sheldon Whitehouse (D-RI), joining the Republicans. In a quick turnabout, Sen. Patrick Leahy☼ (D-VT), chairman of the Judiciary Committee, offered a motion to move the bill to the Senate floor without the immunity provisions. It passed on a 10-9 vote.

Senate Majority Leader Harry Reid (D-NV) will now have to decide which version of the FISA bill to bring to Senate floor, the Judiciary Committee version without immunity for the telecommunications companies, or the Intelligence Committee version with immunity. Since there will inevitably be an amendment to either strip immunity or add it, Reid also needs to decide whether this type of amendment will require 60 votes to kill a potential filibuster or a simple majority.

Recently confirmed Attorney General Robert Mukasey and the Director of National Intelligence Mike McConnell issued a statement opposing the bill and said that they would recommend that President Bush veto it. They stated that the Senate Judiciary Committee bill "would not provide the intelligence community with the tools it needs effectively to collect foreign intelligence vital for the security of the Nation."

The battle over telecom immunity is likely to occur on the Senate floor. Sen. Arlen Specter☼ (R-PA) is already drafting a compromise which would substitute the government for the telecommunications companies as defendants in the forty-plus lawsuits currently moving through the courts. This would allow the cases to be heard but would hold the government liable for damages if any of the plaintiffs prevail. The Senate is expected to vote on S. 2248 before the close of session.

Secrecy for Farm Animals

The Senate Agriculture Committee approved a bill in late October that would create a Freedom of Information Act (FOIA) exemption for records in the National Animal Identification System (NAIS). Open government advocates strongly oppose the exemption and see it as a violation of the public's right to access information regarding food safety.

Following the 2004 mad cow scare, the NAIS, a voluntary registry to track food animals, was created in case of another outbreak. The Agriculture Committee's Farm Bill includes a provision in Section 10305 of Title X (Livestock), added during markup, that would exempt information from this system from disclosure in response to any FOIA requests. The provision would also impose criminal sanctions on anyone who does disclose information from the system. Only the Secretary of Agriculture would have the authority to share the information with the owner of the farm animal, the state agriculture department, the Attorney General, the Secretary of Homeland Security, the Secretary of Health and Human Services, and affected foreign governments. Despite the clear public interest in information about food safety, these provisions would block the public from ever having access to these records.

Sen. Tom Harkin☼ (D-IA), chairman of the Senate Agriculture Committee, added the provision to bill and defended it as being necessary to ensure the cooperation of farmers in the voluntary program. Open government advocates, on the other hand, requested in a letter to the Senate that the provision be removed and claimed that the provision would "create an unnecessary bar to public disclosure." Harkin staff are reportedly working on "mutually agreeable language that will reassure producers and allow our government to be transparent and open."

The Senate was not able to consider the bill before the Thanksgiving recess, but the legislation may be voted on in December before the close of session.

Toxic Chemicals R Us

All 35 participants tested positive for three toxic chemical groups in a study conducted by the Commonweal Biomonitoring Resource Center and the Body Burden Working Group. The report on the study, *Is It In Us?: Chemical Contamination in our Bodies*, released Nov. 8, is the first multi-state, multi-organizational effort to evaluate the presence of this particular combination of chemicals in Americans.

The study tested for chemicals from the following three categories — phthalates, polybrominated diphenyl ethers (PBDEs) and bisphenol A (BPA). These are all common industrial chemicals found in everyday products. Uses of the chemicals include the following:

- Phthalates — make plastics flexible and are used in everything from shower curtains

and vinyl flooring to IV bags and toys. They are also used in detergents, adhesives and personal care products such as soap, deodorant and nail polish. Phthalates have been connected to reproductive, developmental and respiratory problems. They do not bioaccumulate (build up in bodies over time), but humans are constantly exposed.

- PBDEs — used as flame retardants, common in TVs, computers, couches, cars and airplanes. They do bioaccumulate and are associated with reproductive and developmental problems and endocrine disruption. North Americans have PBDE exposure levels up to 40 times higher than Europeans, and it is speculated that this is due to the greater use of PBDEs in American products.
- BPA — mainly known for its use in #7 plastics for food and drink containers but is also used in metal can linings. A recent Centers for Disease Control and Prevention (CDC) survey of more than 2,500 people found BPA in 95 percent of urine samples. Studies have shown BPA to be an endocrine disruptor that may also cause reproductive and other developmental problems.

The results of the study indicate that the chemicals of concern are virtually impossible to avoid. Of the 20 chemicals tested, at least seven were found in all the participants, including six types of PBDEs. Almost all of the participants, 33 of the 35, tested positive for at least 13 of the 20 chemicals. Three types of phthalates and BPA was present in every participant who provided a urine sample (33), and 25 participants were above the CDC median level for BPA.

Disturbingly, participants conscientious to avoid chemicals had some of the highest levels — likely due to exposures beyond their control. Heather Loukmas, executive director of the Learning Disabilities Association of New York State, has worked to link learning disabilities and toxic chemicals. Loukmas had the highest level of a certain PBDE flame retardant in the study, probably from an accidental grain contamination event in the 1970s in Michigan, when she was two years old.

The purpose of the small study was to add to the growing awareness and research about toxins in our bodies, highlight the lack of knowledge about these toxins and their health implications, and to advocate for updated laws and policies that will adequately protect public health. Due to its small size, the project is not a health impact study and should not be used to generalize about the entire U.S. population. The detection of such ubiquitous toxic contamination in any sample group, however, adds to growing concerns about the use of dangerous chemicals in common products and the current policies that trigger government action only after confirmed harm.

The lack of information about new chemicals and their impact on humans is a major problem, and legislation has been introduced to address this knowledge gap. Sen. Barack Obama☼ (D-IL) introduced the Healthy Communities Act of 2007 (S. 1068) to specifically identify gaps in research and provide biomonitoring project grants. Another bill, the Coordinated Environmental Public Health Network Act of 2007, has been introduced in the Senate (S. 2082) and House (H.R. 3643) by Sen. Hillary Clinton☼ (D-NY) and House Speaker Nancy Pelosi (D-CA), respectively, to increase funding for CDC biomonitoring

projects.

While there has been little to no effort on the federal level to take action against these chemical exposures beyond increased testing, states have begun to be more proactive in their effort to protect citizens. Some states — California, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, New York, Oregon, Rhode Island, and Washington — have started efforts to either ban phthalates and/or BPA in children's products or phase out PBDEs. It remains to be seen if similar federal legislation will follow.

States Average a D-Minus on Disclosure

A new report by Good Jobs First finds that states have not kept up with technology in creating certain disclosure systems, and in some cases actively resist advances. *The State of State Disclosure* analyzed state websites for publicly available data on economic development subsidies, state procurement contracts and lobbying activities. Connecticut scored the highest, with an average of 84 percent, but more than half of the states received failing grades, placing the average score at 60 percent, a D-minus.

Using a 100 percent scoring system, the report reviewed each state's government websites, judging them on availability of information, level of detail, and navigability in the three areas covered by the report (economic development subsidies, procurement contracts, and lobbying activities). Information accessible through informal or formal records requests was not considered. Websites were then rated according to the following criteria:

- Ease of finding the site
- Level of detail, including grant/subsidy type, grantee name and dollar value
- Thoroughness in terms of providing other information and/or linking to other related data
- Depth, including archival years available
- Timeliness, in terms of how current the data is

Though every state either had information on procurement contracts and lobbying available or had plans to make the information available, fewer than half the states devoted any part of their websites to development subsidies. Some states also varied widely on their scores across sectors, with an exceptional site for one issue but no available information on another area. Results of the report included the following:

- States scored best on procurement contracts, averaging a B-, with 16 states at or above 90 percent.
- Despite the strong trend for procurement contracts information, Minnesota and Wyoming scored the lowest, below 50 percent, in this area, and four other states also received failing grades.
- Five states received a near perfect score on lobbying information: Colorado, Nebraska, New York, Wisconsin and Washington.

- Only 23 states had online disclosure programs for economic subsidies, and 11 of those received failing grades.

The State of State Disclosure recommends states take advantage of online programs to enhance public information access. Specifically, the report emphasizes the importance of the user's ability to search databases for specific entities with access to the full data set; to provide the data in a variety of forms to appeal to a diverse audience; to include outcomes and past performance data on subsidy and contract databases; and to overlay the information with campaign contributions.

Government transparency is crucial in providing accountability, controlling corruption and enabling constituents to be active partners in democracy. The Internet has emerged as a powerful tool for storing and disseminating information, providing an unparalleled forum for open access, and Philip Mattera, co-author of the report, sees evidence that "states are improving."

Republicans Keep Obstructing Common-Sense Investment Initiatives

Over the past few months, an intransigent president and a conservative coalition in Congress have waylaid a host of common-sense, progressive spending initiatives, including the reauthorization of the nutrition section of the Farm Bill, the State Children's Health Insurance Program (SCHIP), and funding for domestic priorities in the Departments of Labor, Health and Human Services (HHS), and Education.

Conservative Republicans Barely Sustain President's Labor/HHS Veto
The House and Senate agreed to a $150.7 billion appropriations bill for the Departments of Labor, Health and Human Services, and Education, which includes funding for programs like Head Start, the National Institutes of Health, and energy assistance for low-income families (see this Center on Budget and Policy Priorities paper for more on what's in the bill). But the president vetoed that bill on Nov. 13. The House then attempted to override the president's veto but failed by a margin of 277-141, only five votes short of success.

Democratic leadership has since offered to cut $11 billion out of all of the appropriations bills — about half of the difference between their entire spending proposal and the president's. Under this plan, programs funded in the Labor/HHS bill would take sizable cuts. Specifics about how the cuts would be distributed across specific programs have not been announced.

House Republicans and the president have told the media they rejected this compromise and demanded that all budget bills meet the president's requests. It is unclear how effective they will be in keeping moderate House Republicans from accepting that compromise or any other offered by the Democrats. But Republican leaders have had success so far in rejecting anything but the president's budget requests, which call for even deeper cuts to human

needs programs and public investments, while drastically increasing funding for the Department of Defense and the wars in Iraq and Afghanistan.

As the budget conflict continues, more continuing resolutions (CRs), which temporarily fund government services at the previous year's levels, may be necessary. The current CR will last through Dec. 14 and has already been extended once since the beginning of the fiscal year on Oct. 1. The current CR was passed as an amendment to the $459.3 billion Defense appropriations bill. The president signed that bill on Nov. 16.

Senate Republicans Obstruct Farm Bill

The House-passed 2008 farm bill contains a small but important $4.2 billion increase for nutrition programs like Food Stamps over the next five years. These increases are especially important in light of reports that food insecurity continues to rise, while food banks across the country are experiencing shortages of food supplies to give to people struggling with hunger.

Perhaps realizing the significant need across the country, the president has issued a somewhat muted veto threat against the farm bill.

While the House has passed its version of the farm bill, the Senate has had more difficulty, as Senate Republicans filibustered the first proposal on Nov. 16 (roll call). The Food Research and Action Center has predicted if the Senate does not pass a bill, the funding increases for nutrition programs will be wiped away, perhaps causing cutbacks in these important supports.

SCHIP Negotiations Going Nowhere

Since House Republicans sustained the president's veto of the $35 billion SCHIP reauthorization bill on Oct. 25, bicameral and bipartisan negotiations have been taking place to craft a bill that would receive veto-proof support. Despite strong support for reauthorizing and expanding SCHIP, no agreement has been reached.

Indeed, chances of reaching an agreement appear to decrease by the day. Conservatives were asking for restrictive changes, particularly regarding immigrants and minority participation in the program, that many minority Democrats have strenuously objected to.

If no agreement is reached, the SCHIP program will continue under a temporary extension. But the net result of the House Republicans' vote to sustain the president's veto will be to deny health insurance to the four million uninsured children who would have received it had the bill been passed into law.

Estate Tax Repeal No Longer on the Table

On Nov. 14, the Senate Finance Committee dedicated time to a hearing to investigate uncertainty in estate tax law, despite a plethora of more pressing fiscal issues facing the

current Congress.

In their opening statements, both Sens. Max Baucus (D-MT) and Charles Grassley (R-IA) expressed their personal support for estate tax repeal, but Baucus went on to acknowledge repeal is not part of the discussion any more in the Senate. Most outside observers rule out estate tax repeal as well. Mark Bloomfield, president of the American Council for Capital Formation, who has lobbied for repeal, told Bloomberg News, "I don't think complete repeal has the votes, has not had the votes for a few years and won't have the votes in the future."

The hearing featured a star witness, billionaire Warren Buffett, whose fortune from business and investments is estimated at $100 billion dollars, making him the third-richest man in the world. Buffett made clear his belief the estate tax should not be repealed or drastically reformed. Such changes, Buffett said, would help the richest Americans who have seen their wealth take off like a "rocket ship" in the last two decades while lower-income workers have "been on a treadmill," not improving their standing. Buffett also believes the estate tax is an integral part of our country and our government system, saying "a meaningful estate tax is needed to prevent our democracy from becoming a dynastic plutocracy."

Some familiar hyperbole surrounding the estate tax was expressed at the hearing. Grassley asserted at one point that "As most people are not privy to exactly when they will hand over half of everything they own to the government, the death tax is fundamentally not fair." Mr. Buffett reminded the Committee the vast majority of people will not hand *anything* over to the government upon death, noting that of 2.4 million Americans who died last year, roughly 12,000 paid estate tax. "You'd have to attend 200 funerals to be at one" where an estate tax was owed, he said. Mr. Buffett also pointed out the vast majority of families who are not subject to the estate tax benefit from a step-up in basis for the assets they inherent. This means the appreciation of any asset is inherited tax-free.

Mr. Buffett also addressed the contentious claim the estate tax might bankrupt a farm or small business at some point. A business large enough to owe the estate tax, Buffett said, could readily borrow against the value of the farm or business, use operating revenues to pay off that debt and still generate plenty of income. "[Those farms and businesses] may not prefer to pay the tax, but they have the resources, ample resources to pay the tax."

Buffett proposed adjusting the estate tax exemption levels slightly, but increasing the tax on extremely large estates to arrive at a revenue neutral reform option. He thought the money generated by the estate tax should be dedicated to funding a tax credit for the 23 million households who live on $20,000 or less a year in income, to help make their lives easier.

In a sign most committee members hold the estate tax as a very low priority, some senators could not resist taking the opportunity to ask Buffett his views on other tax matters that may come before the Finance Committee. Buffett was quizzed by Grassley on his position on the carried interest tax loophole (he supports closing it despite having benefited from it himself for a dozen years), and the tax-exempt status of philanthropic foundations and university endowments (he believes those institutions should pay out more each year than they

currently do). He was also asked about a consumption-based tax system by Sen. Ron Wyden☼ (D-OR), responding, "I don't see how we get there from here."

The table below shows why the only bipartisan consensus on the estate tax issue is that *something* should be done in the next couple of years. The 2001 Bush tax cuts put in place an annually changing schedule for the estate tax, creating uncertainty and unnecessarily high planning costs for a few large estates. In 2007 and 2008, $4 million per couple ($2 million for individuals) will be exempt and only assets above that exemption will be taxed, up to a top tax rate of 45 percent. In 2009, the exemption level will rise to $7 million for couples ($3.5 million for individuals). In 2010, the estate tax is to be fully repealed for one year at a cost to the government of roughly $20 billion. The tax is scheduled to return in 2011 to the way it was prior to the 2001 tax cuts, with a top rate of 55 percent on estates worth more than $2 million per couple.

Calendar year	Estate and GST tax deathtime transfer exemption	Highest estate and gift tax rates
2001	$675,000	55%
2002	$1 million	50%
2003	$1 million	49%
2004	$1.5 million	48%
2005	$1.5 million	47%
2006	$2 million	46%
2007	$2 million	45%
2008	$2 million	45%
2009	$3.5 million	45%
2010	N/A (taxes repealed)	top individual rate under the bill (gift tax only)
2011	$1 million	55%

Source: Joint Committee on Taxation

While no legislative action is expected on the estate tax for the rest of the year, Baucus said he plans to introduce a bill reforming the tax for markup sometime this spring. It will be interesting to see what Baucus proposes, if anything, in view of the deep divide within the Senate on the issue. In 2006, the Senate rejected GOP proposals to end the estate tax as well as an amendment by Sen. Jon Kyl☼ (R-AZ) to reduce the estate tax rate to 15 percent. At the same time, a Democratic proposal to bring the rate down to 30 percent was also rejected.

White House Attempts to Entrench PART at Federal Agencies

The White House issued an executive order (E.O. 13450) on Nov. 13 that would attempt to entrench the administration's controversial Program Assessment Rating Tool (PART) within federal agencies long after President Bush leaves the White House. The order would create a

point person within agencies responsible for program performance, allow the Office of Management and Budget (OMB) more leverage over specific aspects of program implementation and solidify the PART program review process as *the* evaluator of government programs.

The PART mechanism has significant limitations to thorough and unbiased program evaluation, introducing biases and a skewed ideological perspective into a model claiming to present consistent and objective performance data and evaluations of government programs. Oftentimes, the PART actually decreases the efficiency and effectiveness of government through increased administrative burdens, distracted managers and compliance costs.

This somewhat redundant executive order re-emphasizes the need for agency staff and programs to "spend taxpayer dollars effectively and more effectively each year," and requires agency heads to establish clear annual and long-term goals that can be assessed by "objectively measured outcomes." Agency heads are also required to develop specific plans for achieving program goals and the means to measure program progress toward those goals. All of these requirements, in some form, are present in a previous government performance initiative, the Government Performance and Results Act (GPRA), and on the surface are worthwhile and commendable goals.

Reaction to the order from public management experts was somewhat quizzical (see this *Washington Post* article), as many thought the order failed to break new ground — repeating many of the requirements agencies already operate under in the GPRA law. An anonymous source at the U.S. Environmental Protection Agency told *Inside the EPA* this order was unlikely to "result in major changes in agency practice" because agencies already follow most of the requirements contained within the order. Others were surprised at the timing of the order, coming late in tenure of this administration. OMB has stated it would like to have the E.O. fully implemented by September 2008, just four months before the end of the Bush presidency.

The timing has led many to conclude this is an attempt to extend the influence of the Bush administration's performance management initiative. Clay Johnson, the deputy director for management at OMB, confirmed that objective. "There should be no dropped batons going from this administration to the next administration," he told the *Washington Post*. "The next administration will come in knowing what every department is committed to do. It will help ensure there is continuous attention to these goals."

The crucial aspect in this executive order that attempts to extend influence is the requirement that the heads of agencies — including all government corporations and sponsored entities (i.e., Corporation for Public Broadcasting, Fannie Mae) and all independent agencies (i.e., Federal Communications Commission, Federal Election Commission) — appoint a senior executive to serve as a "performance improvement officer" to oversee all performance management activities of the agency, including development of strategic plans, annual performance goals, and performance reports. These performance improvement officers would also be required to advise the head of agencies as to the

sufficient aggressiveness of program goals and realistic chances of achieving those goals given resource constraints.

This structure, in and of itself, is not a terrible proposal. A more formalized, streamlined, and hopefully accountable structure within each federal agency that reports to the agency head (and not OMB) that would focus on improving program performance and spending money wisely is certainly needed. This structure may even help to make strategic plans developed under GPRA more tangible within agencies and create an atmosphere that boosts staff productivity and morale.

Unfortunately, these results are not guaranteed by the structure of the proposal, and using current Bush administration performance management tools, particularly the PART, would seriously damage the ability to develop objective and reliable program evaluations and recommendations.

Further decreasing the potential of this proposal, the executive order creates a narrowly-populated "performance improvement council," consisting of the Deputy Director of Management at OMB, who would act as the chair of the council, a selection of performance improvement officers, and other full or part-time agency staff as determined by the chair of the council and relevant agency heads. This council would, among other duties, submit to the director of OMB current or proposed performance management policies and criteria for evaluation of program performance, as well as update the director or the president on the progress of performance improvement across the government. While the E.O. states the program improvement officers are responsible to agency heads, the structure of this council cuts out agency heads and has the potential to be the conduit for infusion of political directives and biases into program operations.

On the whole, this executive order continues the Bush administration focus on narrow, White House-centered performance evaluation. This is significantly different from GPRA, which was supposed to be agency-driven in creating long-term goals, developed in consultation with outside stakeholders and Congress. It is likely Congress will meet this executive order with as much skepticism as they give to the PART. In a recent attempt to increase the relevance of PART in Congress, an amendment offered by Sen. Wayne Allard☼ (R-CO) was soundly defeated 68-21.

Because the performance improvement council consists of high-level OMB staff and senior executives, both of whom are unlikely to have extensive programmatic experience in the programs they are to evaluate, this order is sure to make PART the de facto metric for determining program performance.

It is possible the performance improvement officers will create another window through which OMB and the White House can attempt to control specifics of program policies and implementation within the agencies. Even worse, this structure further separates career agency and OMB personnel from the very performance accountability standards the administration has attempted to impose. Appointing an agency representative who oversees

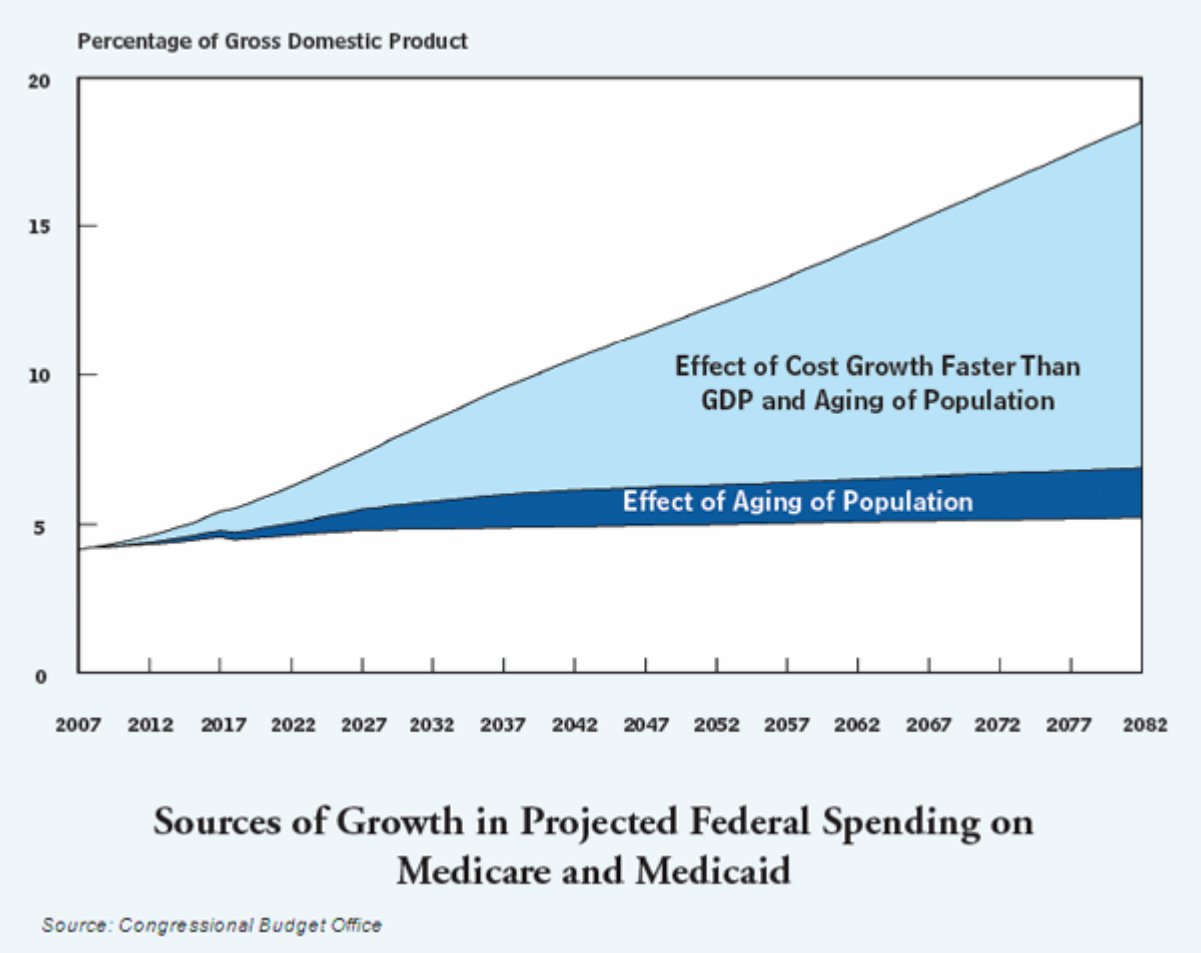
all performance evaluation and reports directly to the head of the agency and high-level OMB staff, but who will likely have little to no experience with specific programs they are supposed to be evaluating, will exacerbate the severe limitations of the PART.

The E.O. also leaves open some issues. Will the process described in the E.O. be an add-on to the existing PART process? How will the requirements of the E.O. be reconciled with legislative requirements under GPRA? Will this add more paperwork requirements for agency staff? These types of questions will need to be answered before the civil service staff embrace the intent of the E.O.

Despite the limitations of this executive order, OMB has continued its commitment to increasing transparency and access to government information. This order requires agency websites to contain regularly updated and accurate information on program performance in a useable and searchable form and makes an effort to make agency Inspector General reports more accessible on the web. This requirement builds upon many improvements OMB has made to its ExpectMore.gov website, which displays the PART review information for all programs. Unfortunately, this commitment to transparency is not enough to make up for the fact that the information being provided is of limited value.

The Real Long-Term Health Care Challenge

Recently, the Congressional Budget Office (CBO) has been issuing a reports challenging the conventional thinking about the long-term fiscal problem facing the nation, which was once believed to be primarily related to the influence of demographic changes on Social Security and Medicare. These reports draw on the results of other researchers and writers who found that long-term fiscal challenge is almost entirely unrelated to demographics and Social Security, and it is mostly confined to inefficiencies in the private and public health care system.



Sources of Growth in Projected Federal Spending on Medicare and Medicaid

Source: Congressional Budget Office

The new thinking expressed in the CBO reports goes like this: most of all, the health care cost issue is about *rapidly rising prices*. Spending on health care, both by the government and in the private sector, has been growing faster than the economy for many years and is projected to increase to unsustainable levels in the near future. On average, health care consumers are purchasing more than in the past, and what they purchase has increased in cost.

It would be one thing if all of this spending was valuable. But a growing body of research suggests a great deal of this spending has not been worth it. Researchers at Dartmouth Medical School have found extreme variation in the price of health care by region within the

U.S. Overall, the variation in spending does not correlate with health outcomes, meaning spending more does not necessarily make a person healthier.

Many observers have concluded that the price of health care (in 2006, we spent over $2 trillion annually on it) does not reflect its value. A 2007 McKinsey & Company study estimated around $480 billion of total annual health care spending could be eliminated, with no adverse impact on health outcomes for individuals. About half of that inefficient spending may be subsidized by public programs, the biggest being Medicare and Medicaid.

Causes and Solutions

At the root of the problem, says Arnold Relman, editor emeritus of the *New England Journal of Medicine*, in his book *A Second Opinion*, is that markets are bad at providing health care. For markets to be efficient, buyers and sellers need good information about products. But in health care, that information is too often unavailable to doctors and patients. As a result, people are spending money on treatments that are not the best deal.

When a patient is buying a health care service, they rarely know if they're getting a good deal and therefore are unable to choose health care efficiently. Doctors, too, are often in the dark about what options are best. CBO Director Peter Orszag has found insufficient research on the "comparative effectiveness" of different options for treating patients. Some doctors choose options that might be more expensive than necessary or less effective than other available procedures. If competition and additional choices are not having an impact on the bottom line of health care costs, the additional overhead and administrative fees charged by companies will make long-term costs significantly higher.

Orszag has further concluded that "comparative effectiveness" findings would probably have to be factored into how doctors are paid to bring down costs. Medicaid and Medicare pay doctors on a "fee-for-service" basis, meaning they are reimbursed for services they provide. Government health plans could use financial incentives through the fee-for-services system to encourage the use of treatments research has proven most effective.

Relman, as opposed to Orszag, believes the "fee-for-service" system is only a part of a health care system that has been too commercialized. Reforming it is not enough to fix the significant problems facing it. Relman identifies the profits and overhead expenses, made necessary by the competition endemic in the marketplace, as expenses that have not had a substantial return in health outcomes. He advocates reorganizing the system on a not-for-profit basis, which should reduce the competition and race-to-the-bottom mentality that contributes to inefficient health outcomes.

Similarly, in her book *Overtreated*, Shannon Brownlee, a health care journalist, identified a trend in health care provision where patients' consumption is driven by the supply of health care products. Brownlee has found that in regions where there are more hospital beds, for example, patients tended to use them more, but are no healthier. She concludes that greater regulation of the supply of health care services may be appropriate to control costs

throughout the system without sacrificing health care outcomes.

What's Insurance Got to Do with It?
The proliferation of insurance has also likely increased health care costs by enabling people to purchase health care, and through administrative and profit-related cost excesses. But high insurance costs are mostly the result of inefficiencies in the delivery system, and changing the insurance system may have a limited effect on health care spending.

Government insurance programs that pay for health care, like Medicare, Medicaid and tax exemptions, have to a large extent financed the long-term increases in health care costs that began in the 1960s. Much of that investment has been in efficient medical care, but most observers, including Princeton economist and *New York Times* columnist Paul Krugman, believe the U.S. health insurance system itself generates significant inefficiencies on its own. Private insurance companies are forced to take profits and spend considerably on competition with other insurers (advertising, promotions, incentives, discounts, etc.), which drives up costs for consumers.

However, there is significant disagreement over whether insurance encourages wasteful behavior by consumers, a tendency economists call "moral hazard." According to Orszag, a landmark RAND study showed when consumers pay higher co-payments, they consume less health care, with little or no adverse effects on health.

Increasing co-payments and deductibles might reduce overspending by a small percentage. This reduction would be small for a variety of reasons. The majority of health care expenditures are directed at chronic illness near the end of life, and financial incentives may not discourage buying in life-or-death situations. As noted above, in most situations, patients (and doctors) would still lack the knowledge and expertise to make efficient purchases even if cost concerns forced them to, while overhead in the delivery and insurance system would be unchanged by higher patient costs. What's more, a plan to discourage health care spending would have to take equity into consideration and not discriminate against low-income families, further limiting the extent to which such a plan could reduce costs through discouraging consumption. This point has been made by health care journalist Merill Goozner.

The new reports by the CBO give credence to and help to underscore the findings of a growing number of health care experts who have found the long-term fiscal challenge is almost entirely due to rising health care costs due to inefficiencies in the entire health care system.

Nonprofits Object to Poison Pill Amendment in Senate Campaign Finance Disclosure Bill

A long-standing effort to require campaigns for the U.S. Senate to file their campaign finance reports electronically has hit a new roadblock. An amendment offered by Sen. John Ensign☼

(R-NV) would infringe on contributor privacy rights by requiring donor disclosure by groups that file Senate ethics complaints. An ideologically diverse group of nonprofits sent a letter to Senate leadership voicing opposition to this proposal, saying the amendment's clear intent is "to discourage organizations from taking action to keep government accountable."

Since 2001, candidates for the House and the presidency, as well as federal political action committees, have been required to file campaign finance reports online with the Federal Election Commission (FEC). Voters can immediately view this information and see who supported each candidate. The Senate Campaign Disclosure Parity Act (S. 223), introduced by Sens. Russell Feingold (D-WI) and Thad Cochran (R-MS), would require that Senate candidates do the same. Currently, the Senate's paper campaign finance reports have to be entered into a computer before the information can go online. This time-consuming process delays public release of the information for months after the contributions are made and weeks after they filed. In the case of reports due at the end of October, the information is not available until after the election. S. 223 would change this by requiring Senate campaign reports to be filed electronically, creating a more cost-effective, transparent, and timely process.

The bill passed out of the Senate Rules Committee on March 28, and since then, Sen. Dianne Feinstein☼ (D-CA), the Rules Committee chair, has fought to pass the bill unanimously. The issue has been raised in the last two sessions of Congress but has never been passed by the Senate because holds have been put on the bill in order to block it.

Ensign's hold is designed to force consideration of his amendment, which would require any charity, religious organization or civic group filing a complaint with the Senate Ethics Committee to disclose the identity of donors giving more than $5,000. This would, in effect, discourage groups from filing ethics complaints against senators, which is why supporters of the bill call the non-germane amendment a "poison pill."

In response to the Ensign amendment, OMB Watch coordinated an effort by a broad group of nonprofits and coalitions to write to Senate Majority Leader Harry Reid (D-NV) and Minority Leader Mitch McConnell (R-KY) urging them to drop the Ensign amendment. The letter states, "This proposal contravenes and runs counter to the letter and spirit of well-established tax law policies, rules and regulations protecting the identity of donors that were enacted in recognition of the Supreme Court's decision in *NAACP v. Alabama*. If adopted, this provision would have the effect of changing existing tax law without the benefit of a full and open public debate, including involvement of Congressional tax-writing committees, and without a change in the Supreme Court's decision."

A few days after the letter was sent, Feinstein asked Ensign to withdraw his amendment, and in seeking a compromise, proposed to hold a Rules Committee hearing on the subject of the amendment. Referencing the groups' letter, Feinstein's press release stated, "[A] large group of conservative and liberal non-profit organizations wrote to express their belief that the amendment is obstructionist and retaliatory, and runs counter to donors' privacy, free speech, and association rights. In addition, they charge that the amendment would have an

effect on existing tax laws."

Why such a straightforward, good government bill that has bipartisan support (forty co-sponsors, including sixteen Republicans) cannot easily pass is perplexing. Most states, in fact, require easy access to campaign finance reports. A new report by the Campaign Disclosure Project found that 30 states require statewide candidates to file disclosure reports electronically. Ensign should drop his amendment to allow for the quick passage of a bill that has no public opposition and simply requires the electronic filing of campaign reports.

Scrutiny of Anti-Terrorism Watchlists Increases

Stirring up controversy and resentment, the United Nation's terrorist watchlist has led to the release of a critical report from Europe's leading human rights watchdog organization. U.S. watchlists have also caused controversy, including the massive no-fly list and the Specially Designated Nationals (SDN) list used to shut down charities. A recent hearing in the House Homeland Security Committee examined the extent to which U.S. watchlists infringe on the rights of innocent persons by maintaining inaccurate records and not addressing current security vulnerabilities.

The report from the Council of Europe, coupled with the House and Senate hearings, demonstrates the many shortcomings of relying on nontransparent watchlist methods. Both in the U.S. and in the EU, procedures for getting on or off government watchlists are often unclear. The draft report, published by the Council of Europe's legal committee, maintains that the methods used for sanctioning individuals and organizations do not include any "procedures for an independent review of decisions taken, and for compensation for infringements of rights." The 47-nation council said, "If one adds to this picture the practice of abductions (extraordinary renditions), of secret detention centers and the trivialization of torture, this provides a worrying, devastating message: Principles that are as fundamental as the rule of law and the protection of human rights are optional accessories applicable only in fair weather." Most of the council's criticism focuses on inefficient redress mechanisms and non-transparent designation processes.

Specific grievances include the following:

- Individuals/organizations should be adequately informed of the charges held against them.
- Individuals/organizations have the right to defend themselves against charges which restrict travel, freedom of movement, right to health, freedom of religion or access to economic resources (i.e. instances of frozen assets).
- Individuals/organizations should have the merits of their cases heard and speedily reviewed by an impartial and independent body, which has the authority to modify or annul blacklist designations.

The report calls for specific reforms, including:

- Adequate notice of charges and decisions
- A right to be heard and adequately defend oneself
- The ability to have decisions "affecting one's rights speedily reviewed by an independent impartial body" with authority to annul or modify it
- Compensation for wrongful violations of rights

The report calls for an overhaul of current international regulations on blacklisting, saying it is both regrettable and worrisome that "important and prestigious international organizations, founded on the protection of human rights, the rule of law and democracy, have chosen to forego these values."

This characterization might readily apply to U.S. watchlists. In recent months, Congress has been paying increased attention to problems within the watchlist system. The House Homeland Security Committee held a hearing entitled "The Progress and Pitfalls of the Terrorist Watch List" on Nov. 8. The hearing was similar to the Senate Homeland Security and Governmental Affairs Committee hearing held on Oct. 24. Opening comments from the House committee's chairman, Rep. Bennie Thompson☼ (D-MS), expressed concerns about the quality of watchlist data and the overall growth in the number of watchlist names. He said, "We can do better — and we have to do better..."

One key difference from the Senate hearing was the testimony of Kathleen Kraninger, Director of Screening Coordination for the Department of Homeland Security (DHS). Her comments highlighted actions DHS can take to further improve watchlist matching efforts. According to Kraninger, the DHS is preparing to take over the No Fly and Selectee watchlist-matching processes for both international and domestic flights. It will use Secure Flight, a program that is supposed to significantly enhance watchlist matching capabilities in several ways. As a result, she said:

- DHS will have access to real-time watchlist information for quicker identification of potential matches prior to airport arrival.
- Quicker calibrations will allow the Secure Flight system to increase/decrease the number of potential matches depending on the level of threat assessed.
- DHS will have more time to coordinate appropriate law enforcement responses before known/suspected terrorists arrive at passenger screening checkpoints.
- Matching will be performed in one process that will be consistently applied across airlines.

While these improvements are welcomed, they may take longer than expected if critical funding shortfalls are not overcome. Kraninger said, "The lack of funding will severely delay rollout of the program and increase costs and risks."

Given the lack of transparency in watchlist designations, Kraninger said it is important for agencies to have robust information for checking against watchlists. Kraninger stated,

"Different screening opportunities present different challenges." Customs and Border Protection has access to many different types of information, to identify and screen individuals entering the U.S., while domestic airline personnel currently rely most heavily on name-matching capabilities. Recognizing the limitations of using name based matches, Kraninger spoke of DHS efforts to begin using US-VISIT biometric information during screenings. According to Kraninger, in FY 2007, CBP encountered 5,953 positive watchlist matches. However, that number could increase substantially if biometrics were used.

The current number of unajudicated redress requests further highlights current inefficiencies in DHS counterterrorism efforts. Of 15,954 redress requests, approximately 7,400 have not been addressed. With nearly half of all cases being addressed, DHS is reportedly refining the concept of operations for redress requests. Other systems that might further enhance current screening efforts include the Western Hemisphere Travel Initiative (WHTI) and REAL ID. Both recommended by the 9/11 Commission, these two systems would make it much harder for known/suspected terrorists to use fraudulent credentials.

During the hearing, Kraninger also addressed key recommendations from GAO's October 2007 report. In response to GAO's recommendation that the Secretary of Homeland Security develop guidelines for using watchlist records to support private sector screening processes, Kraninger said DHS is currently drafting guidelines to establish and support private sector screening. List checking by private companies, such as banks and lenders, has led to problems for individuals with names similar to people on the list. In a March report, the Lawyer's Committee for Civil Rights of the San Francisco Bay Area showed that many Americans are being denied jobs and various services because their names are similar to others who are designated.

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In This Issue

Congress, President Running Out of Time to Achieve Fiscal Priorities

In our last issue, *The Watcher* detailed the status of several federal spending measures that have been delayed most of the fall. In this issue, we take a look at what these delays could mean to millions of American citizens.

Moves by Senate Republicans and the president to obstruct the passage of a spate of must-pass spending and revenue measures may result in benefit reductions or tax increases for millions of low- and moderate-income Americans if action is not taken quickly. President Bush has vetoed important and reasonable low-income assistance spending measures such as the Labor-HHS-Education appropriations bill and the SCHIP reauthorization bill, while Senate Republicans are in a deadlock with the Democratic leadership over Food Stamp and war spending. On the tax side, congressional Democrats also face Senate Republicans and a

president hostile to fiscally responsible pay-as-you-go principles who would prefer to see taxes increased for some 20 million middle-income families rather than for wealthy private equity managers.

Appropriations

Entering the third month of the new fiscal year, Congress and the president have only passed one of the twelve appropriations bills into law. If Congress fails to pass or fails to override Bush vetoes of the remaining FY 2008 appropriations bills, it will have to pass another continuing resolution (CR) to avoid a government shutdown before Dec. 14. Congress may extend the current CR until early 2008 and take up the spending fight then, or it may pass a CR that would fund the government for the rest of the 2008 fiscal year (through Sept. 30, 2008). A CR would most likely extend FY 2007 spending levels without including increases for population growth or inflation, putting pressure on state governments to find supplemental funding for assistance programs millions of Americans depend on.

The other option is for Congress to combine the remaining spending bills into one large bill, passing them all at once. This strategy, called an omnibus bill, may make it more difficult for the president to veto the bills should the funding levels not meet his demands. Although specific funding levels have not been mentioned during this stand-off, it is unlikely Bush would accept levels exceeding a compromise offered by Senate Majority Leader Harry Reid (D-NV) to split the difference. Because a significant number of conservative Republicans in the House are expected to back the president, overriding a veto of an omnibus is not in the offing.

The delays and cutbacks currently taking place have real consequences. As the Center on Budget and Policy Priorities notes, if this scenario plays out, the Women, Infants, and Children nutrition program (WIC) would be funded at about $5.5 billion. And, depending on which version of the Labor-HHS spending level is cut (House or Senate version), some 295,000 to 405,000 women, infants, and children would be dropped from the program. If Congress capitulates to Bush's demand that spending bills not exceed his "top line level" of $933 billion, over 500,000 WIC participants would be dropped from the program.

With only two weeks left to complete work, the worst-case scenario for appropriations would be enactment of a year-long CR. This would reduce funding for FY 2008 below even Bush's budget request and would result in substantial cuts in almost every budget area.

The Farm Bill

The current farm bill — a five-year agriculture subsidy and nutrition assistance spending bill — expired Sept. 30. If Congress fails to approve the pending $286 billion renewal, millions of Americans who rely on the Food Stamp program will face benefit cuts. Republicans are filibustering the Senate version over Reid's insistence that amendments be germane to the bill. It is possible a compromise will be reached soon that would allow Senate Republicans to offer a limited number of non-germane amendments, most likely to be related to tax policy. This would move the farm bill forward to likely passage later in

December.

It is crucial for the Senate to pass a reauthorization of the farm bill by the end of 2007. Because the current Food Stamp program eligibility requirements have not been adjusted for inflation since 1995, a simple extension of the current bill would cause millions of Food Stamp recipients to see their benefits reduced. The new farm bill would also provide an increase in the Emergency Food Assistance Program, which provides assistance to food banks. In light of a recent U.S. Department of Agriculture report, which found that 11 percent of U.S. households do not have access to enough food for an active, healthy life, erosion of this program would further threaten basic supports provided by food banks around the country. Without passage of a new farm bill, these and other programs providing nutrition assistance will likely cause millions of Americans to experience food insecurity or go hungry.

State Children's Health Insurance Program (SCHIP)

Aligning themselves with the president's opposition to expanding health care coverage for children, a group of conservative House Republicans have refused to override a veto of Congress's bipartisan, fiscally responsible extension of the State Children's Health Insurance Program. If these House members continue blocking the renewal bill and support Bush's meager proposal, one million fewer children and pregnant women would be enrolled in the program than if its current level of service was extended. If Congress simply extends current funding levels, 1.7 million pregnant women and children would not have access to this program. Although neither option is reasonable, inaction by Congress will result in the denial of health insurance coverage for over a million program participants.

During the week of Dec. 3, Congress sent the president a slightly modified version of the SCHIP reauthorization he vetoed earlier in 2007. The new version contains minor changes to address some concerns expressed during the first debate over the bill. The modifications tighten eligibility standards for undocumented immigrants, adults, and children living in families making more than 300 percent of the poverty level ($61,950 for a family of four). Bush is expected to veto this version as well.

War Funding

Of all the spending measures confronting Congress in December, this is perhaps the least pressing. Although the president claims that without passage of supplemental war funding, thousands of Pentagon employees and contractors will be furloughed, he vetoed a $50 billion supplemental spending bill because of its requirement that he set a timeline for withdrawal of troops. Bush's claims that layoffs will be needed, however, is pure political theater, as the Defense Department has multiple options for continuing to fund the war in the absence of a new emergency appropriation. In particular, the Defense Department could transfer money included in the recently passed Defense appropriations bill for FY 2008 until additional funds could be approved.

But even if layoffs were necessary, the president would bear ultimate responsibility. The vast majority of Americans — 67 percent according to a recent poll — disapprove of Bush's

handling of the Iraq War. That Congress would exercise its power of the purse to alter war policy is an attempt to align the interests of Americans with the nation's foreign policy. Congress, then, is presenting Bush with two options: Be accountable to the citizens he serves or layoff thousands of workers to fight a massively unpopular war. By his own admission, Bush would likely choose the latter.

AMT and Other Tax Provisions

Two "must-pass" tax items remain on the year's legislative agenda, and they are joined at the hip. Congress has failed thus far to extend the fix, or "patch," it has applied for several years running to the Alternative Minimum Tax (AMT). Without such a fix in place by Dec. 31, the number of taxpayers subject to the AMT will rise by 500 percent in 2008, from 4.2 million to roughly 23 million. Extending this hold-harmless provision for 2007 tax year returns is estimated to cost just over $50 billion over ten years. Congress has also failed to extend the package of popular individual and business tax credits, deductions, and other provisions known as "extenders," which includes the state and local sales tax deduction, the Work Opportunity Tax Credit, and the Welfare-to-Work Tax Credit and the research and development credit for businesses. Extending this set of provisions — which also expires at year's end — would cost $21 billion over ten years.

On Nov. 9, the House passed H.R. 3996, the Temporary Tax Relief Act of 2007, a bill (summary; vote; JCT score) combining the AMT patch and the extenders package. Since Congress' pay-as-you-go (PAYGO) rules require tax cuts to be offset, the bill contains revenue raising provisions, making it PAYGO compliant. The three chief offset provisions, each of which would raise just over $20 billion over ten years are: 1) taxing fund managers' carried interest payments as ordinary income; 2) eliminating the deferral of corporate deductions until executives' deferred compensation is actually received; and 3) delaying implementation of the provisions of the Job Creation Act of 2004.

Shortly before H.R. 3996 passed the House, President Bush issued a formal veto threat against the bill, saying that "these offsets ... would undermine the competitiveness of U.S. businesses in the global economy and could have adverse effects on the U.S. economy." There has been no action on the bill on the Senate side, and none is scheduled at present. Reid has insisted the principles of PAYGO be adhered to; GOP leaders have said they do not believe the AMT patch portion of the bill should require offsets. Although both the patch and the extenders are universally regarded as must-pass before Congress adjourns for the year, they currently remain in legislative limbo.

States Sue EPA for Reduced Reporting on Toxics

Twelve states are suing the U.S. Environmental Protection Agency (EPA) over the December 2006 regulation that weakened the Toxics Release Inventory (TRI). New York Attorney General Andrew Cuomo, leading the suit, filed in the U.S. District Court for the Southern District of New York on Nov. 28. Joining the suit are attorneys general from Arizona, California, Connecticut, Illinois, Maine, Massachusetts, Minnesota, New Jersey

and Vermont, and the Pennsylvania Department of Environmental Protection.

The EPA's Dec. 22, 2006, rule change, which went into effect Jan. 22, raised detailed reporting thresholds up to ten times above the old requirements. The suit claims that the increase was a violation of the Emergency Planning and Community Right-to-Know Act (EPCRA) because EPA does not have the authority to make changes that have such substantial impact. Moreover, EPA did not adequately justify the change and failed to follow its own rulemaking procedures.

The TRI program, which tracks the waste production and release of approximately 650 dangerous chemicals, has been one of EPA's most successful programs. Previously, facilities had to report detailed information (Form R) about the amount of the chemical and where the chemical went for any amount over 500 pounds. For pollution amounts less than 500 pounds, facilities only had to file a short form certification (Form A) that the chemical was under the limit. Now, for the majority of TRI chemicals, the threshold for reduced reporting is 5,000 pounds, so long as 2,000 pounds or less are released directly to the environment.

Though TRI does not mandate pollution reduction, the public disclosure of toxic pollution has acted as a powerful incentive for companies to reduce their generation of waste, eliminating over half of the annual toxic waste from the original chemical list since TRI's 1988 inception. In the last five years alone, TRI has shown an overall reduction of 2.8 billion pounds.

The lawsuit's nineteen claims concentrate on the following four areas:

1. *The change violates EPCRA because EPA did not apply the substantial majority standard on a chemical-by-chemical basis*: EPCRA allows EPA to change the reporting threshold only if the "majority of the total releases of the chemical at all facilities" is still reported (EPCRA section 313(f)(2)). That only a small percentage of total national releases would be lost with the rule change is irrelevant since the majority standard must be applied to each chemical individually. EPA's own analysis indicates that at least half of the detailed reporting for up to 46 chemicals in 2004 would have been missing if the new standard had applied.
2. *EPA's analysis in justifying the rule change was flawed*: EPA never explained how it selected the seemingly random new threshold levels, how it calculated the amounts for lost reporting and why there were large variations in its calculations. EPA's analysis also failed to consider all of the facilities required to report to TRI, thereby reducing the ability to project the impact on the substantial majority. The suit also questioned how EPA calculated the burden reduction impacts and why health and environmental factors were not considered.
3. *EPA's "burden reduction" justification is flawed and not in keeping with original legislative intent*: EPA never explained why burden reduction was "necessary" to carry out EPCRA, instead justifying the change with the assumption that it will motivate pollution reduction. Regardless, pollution reduction is not actually a stated purpose of TRI. Instead, the threshold change works *against* the purpose of the

program, which is to provide public information about chemical releases.

4. *EPA's response to comments was inadequate and failed to meet the standards for the rule change process*: Within the more than 122,000 comments that were submitted to EPA opposing this change, many raised a variety of these claims and complaints, which EPA failed to address.

Assistant EPA Administrator Molly O'Neill said in response to the lawsuit, "The TRI rule is making a good program better." Sean Moulton of OMB Watch disagreed, describing the change as "sweeping the thousands of tons of toxic waste under the carpet and calling it cleaning up the environment."

In EPA's effort to defend the change, the agency has stressed that for Persistent Bioaccumulative Toxins (PBTs), the most dangerous chemicals, facilities must certify that there are zero releases to the environment. Moulton counters, "This incorrectly assumes that just because these PBTs are captured and stored in a barrel they are safe." Hurricane Katrina and other disasters have demonstrated that chemicals that facilities do not plan to release to the environment can wind up in the air and water.

Stressing the PBT reporting requirements also allows EPA to avoid discussion of the new reporting threshold for the hundreds of other toxic chemicals under TRI, of which facilities are now allowed to release thousands of pounds without detailed reporting.

There has been enormous opposition to changing this popular program. The attorney general suit is the latest development of opposition on many fronts. California passed state legislation to create a requirement to report toxic pollution to the state agency using the old federal thresholds. At the federal level, companion bills have been introduced in the House and Senate to reverse the TRI changes and strip EPA of the ability to cutback the program in the future. During an Oct. 4 hearing of the House Energy and Commerce Subcommittee on Environment and Hazardous Materials, the Government Accountability Office testified that an ongoing investigation into the rule change has revealed that EPA cut corners and did not adequately review the impact of the changes, including the environment justice impact. A report on the GAO investigation is expected within a month.

This is the first legal challenge to the threshold change. District Judge Barbara S. Jones and Magistrate Judge Debra Freeman have been assigned to the case.

FedSpending 3.0 Goes Public

On Nov. 29, OMB Watch launched the third upgrade of its FedSpending.org website, which allows the public to search federal spending data, since the site was created a year ago. The new version includes approximately $16.8 trillion in spending data, including annual spending from FY 2000 through FY 2006 for both contracts and federal assistance, with partial contracts data for FY 2007. Major feature upgrades of this version include mapping,

expandable summary tables and a more powerful "SuperSearch."

During the site's first year, users performed approximately five million searches, clearly demonstrating the demand for greater transparency of federal spending. Many users offered suggestions for improvements or requests for changes and new features, which OMB Watch has tried to prioritize and consider. OMB Watch made two previous upgrades, each bringing FedSpending.org more current data and site improvements. Previous enhancements include improved data interface, increased search options, and improved accessibility for people with disabilities.

The new mapping feature, which can be accessed either through the map icon that appears in the upper right-hand corner of all search results or through level of detail options, allows users to view the geographic distribution of federal spending. Users can see a state-by-state breakdown of spending at the national level or drill down into an individual state to view the breakdown of congressional district spending. Below each map are tables with the mapped information listed on the left side and unmappable information listed on the right side. Unfortunately, FedSpending.org can only map domestic spending locations, so information on spending outside the U.S. or data with quality problems that make it impossible to assign the spending to a specific location are unmappable at this time.

Another significant improvement is the capability for FedSpending.org users to expand the tables within the "summary" view — such as the Top 5 Products and Services or Top 5 Funding Agencies. Now, for any search result, users can simply click on a link to expand these tables to list all of the results of these breakdowns. Previously, it would have been necessary for users to download or copy more detailed data from the site and calculate these results themselves. The expandable tables represent a real time saving for users.

The final new feature of FedSpending.org 3.0 is the introduction of a SuperSearch on both the contracts and assistance spending data. OMB Watch has consolidated and organized the search options previously separated into advanced search forms based on recipient, location and funding agency. The SuperSearch makes searching the spending data more versatile and powerful, as it offers the ability to combine a greater variety of search fields and more easily find the specific information users are looking for on the site.

The FedSpending.org 3.0 upgrade includes some of the biggest steps forward for the site since its creation and will make it easier for users to get better answers to their questions on federal spending. OMB Watch intends to continue to improve and expand the functions of FedSpending.org, with plans to link the spending information with other databases such census population estimates and campaign finance reports.

Secrecy Hinders Progress of Terrorism Cases

The secrecy of the government's counterterrorism efforts is impeding the progress of bringing suspected terrorists to trial. In reports from *The New York Times* and *The*

Washington Post, secret government programs and secret court procedures have slowed cases involving suspected and convicted terrorists.

A series of documents detailing secretly conducted arguments, in what may be the first Guantanamo case to go to trial, was released by the government the week of Nov. 26. *The New York Times* reports that documents reveal that the case of Omar Ahmed Khadr — captured when he was 15 in 2002 and held in Guantanamo as an enemy combatant for allegedly killing a U.S. army medic and planting mines in Afghanistan — has been hindered by debates regarding access to the identity of witnesses.

The military commission trying Khadr issued secret orders preventing his lawyers from learning the names of the witnesses against him. Access to the identity of those who are testifying against a defendant is a fundamental principle of the American legal system. Without such access, an adequate defense cannot be made, and the veracity of such witnesses' statements cannot be tested.

Another case suffering from excessive secrecy involves a Muslim leader convicted on terrorism charges in Fairfax, VA. The case is being hindered due to the government's attempts to implement secret proceedings. Ali al-Timimi is challenging his conviction, arguing that the evidence used against him may have been gathered using the secret National Security Agency's (NSA) Terrorist Surveillance Program (TSP).

The al-Timimi case has been bogged down by a series of secret filings regarding the program submitted by the intelligence community. The government intelligence community is not even allowing the government's prosecutors in the case to see the filings. *The Washington Post* reports that according to a transcript of the hearing, U.S. District Judge Leonie M. Brinkema said, "I am no longer willing to work under circumstances where both the prosecuting team and defense counsel are not getting any kind of access to these materials."

Judge Brinkema threatened to grant a motion for a new trial if the government intelligence community did not permit the prosecuting and defending counsel to review the secret filings.

In addition to secret filings and secret witnesses and evidence, the government has also used the state secrets privilege in an attempt to dismiss claims against the government on the grounds they involve information which, if revealed, would be dangerous to national security. The states secrets privilege is being invoked in the approximately 50 lawsuits against the government and telecommunications companies alleged to be involved in the NSA's TSP.

In a ruling by the Ninth Circuit Court of Appeals in *Al-Haramain Islamic Foundation v. Bush*, the court held that a document detailing that a particular organization was targeted by the TSP was a state secret but that the subject matter of the suit itself was not. Because the government has openly admitted the existence of the program, the government cannot

claim that TSP is now a state secret and that all lawsuits regarding the program should be dismissed. Sen. Arlen Specter☼ (R-PA) and others are considering curtailing the use of the states secrets privilege.

While many of the cases proceeding in the American justice system and in military commissions involve sensitive matters of national security, the truth-seeking operations of any justice system depend upon a level of openness and transparency. In order to defend against claims or proceed with claims against suspected terrorists, lawyers need access to basic information to make their case. Unfortunately, the present state of the justice system does not ensure this level of transparency.

Political Influence Leads to Revised Endangered Species Decisions

The U.S. Fish and Wildlife Service (FWS) will revise seven of eight decisions made under the Endangered Species Act program after reviewing them for improper political interference. The four-month review came as a result of a Department of Interior inspector general's investigation of allegations that former Deputy Assistant Secretary for Fish, Wildlife and Parks, Julie A. MacDonald, intimidated staff and changed the scientific information agency scientists developed for decisions about listing or delisting threatened or endangered species.

MacDonald resigned her position April 30 after the investigation concluded her actions, though not illegal, violated the Code of Federal Regulations regarding disclosure of nonpublic information and the appearance of preferential treatment. MacDonald disclosed information to the California Farm Bureau Federation and the Pacific Legal Foundation, a property rights group that often challenges endangered species decisions.

FWS Acting Director Kenneth Stansell sent a letter Nov. 23 to House Natural Resources Committee Chair Nick Rahall (D-WV) detailing the outcome of the eight decisions reviewed. Stansell wrote, "The Service believes that revising the seven identified decisions is supported by scientific evidence and the proper legal standards. As resources allow, these revisions will be completed as expeditiously as possible."

Rahall led the charge to investigate political interference in FWS. The Natural Resources Committee held a hearing May 9, shortly after the inspector general's investigation and MacDonald's resignation. On the committee's website, Rahall's reaction to the letter from Stansell implies the problem may go much deeper than these seven decisions. He is quoted as saying, "Julie MacDonald, who was a civil engineer by training, should never have been allowed near the endangered species program. This announcement is the latest illustration of the depth of incompetence at the highest levels of management within the Interior Department and breadth of this Administration's penchant for torpedoing science. Today we hear that seven out of eight decisions she made need to be scrapped, causing us once

again to question the integrity of the entire program under her watch."

Stansell's letter did not imply a sense of urgency to revise the decisions, however. In the case of the white-tailed prairie dog, for example, his letter indicates that "the Service will complete a 12-month finding in Fiscal Year 2009, if funding is available." The FWS is under court direction to complete a new proposed rule for the Canadian lynx critical habitat by August 2008 and must supply status reports to the court starting Feb. 1, 2008. Other species covered by the review include 12 species of Hawaiian picture-wing flies, the Arroyo toad, the California red-legged frog, and the Preble's meadow jumping mouse. The letter consistently promises to revise the decisions "as funding is made available."

According to a Nov. 28 *Washington Post* story, some environmentalists are suspicious of FWS's review and have sued the agency over the status of the white-tailed prairie dog. The Forest Guardians and the Center for Native Ecosystems joined with other groups to initiate the suit. A spokesperson for the Forest Guardians is quoted as saying the group believes there are other decisions that need to be reviewed because of MacDonald's action. In addition, they want FWS to review other decisions made by political appointees.

Scientific Wrangling over Air Quality Standard for Lead

The U.S. Environmental Protection Agency (EPA) is preparing to revise the national standard for airborne lead pollution, but differing scientific opinions among federal officials are further complicating a protracted rulemaking effort. The prevailing interpretation may have a significant impact on the agency's decision to tighten or weaken the standard.

EPA is developing its proposed revision for the National Ambient Air Quality Standard (NAAQS) for lead. Lead is one of six pollutants regulated by EPA's NAAQS program, which requires the agency to regularly evaluate and revise air quality standards and ensure federal regulations are fully protective of public health, regardless of their economic impact. The current standard for lead is 1.5 $\mu g/m^3$ (micrograms per cubic meter), a weight to volume measure of lead concentration in the air.

According to EPA, "The major sources of lead emissions have historically been motor vehicles (such as cars and trucks) and industrial sources." According to the American Lung Association, "Exposure to lead occurs mainly through the inhalation of air and the ingestion of lead in food, water, soil, or dust." Lead exposure can lead to a variety of adverse health effects including organ damage and neurological impairment. Its effects are most pronounced in children.

Environmental scientists on EPA's staff are recommending a markedly tighter air quality standard for lead. In its Nov. 1 final Staff Paper, EPA's Office of Air Quality Planning and Standards found, "The overall body of evidence on lead health effects: Clearly calls into question the adequacy of the current standard; and provides strong support for consideration of a lead standard that would provide greater health protection for sensitive

groups, especially for children." The staff paper recommends a range of levels from 0.2 μg/m^3 to as low as 0.02 μg/m^3.

Administrator Stephen Johnson will use the staff recommendations — along with the input of EPA advisory committees, public comment, and his own examination of the scientific evidence — when deciding on the standard.

However, statistics from the Centers for Disease Control and Prevention (CDC) — a federal body housed within the Department of Health and Human Services — are confounding the EPA staff recommendations. CDC establishes a "level of concern" for lead and other toxins. The current level of concern for lead is 10 μg/dL (micrograms per deciliter), a measure of lead concentration in the human bloodstream. Although CDC recognizes "recent studies suggest that adverse health effects exist in children at blood lead levels less than 10 μg/dL," the agency has not lowered the level of concern because it believes adequate evidence does not exist to properly identify a lower level.

If EPA abides by CDC's endorsement of a 10 μg/dL level of concern, there would be no need to tighten the air pollution standard to achieve that health outcome, experts say. However, if EPA were to endorse a lower blood lead level as protective of public health, it would be obligated to tighten the air quality standard in order to effect the lower concentration.

Policy analysts inside EPA's Office of Policy, Economics & Innovation (OPEI) are using CDC's numbers to chart a course in which the agency could weaken the standard. According to *Inside EPA* (subscription), OPEI is pushing EPA to endorse the CDC's blood lead level of concern of 10 μg/dL. If officials within OPEI are successful, EPA will likely propose a revision to the standard that is weaker than the current one.

A recent scientific study gives further credence to the EPA staff argument that the current standard is not sufficiently protective of public health. A study published in the journal *Environmental Health Perspectives* found children with blood lead levels between 5 μg/dL and 9.9 μg/dL scored lower on IQ tests than children with blood lead levels less than 5 μg/dL.

The study examined children between the ages of six months and six years. The authors concluded, "Children's intellectual functioning at 6 years of age is impaired by blood lead concentrations well below 10 μg/dL, the CDC definition of an elevated blood lead level."

Under the Clean Air Act, EPA must revise all NAAQS every five years. EPA set the current standard in 1978. EPA has not reviewed the national standard for lead since 1990. During the 1990 review, EPA decided a revision of the standard was unnecessary.

EPA began its current review of the NAAQS for lead after a federal court mandated the agency undertake the rulemaking. In September 2005, as a result of a lawsuit brought by the Missouri Coalition for the Environment, the U.S. District Court for the Eastern District of Missouri ordered EPA to begin a review of the lead standard and set out a timetable for

the review.

EPA was expected to publish an Advanced Notice of Proposed Rulemaking (ANPRM) by the end of November but has yet to do so. EPA submitted the ANPRM to the White House Office of Information and Regulatory Affairs (OIRA) on Nov. 16. OIRA reviews and edits agency regulatory actions before the actions are released to the public. OIRA has not completed its review of the ANPRM, according to its database on review.

EPA has indicated it will propose a new standard for lead in March 2008 and make its final decision by September of that year.

Snowmobile Plan for Yellowstone Ignores Environmental Impacts

For at least a decade, the limit on snowmobiles in Yellowstone National Park has been the subject of a pitched battle between conservationists and snowmobile advocates. The National Park Service (NPS) has announced a limit on snowmobile use in Yellowstone. As expected, NPS will allow 540 snowmobiles per day, an amount close to double the daily average from the previous winter.

On Nov. 20, The director of the Intermountain Region of the National Park Service announced the policy in a Record of Decision. The new policy will take effect beginning in December 2008, just as President Bush is leaving office.

Shortly before leaving office in January 2001, the Clinton administration banned all snowmobile use in Yellowstone. The Bush administration was able to delay implementation until a federal court invalidated the ban in 2004 in a case brought by the snowmobile industry.

For the past few winters, NPS had a temporary cap of 720 snowmobiles in place but has been promising to finalize a limit. NPS has delayed a decision while preparing a final environmental impact statement (FEIS), as required by the National Environmental Policy Act. (Click here for a summary.)

NPS published the FEIS on Sept. 25. NPS's decision adopts one of seven policy alternatives examined in the FEIS. Other options include capping snowmobile use at 1,024 per day, banning snowmobile use in favor of larger but less numerous snowcoaches, and banning all "oversnow vehicles" such as snowmobiles and snowcoaches. NPS calls the ban on all oversnow vehicles the "environmentally preferred alternative."

The most notable difference between the chosen alternative of 540 snowmobiles per day and the more environmentally friendly alternatives (the ban on snowmobiles and the ban on all oversnow vehicles) is the effect on air quality. A ban on all oversnow vehicles would result in no emissions, and a ban on snowmobiles would lead to "negligible" emissions from

snowcoaches. NPS classifies the adverse impacts related to the 540 snowmobile limit as "moderate."

In March, NPS released a draft version of the environmental impact statement for public comment. Commenters overwhelmingly supported the alternative to ban snowmobiles but allow snowcoaches.

Conservation groups support an outright ban on snowmobile use in Yellowstone. Advocates believe snowmobiles cause air pollution and excess noise that jeopardize the health of the Yellowstone environment.

The snowmobile industry has led the charge against a ban on snowmobile use in Yellowstone. The International Snowmobile Manufacturers Association said in a statement, "Continued snowmobile use in portions of Yellowstone and Grand Teton road systems have no adverse impacts on Park Resources, including: Air Quality, Wildlife, or Soundscapes."

Conservation groups expressed disappointment with NPS's new policy. The Wilderness Society derided NPS's decision, saying it would "swing the gates of Yellowstone National Park open — beyond this winter season — to more, not fewer snowmobiles, despite the Agency's own scientific conclusions that an increase in snowmobile use above the levels of the past three winters will lead to more noise, dirtier air and frequent disturbance of wildlife."

In October, a bipartisan group of 86 House members (none from the Yellowstone region) wrote to NPS asking for a ban on snowmobile use in favor of snowcoaches. The representatives wrote, "The agency's studies have repeatedly demonstrated that the best way to protect the health and safety of Yellowstone's visitors, staff, wildlife, and national resources while promoting more affordable and educational access, is to phase out snowmobile use entirely."

In March, seven former National Park Service directors wrote to Interior Secretary Dirk Kempthorne opposing expanded snowmobile use in Yellowstone.

Based on figures from previous winters, the new limit may not have a practical effect on snowmobile activity in the park. According to NPS, average daily snowmobile use last winter was about 290.

Multinationals Push for New Greenhouse Gas Emissions Regulations

Two calls-to-action on cutting greenhouse gas emissions were released Nov. 30, shortly before world leaders met in Bali to begin outlining a global agreement to succeed the Kyoto Protocol. First, business leaders from 150 global firms issued a communiqué calling for "a comprehensive, legally binding United Nations framework to tackle climate change."

Second, a report sponsored by a coalition of U.S businesses and nongovernmental organizations said the U.S. could reduce its output of greenhouse gas emissions substantially using existing technologies and low-cost emerging alternatives, but to do so "will require strong, coordinated, economy-wide action that begins in the near future."

The Bali Communiqué was issued by The Prince of Wales's UK and EU Corporate Leaders Groups on Climate Change. It calls for:

- "a comprehensive, legally binding United Nations framework to tackle climate change"
- "emission reduction targets to be guided primarily by science"
- "those countries that have already industrialised to make the greatest effort"
- "world leaders to seize the window of opportunity and agree [to] a work plan of negotiations to ensure an agreement can come into force post 2012 (when the existing Kyoto Protocol expires)"

This group of corporate leaders includes such giants as General Electric, Shell Oil, British Airways and DuPont. They note that the scientific evidence regarding climate change is "now overwhelming" and that a mandatory framework for reducing greenhouse gas (GHG) emissions "will provide business with the certainty it needs to scale up global investment in low-carbon technologies," according to a *Washington Post* story.

BBC News reports that the business leaders have moved away from the Bush administration's position and expect this administration to oppose a mandatory framework. James Connaughton, the chair of the U.S. Council on Environmental Quality "confirmed to the BBC's Environment Analyst that the White House will not agree to binding international emissions cuts during the UN's climate negotiations."

In the U.S., GHG emissions are projected to rise 35 percent between 2005 and 2030, according to a new report, *Reducing Greenhouse Gas Emissions: How Much at What Cost?* The report was sponsored by Environmental Defense, the Natural Resources Defense Council (NRDC), Pacific Gas & Electric, Shell, Honeywell and others and was conducted by McKinsey & Company, a consulting firm, which analyzed more than 250 opportunities to reduce or prevent GHGs.

Without any specific policy changes or reduced demand from consumers, the authors concluded that "[r]elying on tested approaches and high-potential emerging technologies, the U.S. could reduce annual GHG emissions by as much as 3.0 gigatons in the mid-range case to 4.5 gigatons in the high-range case by 2030" or in the range of 7-28 percent at a marginal cost of less than $50 per ton. Most of this reduction could be achieved by common sense practices focusing on energy efficiency both in households and businesses.

In NRDC's press release announcing the report, its president, Frances Beineke, said, "Global warming is becoming a core driver for business and the American economy. Smart companies know that action is coming, and they are moving to get ahead of the game ...

Strategies to cut emissions and reduce energy demand create both a challenge and an opportunity. With the right measures now, we can unlock tremendous savings throughout the economy."

The press release noted several factors make 2007 a turning point in attitudes toward global warming. For example, the U.S. Climate Action Partnership, a coalition of major businesses, issued a call for a federal limit on GHGs in conjunction with a market trading system. In April, the U.S. Supreme Court ruled that the U.S. Environmental Protection Agency (EPA) must start addressing climate change. Many states and Congress are progressing with programs and/or legislation to reduce GHG emissions.

The common themes among the business groups calling for action on GHG reductions include the need for mandatory frameworks that provide certainty for investors and businesses, the removal of disincentives that affect energy efficiency (such as shifting the cost of electricity to owners of apartment buildings from tenants so there would be incentives to buy energy efficient appliances), and federal support for research and development. Clearly, there is an important role for governments to achieve what the public, the business community and these reports support: domestic and international actions to reduce GHG emissions while there is still an opportunity to prevent the worst damage from a changing climate.

These actions suggest that business is not monolithic when it comes to regulatory matters. Many view environmental, consumer and health problems with equal concern as the public — and recognize that addressing the problems is good for business. This is where federal leadership is needed. The federal government needs to plot a steady long-range regulatory course for dealing with GHG emissions and other societal problems. Such leadership is sorely needed today.

FEC Approves Rule Exempting Issue Advocacy from Broadcast Ban

The Federal Election Commission (FEC) approved a final rule exempting some issue-related broadcasts from the electioneering communications rule. The old rule barred corporations — including nonprofits — and unions from paying for such ads within 60 days of a federal general election or 30 days of a primary, if the ads referred to a federal candidate. The new rule is the FEC's response to the U.S. Supreme Court's decision in the *FEC v. Wisconsin Right to Life* case, which struck down the ban as applied to grassroots lobbying. The new rule does not provide a specific standard. Instead, there is a safe harbor for some grassroots lobbying broadcasts, and the rest of the rule lists criteria for the FEC to decide if a communication is allowable on a case-by-case basis. It also requires donor disclosure for these non-electoral messages.

The new rule, which will be Section 114.15 of the Code of Federal Regulations, starts with the general statement that corporations and labor organizations may broadcast

electioneering communications if they are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate." The rule sets up the FEC to do the interpretation on a case-by-case basis by listing "Rules of Interpretation" for all communications that do not fall within a limited safe harbor.

The safe harbor allows broadcasts to refer to federal candidates within the 30/60-day blackout period if:

- There is no mention of "any election, candidacy, political party, opposing candidate, or voting by the general public";
- It takes no position on a federal candidate's character or fitness for office; and
- It "focuses on a legislative, executive, or judicial matter" and asks the candidate to take a certain position or includes a call to action to the public to contact the candidate about the issue.

The safe harbor also allows commercial advertising that does not address the election. The safe harbor does not include a requirement that the candidate be an officeholder in a position to make a decision relating to the action.

The safe harbor's requirement of a call to action on an issue excludes broadcasts that may be simple announcements of events, cable access shows and other communications. The FEC will determine if these are permissible by considering "whether the communication includes any indicia of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." Indicia of express advocacy are communications that mention elections, political parties, voting, opposing candidates, candidacy or take a position relating to a candidate's character or fitness for office.

If the content of the broadcast focuses on a public policy issue and has a call to action or proposes a commercial transaction, it may be considered as something other than an appeal to vote for or against a candidate (e.g., grassroots lobbying). The rule says the FEC will only consider the content of the communication and "basic background information," and "any doubt will be resolved in favor of permitting the communication." The rule says the FEC website will list examples "derived from prior Commission or judicial actions." This overall approach could eventually develop the same kinds of problems charities and religious organizations are experiencing with the vagueness of the Internal Revenue Service's (IRS) "facts and circumstances" standard for enforcing the tax code's ban on partisan intervention in elections.

Donor Disclosure

The FEC left existing disclosure requirements in place for exempted broadcasts, so that any nonprofit that pays for a grassroots lobbying ad running in the 30/60 day period will have to file a report with the name and address of each donor giving $1,000 or more during the calendar year, if a donation "was made for the purpose of furthering electioneering

communications." This will create practical difficulties for nonprofits, since it is not always possible to anticipate when or if a grassroots lobbying ad will be necessary. It also appears to be inconsistent with Congress' decision earlier this year to reject proposals for grassroots lobbying disclosure under the Lobbying Disclosure Act.

The week before its Nov. 20 meeting, the FEC published the General Counsel's draft final rule, which was significantly different than the rule proposed for public comment, dropping the safe harbor approach and only providing general guidance. Just prior to the meeting, Chairman Robert Lenhard proposed an alternative that included a safe harbor. The proposal was adopted after an amendment offered by Commissioner Ellen Weintraub, making clear that the FEC will consider the ad's content and whether the ad contains "indicia of express advocacy."

Study Commission or Thought Police?

A bill that would create a commission and research center on "violent radicalization" and "extremist belief systems" that can lead to homegrown terrorism has been quietly making its way through Congress, passing the House on Oct. 23. The American Civil Liberties Union (ACLU) and other groups are raising concerns that its vague definitions, broad mandate and minimal oversight could lead to ethnic profiling and censorship based on personal beliefs. The bill now moves to the Senate, although the Homeland Security and Governmental Affairs Committee has not yet scheduled a hearing.

The Violent Radicalization and Homegrown Terrorism Act was passed in the House as H.R. 1955 (and has been introduced in the Senate as S. 1959). It provides for:

- Creation of a ten-member national commission charged with examining the "facts and causes of violent radicalization, homegrown terrorism, and ideologically based violence in the United States" and reporting its findings and legislative recommendations to Congress within 18 months of its creation. The commission would have the power to conduct hearings and receive evidence, but the act does not authorize it to subpoena persons or records.
- Establishment of a Center of Excellence for the Study of Violent Radicalization and Homegrown Terrorism in the United States, at a university designated by the Secretary of Homeland Security "following the merit-review processes" used for similar programs in the past. The Center's purpose is to "study the social, criminal, political, psychological, and economic roots of violent radicalism" and methods for addressing them that can be used by federal, state, local and tribal homeland security officials.
- A survey of approaches used by other nations to address the problem, to be conducted jointly by the Department of Homeland Security, Department of State, the Attorney General and "other Federal Government entities, as appropriate." The results are to be reported to Congress and used in developing a national policy on violent radicalization, "to the extent that methodologies are permissible under the

Constitution."

The bill was first introduced in the House on April 19 by Rep. Jane Harman☼ (D-CA), Chair of the Homeland Security Committee's Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment, and Rep. Dave Reichert (R-WA), the ranking member, after the committee held two hearings on the issue. The bill passed the subcommittee on July 17, and on Aug. 1, the full Homeland Security Committee passed it by voice vote. The bill was also considered by the House Judiciary Committee, which discharged it on Oct. 16. It then passed the House 404-6.

The two hearings were primarily one-sided, with the bulk of the witnesses representing law enforcement or federal agencies. There was only one nonprofit witness, representing the Muslim Public Affairs Council. This perpetuates an unfortunate, continuing pattern of insufficient information gathering by congressional committees that are considering terrorism related issues.

For example, in May, the Senate Homeland Security and Governmental Affairs Committee held a hearing on "Violent Islamist Extremism" where Treasury officials erroneously characterized the position of nonprofit organizations, but no charities were invited to testify, prompting a letter of protest from Grantmakers Without Borders. Congress also missed an oversight opportunity in October when it passed expansion of penalties for violating the ban on material support for terrorism, but only heard from government witnesses in the one hearing it had.

The primary objections to the House bill relate to its broad definitions of violent radicalization, homegrown terrorism and ideologically based violence. Sec. 899A defines:

- "[V]iolent radicalization" as promoting an "extremist belief system" aimed at facilitating violence "to advance political, religious, or social change"
- Ideological violence as "use, or planned use, or threatened use of force or violence" to promote beliefs
- Homegrown terrorism as use or planned use of force to "intimdate or coerce the United States government, the civilian population or any segment thereof in furtherance of political or social objectives"

This broad definition could be interpreted to include rallies, sit-ins, protest marches and other traditional forms of dissent.

The Equal Justice Alliance says the bill creates "thought police" and has called on its members to contact their senators to oppose it. Executive Director Odette Williams said the commission "would give the appearance that whoever they are investigating is potentially a traitor or disloyal or a terrorist, even if all they were doing was advocating lawful views."

The ACLU raised further objections in a Nov. 28 press release, which said, "Law enforcement should focus on action, not thought." It said the ACLU appreciates steps taken

to improve the bill but remains concerned about its overall impact. Caroline Frederickson, director of the ACLU's Washington office, said, "The focus on the Internet is problematic" and could lead to censorship. The bill's Findings in Sec. 899B point out that the "Internet has aided in facilitating violent radicalization, ideologically based violence, and the homegrown terrorism process in the United States by providing access to broad and constant streams of terrorist-related propaganda to United States citizens."

Harman responded immediately in a letter to the ACLU, which said, "HR 1955 is not about interfering with speech or belief .... Radical speech, as I have said repeatedly, is protected under our Constitution." She said the ACLU's position is "confusing," since the group suggests revisions but also notes it is unlikely to support the bill even if the legislation is revised.

Sec. 899F of the bill requires that Homeland Security "not violate the constitutional rights, civil rights, or civil liberties of United States citizens or lawful permanent residents." It also would require operations to be conducted with racial neutrality and to be audited by Homeland Security's Civil Rights and Civil Liberties Officer. The ACLU's Mike German told *In These Times* that this provision does not amount to independent oversight, and, "Nobody should be fooled that such an office would have authority to address policies that are approved at a high level of the administration."

The commission itself is likely to be dominated by a coalition of congressional Republicans and administration officials if the bill passes and is implemented during the remainder of the Bush administration, though the majority could change when a new presidential administration takes power in January 2009. The president, Secretary of Homeland Security, minority leaders in the House and Senate and the ranking members of each chamber's homeland security committee would each appoint a member, which would currently provide a majority of six Republicans. Given the current administration's less than desirable record on protecting constitutional rights in the context of national security issues, assurances that such a commission will not lead to attempts to suppress dissent are unconvincing.

Tamil Rehabilitation Organization and its U.S. Branch Shut Down

On Nov. 15, the U.S. Department of the Treasury designated the Tamil Rehabilitation Organization, Inc. (TRO) as a supporter of the group Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, charging that TRO was a fundraising front. TRO's offices in 18 countries, including one in Cumberland, MD, were also designated. The designations, authorized by Executive Order 13224, prohibit Americans from engaging in financial transactions with designated groups and freeze any assets the groups may have under U.S. jurisdiction. TRO says that the freeze on its assets will prevent 300,000 people from receiving assistance, terribly impacting the Tamil people, and will cause further suffering to vulnerable populations. Meanwhile, any efforts to have its U.S. designation removed are

unlikely to be successful, since to date, the courts have upheld Treasury's authority to designate other groups even when the designation is based on secret evidence and where the group is not afforded due process.

Treasury's press release stated, "In the United States, TRO has raised funds on behalf of the LTTE through a network of individual representatives. According to sources within the organization, TRO is the preferred conduit of funds from the United States to the LTTE in Sri Lanka. TRO also has facilitated LTTE procurement operations in the United States. Those operations included the purchase of munitions, equipment, communication devices, and other technology for the LTTE." According to Treasury, because of the humanitarian fundraising after the 2004 tsunami, LTTE was able to use the aid from TRO to strengthen its military operations.

Subsequently, the Internal Revenue Service (IRS), in Announcement 2007-113, said it suspended the tax-exempt status of the charity located in Cumberland, MD, because of the charity's ties to terrorism. The group was recognized in the U.S. for twelve years. TRO's mission, according to its USA website, is to "bring relief to the people of North-eastern Sri Lanka by facilitating the provision of food, clothing and shelter and Provide help via self development programs amongst the people of North-eastern Sri Lanka."

Robert Blake, the U.S. Ambassador to Sri Lanka and the Maldives, held a press conference after the group was designated, during which Deepam TV, a European Tamil television outlet, asked how much money was frozen. In response, Blake said that information could not be released. However, the TRO's latest IRS Form 990 reported that the group raised over $1.6 million in 2006.

On Nov. 22, the government of Sri Lanka banned TRO. Reuters quoted cabinet spokesman and minister Anura Priyadarsana Yapa as saying, "We have found this organization is funding the LTTE, so now we have decided to proscribe TRO in Sri Lanka at yesterday's cabinet meeting."

In response to the actions, TRO issued a press release stating, "TRO wishes to state categorically that all funds received are utilized according to the wishes of the donor, in line with the stated mission of TRO, to assist the tsunami and war affected populations of the NorthEast. None of these funds are, or have ever been found to have been, misappropriated for use by any other organization or used inappropriately by TRO itself." TRO-USA plans to appeal to Treasury to review the decision and remove the designation.

The the U.S. branch charity's president, N.A. Ranjithan, defended the work of the organization. In an editorial in the *Cumberland Times-News* on Nov. 29, "Sri Lankan charity president responds to story", Ranjithan said, "TRO in Sri Lanka assists TRO-USA in appraising projects and programs needed and in implementing such agreed operations. TRO-USA itself monitors all programs so financed including field visits by myself and other representatives from the U.S.A., until the outbreak of intensified war in April 2006 made travel in affected areas virtually impossible. ... As a charity registered in the U.S.A., TRO has

diligently and faithfully been complying with the laws and all regulations related to registered charities. TRO-USA reiterates that it is NOT a 'front to facilitate fundraising for the Libertarian Tigers of Tamil Eelam (LTTE).'"

The TRO received international media attention after its involvement in the relief effort in Tamil areas after the 2004 Asian tsunami. UNICEF worked with TRO to carry out the Action Plan for Children Affected by War, a signed human rights agreement between the LTTE and the government to help children affected by the conflict in the North and East Sri Lanka. According to Human Rights Watch, UNICEF had no choice but to work with TRO. "The TRO is not going away. A representative of UNICEF's Kilinochchi office, which administers the center, said, 'If it hadn't been with the TRO, the transit center would have been impossible. The TRO has a strong presence in the North-East. They have trust from the LTTE, so there are advantages to working with the TRO.'" This highlights the difficulty of providing aid in such a volatile area.

The TRO was the subject of a UK Charity Commission Inquiry from 2000 to 2005, after the commission received allegations that the charity was supporting terrorist activity by transferring funds to Sri Lanka in support of LTTE. The Commission found that "the Trustees had not been able to account satisfactorily for the application of charitable funds of the Charity and also concluded that the trustees were not administering the charity to an acceptable standard." The commission determined that the group's recordkeeping was adequate and did not provide funds to the LTTE. "However, the results of the review suggested that the TRO SL [Sri Lanka] liaised with the LTTE in determining where funds could be applied. It also found that once funds had been received by TRO SL, they were used for a variety of projects which appeared to be generally humanitarian, but not necessarily charitable in English law nor in line with the Charity's objects." The organization is no longer registered in the UK.

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Year in Review Edition

Despite New Majority in Congress, Fiscal Policy Still Mostly Stuck in Neutral

A new congressional majority in 2007 promised a clean break from past practices of a Congress noted for its corruption, dysfunction and profligacy. It moved on a modest agenda and successfully enacted a few important policies, but overall, it failed to chart a new direction in fiscal policy. This failure was due in large part to the majority underestimating the ability and willingness of a coalition of conservative policymakers and the president to fiercely obstruct even the modest reform policies on the new Congress's agenda.

2007's successes were important. Congress raised the minimum wage for the first time in ten years. It vastly improved student loan programs and began to exercise increased oversight of the executive branch. Earmarks are now more transparent and will likely, for good or for ill, be far fewer in number. Perhaps most importantly, it established PAYGO budgeting rules and passed a budget resolution on time.

But overall, Congress missed opportunities to turn a corner on fiscal responsibility, taxation, and budget policy. It appears to be wavering on its promises to follow PAYGO rules and did not enact any of the modest expansions in federal investments it proposed, despite strong bipartisan majorities in favor of many of those proposals. And it failed to

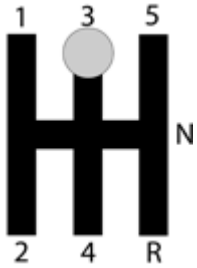
address the inadequacy of long-term revenues or the stigma often attached to taxation and government investments.

So 2007, much like 2006, belonged to a coalition of conservative Republicans in the House and Senate and a very unpopular president, who together fought back modest, fiscally responsible improvements in the tax code and sensible government investments. This coalition's obstruction ensured the new Congress would govern much like the last one, stuck in neutral or moving backward on fiscal policy — with dysfunction, rancor and instilling the public's view of the federal government with even greater cynicism. Here's to better results in 2008.

Budget and Appropriations

Congress Passes Positive Budget Resolution

Congress achieved a basic — if merely preliminary — benchmark of responsible fiscal governance: passing a final budget resolution. The final FY 2008 resolution established a $954 billion discretionary cap for the twelve federal spending bills that would be passed later in 2007, which was $22 billion higher than the president's request. This accomplishment has become somewhat of a rare event in Washington (three of the past five fiscal years did not see a final budget resolution), and the votes were close (Senate 52-40, House 214-209) in passing this one. The discretionary cap made room for modest funding increases in human needs and government investments, but those were all but eliminated in the year-end omnibus appropriations bill.



- Budget Resolution Conference Faces Key Choices on PAYGO, Taxes
- Congress Approves Budget Resolution
- Background Brief: The Budget Resolution

President, Republicans Block Appropriations Bills

The 2007 budget cycle — how the annual appropriations bills are completed — got off to a promising start. A number of bills raised funding levels for human needs programs and enjoyed bipartisan support. But the president rejected nearly all bills containing funding that went beyond his narrow request. Bush vetoed the most important human needs funding bill — the Labor, Health and Human Services, and Education appropriations bill — and enough conservative votes were mustered in the House to sustain his veto. The difference between Democrats and the president on overall domestic discretionary spending was $22 billion, and the Democrats agreed to cut this amount in half. Even though the differences between Democrats and the president amounted to less than

one percent of discretionary spending, the president was unyielding.

The resulting gridlock in Congress made a number of stopgap continuing resolutions necessary, and ultimately as we neared Christmas, Democrats capitulated on the dollar amount but not all the spending priorities. As an omnibus bill moves to completion, it appears the Democrats were able to salvage modest increases in a few top-priority areas and made cuts to some of Bush's priorities. They also added the extra $11 billion in spending they were seeking by putting some high-priority spending items, such veterans spending, into an "emergency" category.

- Congress to Send Labor/HHS Appropriations to President While SCHIP Conflict Continues
- Republicans Keep Obstructing Common-Sense Investment Initiatives
- Bush, Republicans Get Their Dream Budget

Conservatives Stop Improvements to Nutrition, Children's Health Insurance

The new majority in Congress proposed several progressive changes to entitlement programs, but only one significant change — an expansion of student loan programs — was enacted. The most ambitious of these proposals was the $35 billion funding increase for the State Children's Health Insurance Program, which would have provided insurance for an additional four million uninsured children annually. The farm bill, too, contained $4 billion in improvements to several nutrition programs, including Food Stamps. But in the end, the SCHIP bill was vetoed by the president, and that veto was sustained by the House. After Democrats revised the SCHIP bill to address the president's concerns, he vetoed it a second time. Although Senate Republicans obstructed passage of the farm bill for weeks, it was finally passed shortly before Christmas and now needs to be reconciled with the House version.

- Reauthorization of Children's Health Insurance Program Gains Momentum
- Republicans Keep Obstructing Common-Sense Investment Initiatives
- College Loan Bill Enacted!
- House Conservatives Sink SCHIP

Budget Process

Portman Quits; Nussle Appointed New OMB Director

In mid-June, Office of Management and Budget (OMB) Director Rob Portman quietly announced his resignation to spend more time with his wife and children, and President Bush nominated former House Budget Committee Chairman Jim Nussle to replace Portman. Some in Congress warned the nomination might face some trouble in the Senate, given Nussle's reputation as an ideological "bare-knuckled brawler" and poor budget steward as head of the House Budget Committee.

But the Senate Budget and Homeland Security and Governmental Affairs Committees both confirmed Nussle after perfunctory hearings, and the full Senate followed suit in a 69-24 vote, with all Republican senators voting in favor of Nussle and the Democrats split down the middle.

- Portman Out, Nussle Tapped to Head OMB
- Questions, Concerns Surround Start of Nussle Confirmation Hearings
- OMB Watch Letter to Senate Concerning Nussle's Nomination
- OMB Watch Questions and Answers for Nussle Nomination Hearings

Congress Increases Debt Ceiling Again With Hardly a Mention

In mid-September, Congress approved an increase of $850 billion in the nation's debt limit, bringing it to a total of $9.815 trillion. This was the fifth time the statutory debt limit was raised during the Bush presidency and was a direct result of the fiscal policies and practices implemented by Bush and Congress over the past six years. In that time, the national debt has increased 40 percent, from approximately $5.5 to $9 trillion — a milestone it reached on Nov. 6. There was little debate in Congress when the limit was raised and no discussion of the consequences of policies adding to the national debt, the impact on interest expenses or trade-offs in long- versus short-term budget commitments.

- U.S. Reaches Debt Limit: The Case for Long-Term Analysis
- Debt on Arrival — Take II

PAYGO(NE): Congress Institutes a Precarious Commitment to Fiscal Responsibility

One of the first official acts of the House of Representatives, whose new leadership had promised to restore fiscal discipline, was to re-institute pay-as-you-go (PAYGO) rules after a six-year absence. The Senate followed suit in March when it passed its version of PAYGO with the Senate budget resolution. Both rules throw up procedural roadblocks to

deficit-deepening tax cuts or mandatory spending increases that are not offset.

The current Alternative Minimum Tax impasse has revealed the House is sticking to its pledge to offset tax cuts, while the Senate's 88-5 vote on an offset-free AMT patch with nary a point-of-order peep indicates its somewhat muted desire for fiscal discipline barely lasted one year. Unfortunately, a paid-for AMT patch is not a likely outcome, as the president has pledged to veto any fiscally responsible bill that patches the AMT. Adherence to PAYGO is tough with a tax-cut-and-deficit president in the Oval Office, but without demonstrable intestinal fortitude by Congress, PAYGO will not survive in 2008.

- Understanding PAYGO: Questions and Answers
- Perspectives on the Senate BR; the Road Ahead
- Price of Patch too High to Go with PAYGO

President Continues Poor and Manipulative Budget Projections
When the president released his budget proposal in February, he loudly proclaimed his plan "balances the budget without raising taxes." At the heart of this claim, however, were a pair of gimmicks intended to confuse and mislead.

First, Bush's budget assumed the AMT will be patched in 2007 but not in subsequent years. He maintained the AMT is an unintended, unexpected and unwelcome tax increase, and yet he relied on this very tax increase to balance his budget. Second, the president's budget assumed war spending will be $50 billion in 2009 and will not be required thereafter. His $200 billion FY 2008 war supplemental request would punch a $50 billion hole (plus interest on incurred debt) in his five-year plan. These unrealistic — or abandoned — assumptions are an impediment to a much-needed honest assessment of the federal fiscal outlook, which has been buried under a $3 trillion increase in debt since Bush took office.

- President's Budget Full of Cheap Rhetoric, Wrong Priorities
- FY08 Budget Encounters GOP Skepticism in Congress
- OMB Releases Flawed Mid-Session Budget Review

Federal Tax Policy

AMT Reform: a Rough Patch for Congress

At the beginning of 2007, House Ways and Means Committee Chair Charles Rangel (D-NY) said his number one priority was to address the Alternative Minimum Tax (AMT). A year-long discussion and debate of whether and how to eliminate or reform the AMT culminated in the introduction of Rangel's long-awaited "mother of all tax bills." The ten-year, $845 billion bill would eliminate the AMT, add a four percent surtax for those earning over $200,000 a year, reduce the corporate tax rate by four percent, and cut out a raft of business deductions, all on a revenue-neutral basis, redistributing the tax burden away from lower- and middle-class taxpayers and toward the wealthy beneficiaries of the Bush tax cuts of 2001 and 2003.

But Congress did not have time or inclination to take up the Rangel bill — which may not see any action until a new administration is installed in 2009. Instead, it focused on a hold-harmless patch to keep 19 million Americans from paying the AMT for the first time. It also focused on whether and how to pay for the $50 billion cost of that legislation. The struggle over whether or not the AMT patch should comply with Congress' recently self-imposed PAYGO rules extended debate and inaction on the issue to the point where ten of millions of Americans will experience delays in receiving their tax rebate checks from the IRS. As of this writing, there is still not a solution to the AMT issue for 2008.

- OMB Watch Background Brief: The Alternative Minimum Tax
- AMT: Prospects for Reform and the PAYGO Challenge
- AMT: Mother of All Tax Bills and Progeny

Carried Interest — Clears House Despite Massive Lobbying Effort

In early June, Rep. Sander Levin☼ (D-MI) introduced a bill to close the "carried interest" loophole permitting wealthy fund managers to claim compensation based on the performance of the stocks they manage — but do not own — as capital gains rather than ordinary income. A long struggle ensued over the next several months as the Senate Finance Committee held three hearings on the loophole, K Street lobbyists waged a campaign to preserve it, and various progressive advocacy groups — including OMB Watch — sought to educate the public about it and urged Congress to close it.

In the end, the Levin bill was attached to the House version of the AMT patch as a way to pay for the lost revenue. But the Senate vowed not to pay for the patch, and the carried interest provision was dropped. It was included, however, in the "mother of all tax bills" as an offset to the cost of

repealing the AMT, so it's possible that the carried interest provision could get taken up in 2008.

- Wall Street Tax Break Comes under Scrutiny
- OMB Watch Sign-on Letter to Congress Supporting Closing the Carried Interest Tax Loophole
- Addressing Objections to H.R. 2834 — the Levin Carried Interest Bill

Buffett Sets Tone in Muted 2007 Estate Tax Debate

Reform of the currently chaotic statutory estate tax law became increasingly necessary as the one-year full repeal approaches in 2010 and then reverts to the tax policies prior the 2001 Bush tax cuts. In 2006, the estate tax played a leading role in congressional debates throughout the year and came up for repeated votes in the Senate. Ironically, by contrast, the issue received only scant attention in Congress in 2007, with only one hearing held in mid-November, almost as an afterthought. At that hearing, star witness Warren Buffett stole the thunder of those advocating for repeal of the estate tax and reframed the debate by comparing the less-than-one-percent of Americans who pay the tax with the 23 million families who earn less than $20,000 annually. It is safe to say estate tax repeal is no longer a threat in this Congress, but a need for a common sense, revenue-neutral reform still exists. And it is by no means a certainty Congress would pass a reform that is revenue neutral.

- OMB Watch Statement for Senate Finance Committee Hearing on the Uncertainty of Planning under Estate Tax Law
- OMB Watch Statement on the Estate Tax
- Estate Tax Repeal No Longer on the Table

Wealth and Income Inequality

Inequality Continues to Expand

The economic news for Americans not at the top of the income distribution was mixed at best this year. The Census Bureau's 2006 income and poverty report noted the poverty rate declined to 12.3 percent from 12.6 percent in 2005, and household median income reversed course and increased year-over-year by 0.7 percent. These positive developments are tempered by the figures for individual worker wages, which for both men and women declined for a third year in a row. And, as the CBO recently reported, shares of income for each of the bottom four income quintiles continued their historical decline.

- Census Releases 2006 Income, Poverty, and Health Insurance

Numbers
- Census Report Shows Working Americans Falling Behind
- Higher Tax Rates = Higher Income Inequality

Low-Income Workers Get Some Relief with Minimum Wage Increase
After a circuitous route to the president's desk, a meager minimum wage increase to $7.25 per hour was signed by Bush in May. The wage increase was ultimately attached to a $120 billion supplemental spending package and was accompanied by a $4.8 billion tax break for small businesses.

The wage increase is historic for a number of reasons. Prior to this year's increase, the value of the minimum wage, adjusted for inflation, was at a fifty-year low. And not since World War II has the minimum wage sunk below 31 percent of the average wage in the United States. With the increase, some 5.6 million workers will see a raise in their pay.

- Squabbling Over Tax Cuts Continues to Delay Minimum Wage Increase
- Congress Passes Supplemental; Cease-Fire in the Capital

Accountability and Transparency in Federal Spending

After Arduous Implementation, USASpending.gov Launches
In a groundbreaking collaboration, OMB and OMB Watch teamed up to launch a free, searchable, downloadable website of all federal spending. Based on the underlying software of our FedSpending.org, the government site (USASpending.gov) provides a solid foundation to allow the American public to better understand and investigate federal spending. Although this site represents an important step forward for government transparency, more still needs to be done, including proper maintenance and significant data improvements for the site in the years ahead.

- OMB Watch Applauds Important Step Forward for Government Transparency
- USASpending.gov Launched!

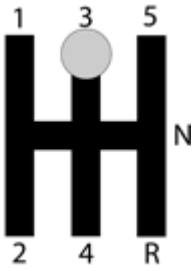
FedSpending.org Continues to Set the Standard for Access to Spending Data
Despite helping to design and implement the government's spending database, OMB Watch continued to push the envelope in proving what is possible with federal spending transparency in 2007 through significant upgrades and expansion of the FedSpending.org website. To celebrate the one-year anniversary of FedSpending.org, OMB Watch released a new and

improved version of the website, with a complete data set through FY 2006 for both contracts and federal assistance spending. This new version also includes major functionality upgrades, including the addition of a mapping feature on all searches, creation of a streamlined and powerful SuperSearch for all advanced searching needs, and increased flexibility in getting data more quickly through expandable summary views. OMB Watch intends to continue to operate and expand FedSpending.org in 2008 and beyond.

- OMB Watch Celebrates One Year of FedSpending.org with New Version of Site
- OMB Watch Updates Data, Features on FedSpending.org
- OMB Watch Launches Upgraded FedSpending.org Website

Earmark Disclosure Procedures Instituted

One of the new reforms enacted in the lobbying and ethics reform bill passed by Congress in 2007 concerns earmark transparency and disclosure. Under the new rules, all earmarked spending items and tax expenditures in bills, resolutions, conference reports and managers' statements must be identified and posted on the Internet 48 hours before a vote. In addition, legislators must also certify that they will not financially benefit from any earmarks they've requested, and extraneous earmarks (i.e., not approved by either chamber) are now subject to a 60-vote point of order in the Senate. These reforms are critical because they allow for the underlying bill to continue to be considered, even when striking a specific provision, and gives the public greater access to the behind-the-scenes deal-swapping that often happens in Congress.



While these reforms cover new legislation moving forward, OMB began a process of publishing past and current earmarks in a searchable, online database. Posting both earmarks in the FY 05 appropriations bills and in the current FY 08 bills as they move through Congress, OMB pushed the federal government to be far more transparent in presenting spending information to the public.

- Congress Passes Sweeping Lobbying and Ethics Reforms
- House Passes PAYGO and Earmark Disclosure Rules
- Senate Passes New Rules on Earmark Disclosure
- OMB 2005 Earmarks Database Up and Running
- Earmarks II: OMB "Database" Tracks FY08 Bills

Government Performance and Management

Final Round of PART Scores Continue Biased Performance Reviews

With the release of the president's FY 08 budget, OMB completed reviews of almost every federal program using its review mechanism — the Program Assessment Rating Tool (PART). To date, nearly 1,000 federal programs, representing 96 percent of all programs, have received at least one review with the PART.

Unfortunately, the PART continues to be an ineffective tool for objectively evaluating program performance, has little to do with even the president's own budget proposal, and adds additional burdens and distractions to program management and implementation. The PART system has created a duplicative and only marginally useful system that many agency program staff treat merely as a compliance exercise.

- OMB Wraps Up First Complete Round of PART Reviews with Little to Show
- OMB-OMB Watch Collaboration Improving Results?
- White House Releases Next Round of PART Scores

Bush Attempts to Codify PART in Executive Order

The White House issued an executive order (E.O. 13450) on Nov. 13 in an attempt to entrench the PART within federal agencies long after President Bush leaves office. The order would create a point person within agencies responsible for program performance, allow OMB more leverage over specific aspects of program implementation and solidify the PART program review process as the evaluator of government programs. While OMB has made commendable strides in making the PART process more transparent, unfortunately, this commitment to transparency is not enough to make up for the fact that the information being provided is of limited value.

- White House Attempts to Entrench PART at Federal Agencies
- Bush Attempts to Secure His Legacy

Problems Remain In Government Contracting/Privatization

More contracting scandals emerged this year, from Blackwater to IRS outsourcing, while Congress moved to make some small but needed reforms of the contracting process. Chief administrators at both the General Services Administration (which handles most general government procurement) and the Department of Housing and Urban Development faced accusations of politicizing federal resources and playing favorites in the contracting process. Meanwhile, Congress passed legislation to set up

a commission to investigate abuses in wartime contracting and to end a wasteful IRS program that uses private debt collectors to track down tax debts. The commission proposal was eventually enacted while repeated efforts to end the dangerous IRS program fell short.

- Wartime Commission Would Investigate Contracting Abuses in Iraq and Afghanistan
- Congressional Hearing Reveals Flaws in Outsourcing Tax Debt Collection
- Another Attempt at Ending IRS Privatization Program Moves Forward
- OMB Watch Questions GSA's Approach to Accountability
- Research Questions Cost-Efficiency of Privatization
- Jackson: Stretching the Truth at HUD

Information Magic Eight-Ball

Over the past year, there has been a great deal of activity on issues related to government transparency and secrecy, but it can remain difficult to figure out exactly what all the discussions, reports and hearings actually mean. To try to get to the bottom of this murky issue, we are breaking out our Magic Eight-Ball of Information Policy to ask a few key questions about the past year — the progress and setbacks, laid out in simple terms. We wish there was a better approach, but unfortunately, 2007 was that kind of year for government transparency, with vague and unclear answers for most questions.

Q: Have we come to our senses and restored the full reporting of toxic pollution?

A: Reply hazy; try again later

Just before the beginning of the year, the U.S. Environmental Protection Agency (EPA) made it more difficult to get complete answers on questions about toxic pollution when it raised the reporting threshold for detailed information under the Toxics Release Inventory (TRI). Since then, there have been plenty of efforts to change the answer on this issue. The New York Attorney General's office filed a Nov. 28 lawsuit on behalf of 11 other states contending the EPA has violated the law. California's magic Eight-Ball came up yes when Governor Arnold Schwarchenegger (R) signed a state law on Oct. 13 to require facilities to report toxic pollution at the old levels. At the federal level, bills have been introduced in the House and

Senate to restore the TRI program, and a recent Government Accountability Office (GAO) investigation concluded that EPA deviated from its rulemaking procedures and did not perform adequate analysis of the reporting change that will have a significant impact on ability of communities to get complete information about toxic pollution production. The GAO report recommended that Congress pursue legislation to restore the TRI program. Besides California's new law, there has been no reversal of EPA's ill-conceived change to the TRI program. However, with so many efforts underway opposing the agency's new reporting thresholds, it seems like it is only a matter of time before this answer switches to yes.

Q: Are scientists able to freely discuss findings without industry or political interference?

A: Don't count on it

Scientists may not be fans of the unempirical Magic Eight-Ball, but even they would have a hard time arguing with this answer. The year saw enough examples of gagged scientists, manipulated findings and suppressed information that it approached becoming a statistically relevant sample. A deputy assistant secretary at the U.S. Fish and Wildlife Service used her influence to manipulate endangered species findings. After Vice President Cheney demanded that the Department of Interior "get science on the side of farmers", they found sufficient evidence to divert water during a drought, in the process causing the largest fish kill in history. OMB edited scientific language in EPA's cost-benefit analysis to downplay the economic benefits of a rule to tighten the standard for human exposure to ground-level ozone, also known as smog. A media policy at EPA prevented agency scientists from discussing the impact of climate change on polar bears and their habitat. In fact, a report charged that political officials throughout the Bush administration have edited and manipulated climate science communications to the media and Congress. EPA also began a process to review and consolidate its laboratory network that set off great concern among scientists, since the agency's library effort from the previous year resulted in closures and discarded information. Scientists throughout the government are hoping that next year, they'll be free to provide the public clearer and more accurate answers.

Q: Have the courts been a good check on government secrecy?

A: Better not tell you now

Throughout the year, the government has used the state secrets privilege in an attempt to dismiss claims against it, on the grounds they involve information which, if revealed, would be dangerous to national security. The states secrets privilege is being invoked in the approximately 50 lawsuits against the government and telecommunications companies alleged to be involved in the National Security Administration's Terrorism Surveillance Program (TSP). The Ninth Circuit ruled that a document detailing that TSP targeted an organization for surveillance was a state secret but that the subject matter of the suit itself was not. Because the government has openly admitted the existence of the program, the courts should stop accepting claims of state secrets to dismiss or block TSP cases from moving forward through a fair judicial process. The Sixth Circuit, on the other hand, dismissed a suit against the government because the plaintiffs failed to demonstrate specific harm caused by TSP. The plaintiffs failed to meet the requirement primarily because the government used the state secrets privilege to block access to details about the program, which may have more clearly demonstrated harm to the plaintiffs in the form of monitored communications. There are plenty of cases still pending, and likely more on the way, so the courts will have an opportunity to reverse this trend in the new year. However, it is unclear what might prompt such a change.

Q: Did the White House provide all the requested information to Congress (or the public) relating to important investigations such as those dealing with government surveillance, interrogation methods, or classification of documents by the vice president?

A: No

Whether it be secret memoranda on the legality of questionable interrogation techniques or documents relating to the government's warrantless wiretapping programs, Congress was hard-pressed and persistently thwarted in its attempts to gain access to information held by the White House. In a staggering display of constitutional hubris, Vice President Dick Cheney argued that the Office of the Vice President was not a part of the executive branch because he is endowed with legislative responsibilities of presiding over the Senate. He took such a leap of logic in order to avoid being subject to a law requiring him to release information on the number of documents he had classified, which he has been avoiding since 2002. The executive branch also managed to evade much of the oversight of its own inspectors general (IGs). NASA's IG was found to be working with the agency to avoid overly intrusive investigations, allegedly destroying records, creating a hostile environment for whistleblowers and interfering with investigations.

Q: Can I get clear information on how the federal government is spending our tax dollars on contracts and financial assistance?

A: Surprisingly, yes

Implementing a law can be murky business, but the White House's Office of Management and Budget (OMB) was able to announce USASpending.gov, created to meet the mandates of the Federal Funding Accountability and Transparency Act (FFATA), almost a month ahead of time. The site allows users to easily search trillions of dollars worth of federal contract and financial assistance spending. OMB said the site would update the spending data every two weeks and would push agencies to improve the data quality of the information. The site is modeled after OMB Watch's precedent-setting FedSpending.org software platform. Between the two sites, the public now has two different Magic Eight-Balls on federal spending to consult when they have questions. The year also included a series of contractor scandals relating to Katrina response and Iraq reconstruction. The House is looking at the next step in transparency with a variety of measures in the 2008 defense authorization bill that would greatly increase oversight of the federal contracting industry.

Q: I have lots of questions for agencies; has it gotten easier to get quick, helpful responses to requests for information?

A: Reply hazy; try again later

Unfortunately, it seems agencies have not made huge strides in responding to inquires. Reviews of FOIA performance during the year demonstrated the need for a significant overhaul of the process and secrecy continues to cast a large shroud over much government information. For the third year in a row, transparency champions on the Hill, such as Sens. Patrick Leahy (D-VT) and John Cornyn (R-TX) and Rep. Henry Waxman☼ (D-CA), pushed to mandate improvements in agency compliance with the Freedom of Information Act (FOIA), the country's most fundamental access law. Congress was able to push the legislation through before the end of the session. Now the bill goes to the president, who will decide whether or not to sign it into law. If the president vetoes the bill, it will be a safe bet that we'll see a fourth year of effort on this issue, hopefully with a better answer at the end of it.

Q: Can we count on the federal government to tell us when we are in danger from a *known* toxic or other environmental hazard?

A: No

You would think that when the government knows the answer, it would provide the information openly, especially when it relates to a health hazard. Unfortunately, you'd be wrong. The year had several examples of major environmental hazards about which the government knowingly withheld important information from the public. Congressional oversight about asbestos and other contaminants in the air after the 2001 World Trade Center attacks underscored that EPA did not have enough evidence for its claims that the air was safe and manipulated the public's impression of the air quality by being unclear about *where* the air was allegedly safe. An April 19 court decision (*Lombardi v. Whitman*) acknowledged the misinformation but absolved EPA of responsibility for resulting illnesses because it found that the misinformation was not enough of a "shock to the conscious." When a court rules that the government lying to people about their safety from air pollution is not shocking enough, the bar has fallen very low in what we expect from our government. The Federal Emergency Management Agency (FEMA), unfortunately, proved the court's point by housing Hurricane Katrina victims in trailers so

shoddily constructed that they released dangerous levels of formaldehyde. FEMA was aware of the possibility of formaldehyde poisoning but attempted to avoid responsibility by refusing to test the trailers. On another front, the Nuclear Regulatory Commission (NRC) covered up a March 2006 spill of uranium by labeling documents about the event For Official Use Only. Public outrage and congressional admonishments prompted the NRC to release specifics in September. Let's hope the government does a better job of coming clean with the public about environmental hazards in the new year.

Q: Can we be sure that our communications aren't being illegally monitored and that any surveillance programs are being overseen to ensure our civil rights are protected?

A: Don't ask me

The Magic Eight-Ball might be reluctant to answer this one because the answer might be tapped. Congress has, so far, been unable to pass legislation to guarantee the protection of people's rights to privacy and due process. In August, President Bush signed the Protect America Act of 2007 (PAA), granting the government the authority to wiretap anyone, including U.S. citizens, without any court approval as long as the "target" of the surveillance is located outside the U.S. After passing the bill, Congress immediately began efforts to reform the president's broad authority. The House passed the RESTORE Act (H.R. 3773), which would require a finding of probable cause for surveillance targeting American citizens, including Americans located overseas. Two Senate committees are split on whether or not to include telecommunications immunity provisions to forgive companies that handed over client information to the government in the Senate's reform bill, the FISA Amendments Act of 2007 (S. 2248). The Senate was expected to pass a PAA reform bill by the end of the year, but Senate Majority Leader Harry Reid (D-NV) pulled the bill on Dec. 17 as it became clear that the telecommunications immunity provision was creating an insurmountable backlash. Even if the Senate is able to pass the indemnity provision, no one is sure what it will end up looking like once it is reconciled with the House bill.

Q: Should we worry about exposure to toxins in consumer products and in the environment?

A: Better not tell you now

As biomonitoring research (human toxicity testing) becomes increasingly popular, reports

indicate that no one has avoided chemical contamination in the industrial era. What is most alarming is what we don't know, as research confirming or refuting the chemical causation of health problems is woefully inadequate. New nanochemicals are already being used in products and remain virtually unregulated by the government. And the chemical contents of everyday products, including personal care products we and our children use, remain largely unknown. The year demonstrated an increasing awareness about this issue but without much movement to address or correct the problems. The National Nanotechnology Coordination Office released a list of research objectives in August that might someday result in a call to regulate these new substances. Bills were introduced in the Senate and House (Healthy Communities Act of 2007, S. 1068, and Coordinated Environmental Public Health Network Act of 2007, S. 2082/H.R.3643) that specifically provided money for biomonitoring projects but made little progress through the legislative process.

Q: In this information age, can we expect new information sources on the many environmental hazards we face?

A: Outlook is good

The good news is that Congress put in some promising efforts to provide the average citizen with new environmental and health information in 2007. Sen. Dianne Feinstein☼ (D-CA) tucked a provision into the Interior appropriations bill funding a greenhouse gas inventory, and Sens. Amy Klobuchar (D-MN) and Olympia Snowe (R-ME) sponsored the National Greenhouse Gas Registry of 2007 (S.1387), which would have added greenhouse gases to the list of substances that facilities are required to report under the Toxics Release Inventory (TRI). Rep. Eliot Engel☼ (D-NY) innovatively used the Securities and Exchange Commission in the Greenhouse Gas Accountability Act of 2007 (H.R. 2651) that required all publicly traded companies with emissions of significance to report to the EPA and include such information in their annual reports. The Raw Sewage Right-to-Know Act (H.R. 2452) required public water treatment plants to quickly notify the public and others when untreated sewage overflows into natural waters. Though none of these are likely to pass before the end of this session, they are good indications that Congress is looking at what new environmental and health information we need.

Q: Has the government set up a good system to ensure the security and safety of the nation's thousands of chemical facilities?

A: Don't count on it

The Department of Homeland Security (DHS) finalized interim chemical security regulations in April. But the rules contain so little public accountability and access to information that citizens would do better to ask their own Magic Eight-Balls about the security of the plant next door rather then depend on the agency to answer the question. The new regulations also fail to require consideration of inherently safer technologies by facilities reporting to DHS, so the agency won't even know the best practices to minimize risks. The program will mostly be conducted in secret, preventing the public from finding out which chemical facilities are even covered by the program, much less what facilities are lagging behind. Moreover, DHS finalized high chemical thresholds for the program, meaning that the majority of chemical facilities will not have to comply with DHS's chemical security protocols. The effort to establish stronger chemical security measures suffered a significant setback in May with the loss of a provision from the Iraq supplemental spending bill that would have prohibited DHS from preempting state law on matters of chemical security. We fully expect Congress to be asking plenty of questions on this program in 2008, but there are no indications yet on what the answers will be or if we will get a more robust chemical security program that will have enough information to actually let people know they are safe or if they should be concerned.

A Year for Failure: Regulatory Policy News in 2007

In 2007, new regulatory policies and the inability of federal agencies to protect the public made headlines more so than at any time in recent memory. Four themes dominated regulatory policy this year: an increase in White House influence over agency rulemaking activity and discretion, which added a perception of more political manipulation; the inability of the federal government to protect the public by ensuring the safety of imported goods; the voice of some industry groups calling for regulation; and the Bush administration's refusal to regulate in the face of overwhelming scientific evidence, as in the case of climate change. At best, government has attempted to respond to crises instead of getting ahead of the curve. This has left the public uncertain about whether we can count on our government to provide adequate safeguards.

White House Interventions

Part I: Systemic Regulatory Changes

On Jan. 18, President George W. Bush issued Executive Order 13422 (E.O.), which amended

Executive Order 12866, Regulatory Planning and Review. The same day, the White House Office of Management and Budget (OMB) issued its *Final Bulletin for Agency Good Guidance Practices*. The two executive directives work in concert to alter the ways federal agencies develop and enforce regulations.

These changes could dramatically impair the ability of agencies to protect the public. The Bush E.O.:

- requires agency regulatory policy officers to be presidential appointees and gives them new power to start and stop regulations;
- shifts the focus for promulgating regulations from the identification of a problem like threats to public health to the identification of a "specific market failure"; and
- in conjunction with the *Final Bulletin*, allows the White House to exert control over agency guidance documents — subjecting a new class of information to political considerations and possible delay.

Despite significant media attention and two congressional oversight hearings, many questions about Bush's E.O. remain unanswered. It is unclear why President Bush waited until the seventh year of his presidency to issue the changes. Also, it is unclear what existing problems the new policies sought to address.

Vague language in the directives has also created uncertainty as to the practical effects. For example, only an agency regulatory policy officer (RPO) may allow agency staff to "commence" a rulemaking, and the RPO may also end a rulemaking at any time. However, neither E.O. 12866 nor E.O. 13422 provides a definition of when a rulemaking commences. Currently, the limits of RPO power remain undefined. An alarming lack of transparency in the rulemaking process keeps the public from knowing the RPOs' roles in the process.

The new policy on guidance documents also raises more questions than answers. Agencies issue guidance documents in order to clarify regulatory obligations to the public and private sectors, explain complex technical issues or otherwise offer clarification or guidance on agency policies. Unlike a regulation, guidance is not legally binding, and therefore imposes no mandates on regulated entities.

E.O. 13422 requires review of guidance documents by OMB's Office of Information and Regulatory Affairs (OIRA). There is a timeframe to complete this process, but it includes a potentially dangerous caveat: "OIRA will complete its consultative process within 30 days or, at that time, advise the agency when consultation will be complete." OIRA is not planning to hire additional staff to manage the influx of guidance, so it is unclear how OIRA plans to review and approve guidance in a timely fashion.

Congress tried to mitigate the impact of the E.O. On June 28, the House passed the Financial Services and General Government Appropriations Act for Fiscal Year 2008. The bill contained an amendment that would have prevented the White House from expending any funds to implement the E.O. and the *Final Bulletin*. The Senate also considered

defunding language for its version of the FY 2008 appropriations bill but never brought the bill to the Senate floor. Instead, all domestic spending bills have been wrapped into one omnibus spending bill. The omnibus bill currently does not contain the defunding language.

The person charged with implementing E.O. 13422 is the new OIRA administrator, Susan Dudley. Prior to her appointment to OIRA, Dudley worked for the industry-funded Mercatus Center, an anti-regulatory think tank at George Mason University. Dudley is ideologically opposed to government regulation, and her nomination faced opposition from public interest groups including OMB Watch, Public Citizen, the Natural Resources Defense Council and the United Auto Workers.

Bush appointed Dudley April 4 while Congress was in recess and shortly after the Senate announced a nomination hearing for her. Nonetheless, Bush chose to install Dudley by recess appointment and was widely criticized for circumventing the Senate's usual confirmation process. Dudley is the only OIRA administrator in history (other than those operating in a temporary, acting capacity) not to have been confirmed by the Senate.

Dudley's first significant public action as administrator was to revise executive branch policies on agency risk analysis. Working with the White House Office of Science and Technology Policy, a memo entitled "Updated Principles for Risk Analysis" was released Sept. 19.

The memo updates a 1995 memo on risk analysis and came in lieu of a 2006 proposal that would have imposed overly prescriptive, one-size-fits-all standards on agency risk assessments. In January, the National Research Council (NRC), part of the National Academy of Sciences, urged the White House to abandon that effort — the "Proposed Risk Assessment Bulletin." The bulletin proposed scientifically questionable standards that would have governed the risk assessment process of all federal agencies.

The memo is an improvement on the proposed bulletin. It is not mandatory and may not have a substantial impact on agency practices. However, the memo does reaffirm existing OMB policies, such as the primacy of cost-benefit analysis in OIRA decisions, which diminish agency discretion.

Part II: Manipulating Agency Rulemaking

Beyond systemic regulatory changes, the White House also had a busy year meddling with agencies' individual regulatory actions. In June, before the U.S. Environmental Protection Agency (EPA) published a proposed rule to set the national air quality standard for ozone (smog), OIRA solicited the input of industry representatives and significantly edited EPA's economic analysis to downplay the rule's potential benefits.

Two National Oceanic and Atmospheric Administration (NOAA) rules have also suffered at OIRA's hand. A rule to protect the North Atlantic right whale from being struck by ships has been held up at OIRA since February. OIRA should have completed the review in June.

OIRA also rejected a NOAA proposal to protect krill — a shrimp-like crustacean that serves as an important link in the marine food chain. In a letter to NOAA, Dudley accused the agency of failing to provide adequate rationale for pursuing the policy and questioned NOAA's legal authority.

OIRA also reviewed EPA's Endocrine Disruptor Screening Program, a scientific assessment that may form the basis of future EPA regulations of endocrine disruptors. OIRA's decision to review the screening program may be in response to the aforementioned new policy on agency guidance. It also is consistent with industry efforts; as early as 2002, the Center for Regulatory Effectiveness, Kansas Corn Growers Association and the Triazine Network used the Data Quality Act to challenge EPA's use of endocrine disruption screening and research protocols.

In 2007, Vice President Cheney renewed the role of the Office of the Vice President (OVP) in rulemaking. Representatives from Cheney's office attended several meetings related to a Department of Homeland Security regulation on chemical security. The regulation was later criticized for not going far enough in protecting the U.S. from potential terrorist attacks on chemical plants.

The influence of OVP in the chemical security rule is part of a recent trend in the Bush administration. According to information posted on the OMB website, OIRA has held more than 550 regulatory review meetings since February 2002. A representative from OVP has been present at only 11, about two percent. However, eight of those 11 meetings have occurred since February, including the four meetings on the DHS chemical security rule.

The OVP is focusing attention mainly on environmental and homeland security rules. The 11 meetings pertained to eight separate rulemakings, four of which were EPA rules (including EPA's ozone rule and upcoming rules on greenhouse gas emissions), and three of which were DHS rules.

Import Safety

A second major regulatory theme in 2007 was the inability of the U.S. government to ensure the quality of the rising tide of imported goods. Toys, tires, toothpaste and a variety of food products made headlines this year for the risk they posed to consumers. Federal agencies responsible for regulating these products are plagued by declining resources and authority. While the agencies bear the brunt of the criticism for individual failures, the common link among the failures is Bush's seven-year war on regulatory protections.

In March and April, contaminated pet food sickened and killed pets across the country. The pet food contained ingredients, imported from China, tainted by the chemical melamine. A pet food recall was organized, but the melamine was detected in animal feed which led to human exposure. Federal scientists concluded the human risk to be low.

In May, the U.S. Food and Drug Administration (FDA) began to warn of Chinese-made

toothpaste contaminated with diethylene glycol, which is commonly found in antifreeze.

In June, the National Highway and Traffic Safety Administration (NHTSA) ordered a New Jersey tire importer to recall 450,000 defective Chinese-made tires. A defect in the tires caused them to explode and was responsible for at least two deaths. The importer, Foreign Tire Sales, recalled the tires and later declared bankruptcy.

Also in June, FDA announced an import ban on five different types of Chinese farm-raised seafood products. While no illnesses have been reported, the agency "repeatedly found that farm-raised seafood imported from China were contaminated with antimicrobial agents that are not approved for this use in the United States."

Recalls of children's products made national news throughout the year. Excessive levels of lead — a toxin known for decades to pose a danger to children — were found in toys, clothes and children's jewelry. The RC2 Corporation recalled more than 1.5 million Thomas and Friends wooden train toys due to high lead levels in the paint. In September, Mattel recalled 675,000 Barbie toys for the same reason.

As of Dec. 13, 104 recalls of lead-contaminated children's products had been announced. The recalls cover more than 17 million individual products, 95 percent of which were manufactured in China. The number of products recalled in 2007 increased nearly six-fold compared to 2006.

RC2, Mattel and many other companies recalled their products in cooperation with the Consumer Product Safety Commission (CPSC), the federal agency responsible for ensuring product safety and for recalling products found to be dangerous. Because of the recalls, CPSC's policy of negotiating recalls with companies and encouraging voluntary compliance has come under fire from the public and Congress.

The broader problems at CPSC reflect Bush's anti-regulatory views. Throughout his presidency, Bush has slashed the CPSC budget and staffing. Bush has failed to propose increases in CPSC's funding to match inflation. Bush's proposed FY 2008 budget calls for 401 full-time employees, the lowest staffing level ever at CPSC.

FDA's failure to ensure import safety also corresponds to declining agency resources. In November, an FDA advisory panel released a report titled *FDA Science and Mission at Risk*. Among other things, the report found FDA has "experienced decreasing resources in the face of increasing responsibilities" and must receive additional resources in the future if the agency is to ensure food and drug safety.

Bush's response to Americans' increasing dissatisfaction with product safety came July 18 when he signed Executive Order 13439, Establishing an Interagency Working Group on Import Safety. The working group, made up of cabinet-level officials, released its final report Nov. 6 on ways to improve the safety of food and consumer products imported into the U.S. The report calls for limited increases in some federal agencies' responsibilities but

does little to change the current voluntary regulatory scheme that governs some $2 trillion worth of products, 800,000 importers and more than 300 ports-of-entry.

Congress made limited progress in addressing these issues. The Senate Commerce Committee in October advanced legislation which would expand the resources and authority of CPSC. Among other things, the bill would dramatically increase the budget and staffing at CPSC, require third-party testing and certification of children's products, ban lead in children's products, and enable CPSC to levy greater fines on noncompliant manufacturers. Both chambers of Congress are considering legislative solutions to FDA's problems with import safety as well. However, none has gained momentum.

Industry Influence

Industry interests also played a major role in shaping regulatory policy in 2007, sometimes in surprising ways.

A new program launched by the Small Business Administration's Office of Advocacy provides industry with a new vehicle to voice their complaints with federal regulations. The program, the Regulatory Review and Reform Initiative, or "R3," includes uniform recommendations for the conduct of agency reviews. More significantly, the Office of Advocacy will solicit from the business community recommendations on which existing rules agencies should review and will transmit those recommendations to the appropriate agency. The R3 program is reminiscent of the anti-regulatory "hit list" compiled by OMB from 2001-2004. That list included rules recommended by industry groups and conservative think tanks.

In a surprising trend, businesses and trade groups began asking for regulations, albeit in ways that often emphasize voluntary standards and third-party certification. Hoping to restore consumer confidence after a spate of defective product recalls and consumer product scandals, a number of industry groups recognized the need for federal regulations and even called for enhancing agencies' authority.

For example, the Toy Industry Association recently asked the CPSC to adopt a mandatory testing system to help ensure toys are safe, and the Grocery Manufacturers' Association proposed that FDA adopt a foreign supplier quality assurance program. Recent evidence showing diacetyl, a chemical used to give microwave popcorn its butter flavor, causes terminal lung disease in factory workers and at least one consumer prompted the Flavor and Extract Manufacturers Association to support a U.S. Occupational Safety and Health Administration (OSHA) standard to limit exposure. Meanwhile, major popcorn companies began to voluntarily phase out the use of diacetyl.

Ignoring Science

The Bush administration also continued its record of refusing to regulate in the face of overwhelming scientific evidence and manipulating scientific conclusions in order to

achieve ideological outcomes.

For example, despite scientific evidence describing the dangers of diacetyl exposure, in September, OSHA denied a labor union petition asking the agency to develop an emergency temporary standard. In denying the petition, Edwin Foulke, the head of OSHA, wrote, "OSHA does not have sufficient evidence that a grave danger currently exists in microwave popcorn manufacturing facilities to support the issuance of an emergency temporary standard (ETS) for diacetyl." Instead, OSHA has chosen to pursue its standard rulemaking procedure, which often takes years.

Congress is considering legislation that would force OSHA to issue a temporary diacetyl standard. The Popcorn Workers Lung Disease Prevention Act (H.R. 2693) would mandate an immediate interim standard and then give the agency time to develop a final rule. This two-step plan gives workers at least a modicum of protection in the short term while long-term strategies are developed. The bill passed the House in September but no companion bill has been introduced in the Senate. President Bush opposes the bill.

The Bush administration delayed action on perchlorate, an ingredient in rocket fuel and fireworks. In April, EPA announced that it would not regulate perchlorate despite a National Academy of Sciences (NAS) conclusion that perchlorate is commonly present in public drinking water supplies and that ingesting it inhibits human thyroid function. EPA cited the need for further investigation in its decision not to regulate perchlorate. According to the Natural Resources Defense Council, the White House and the Department of Defense have been engaged for years in a coordinated campaign to downplay the human health risks associated with perchlorate exposure.

In March, a Department of Interior investigation found Julie A. MacDonald, the deputy assistant secretary for fish, wildlife and parks, allowed political considerations to taint a number of decisions in which the Fish and Wildlife Service (FWS) decided not to consider certain species endangered. Among the transgressions, MacDonald leaked internal agency documents to industry lobbyists and intimidated agency staff in order to manipulate scientific evidence. MacDonald resigned in April as a result of the scandal.

In response to public pressure and the scrutiny of the House Natural Resources Committee, FWS decided to review eight endangered species decisions by MacDonald. In November, FWS announced it had confirmed impropriety in seven of the eight decisions and is now reviewing them.

In July, former Surgeon General Richard Carmona accused senior administration officials of interfering with his work. In one example, a senior official in the Department of Health and Human Services (HHS) blocked the release of a report Carmona and his staff had prepared. The report, *Call to Action on Global Health*, identifies the link between poverty and global health problems, calls for citizens and corporations to take action to address these problems, and recommends America make the issue of global health a primary aspect

of its foreign policy.

An investigation by Sen. Edward Kennedy☼ (D-MA) supported Carmona's claims. In August, Kennedy released e-mails related to Carmona's accusation. In one, HHS's White House liaison wrote, "He needs to be the SG [Surgeon General] with specific speeches, on specific topics addressing the Secretary's and the president's agenda — which will become more political as the re-elect gets underway."

The Bush administration also had a busy year downplaying scientific evidence of global climate change. In April, the U.S. Supreme Court found greenhouse gas emissions could be considered an air pollutant under the Clean Air Act, an assertion previously rejected by the administration. The Court's decision clarifies EPA's statutory authority to regulate these emissions. EPA had argued that it did not have that authority, and even if it did, it was a bad idea to do so. Bush has directed the EPA to propose its program to regulate emissions by the end of 2007.

In light of the Supreme Court decision, California renewed its efforts to enact a state-level program to reduce greenhouse gas emissions from tailpipes. In December 2005, California petitioned EPA for permission to enact its program, as it is required to do under the Clean Air Act. If EPA grants California's petition, at least 12 other states would follow California's lead.

However, in the two years since California filed its petition, EPA has not announced a decision. Administrator Stephen Johnson has pledged to announce the agency's decision by the end of 2007. Meanwhile, an investigation by the House Oversight and Government Reform Committee uncovered an administration-wide campaign involving White House and cabinet officials to lobby congressmen and governors, urging them to oppose the waiver for California. In November, California sued EPA for its refusal to make a decision.

In October, Julie Gerberding, head of the Centers for Disease Control and Prevention (CDC), testified at a Senate hearing about the public health effects of global warming. However, while reviewing Gerberding's testimony, OMB removed seven pages, or about half, of the testimony. The deleted sections included information on extreme weather events and food and water-borne disease, among other things.

A December report by the House Oversight and Government Reform Committee's majority staff revealed more examples of the Bush administration suppressing climate science. The investigation found the White House refused to allow certain administration scientists to speak publicly about climate change and edited multiple government reports. The committee concluded, "The Bush Administration has engaged in a systematic effort to manipulate climate change science and mislead policymakers and the public about the dangers of global warming."

Conclusion

In 2007, Americans became trenchantly aware of the positive role government can play and the consequences that can be wrought when regulatory protections break down. But these past 12 months may only be the beginning of a new chapter in American domestic policy. Many problems have been identified, but few have been solved. Dangerous imports, workplace hazards and environmental degradation may dominate headlines to an even greater extent in 2008.

But will mounting evidence be enough to tip the scales in favor of regulation in the face of the Bush administration's obstructionist policies? Federal agencies like EPA and OSHA may continue to drag their feet on issues such as diacetyl exposure and greenhouse gas emissions, and the White House will likely continue to meddle with agency regulations and may find new ways to enact even more damaging systemic changes.

Will a Democratically controlled Congress be able to move with the urgency necessary to pass new laws that respond to public needs? Despite the increased attention given to resource shortfalls at agencies like CPSC and FDA, Congress has been unable to approve appropriations bills that would make funding and staffing at those agencies commensurate with regulatory responsibility. Legislative measures, like those to improve import safety or reform our nation's energy policy, are constructive but have gained little traction in a Congress seemingly without a sense of national priorities — a Congress which prefers partisan bickering to positive governing.

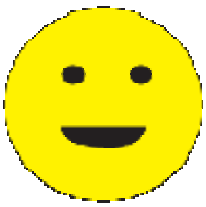
Most importantly, will the public continue to look to government to play a positive role in society? If regulatory failures do indeed continue through 2008 and beyond, will the public succeed in imploring government intervention where circumstance has not? If our leaders continue to disregard science, govern on the cheap, and make politics a higher priority than policy, the public must hold those leaders accountable and demand change.

The Good, the Bad and the Ugly for Nonprofit Speech Rights

While ethics reform and the U.S. Supreme Court decision in *FEC v. Wisconsin Right to Life* were among federal developments in 2007 that strengthened citizen voices, threats to donor privacy and vague, inconsistent IRS enforcement of the ban on partisan activities by charities and religious organizations were among events that went from bad to just plain ugly. Here is a roundup:

The Good

The Supreme Court decision in *Wisconsin Right to Life*



The Supreme Court heard oral arguments on April 25 in *Federal Election Commission vs. Wisconsin Right to Life, Inc.*. Wisconsin Right to Life

(WRTL) challenged the constitutionality of the electioneering communications rule, part of the Bipartisan Campaign Reform Act of 2002 (BCRA), that prohibited corporations, including nonprofits, from funding broadcasts that mention federal candidates 60 days before a general election or 30 days before a primary. The issue before the Court was whether the law was unconstitutional as applied to the facts of WRTL's 2004 grassroots lobbying radio ads, which encouraged listeners to contact their U.S. senators on the issue of judicial filibusters. Because Sen. Russell Feingold☼ (D-WI) was running for reelection at the time, WRTL had to discontinue the ads when the 60-day blackout period began, even though the ad was not about support or opposition to Feingold's election.

OMB Watch led a group of 17 charities to file an amicus brief in the case, urging the Court to protect the right of charities to broadcast grassroots educational and lobbying communications.

On June 25, the Court announced its decision, ruling 5-4 that the federal electioneering communications ban is unconstitutional when applied to genuine issue ads. The WRTL ads were found not to be the equivalent of express advocacy (which generally is considered electioneering). The decision was considered a free speech victory for nonprofit organizations and those that believe issue advocacy (taking action on public policies, but not on support or opposition to a candidate) should be permitted even in the days before an election.

Ethics and lobby disclosure reform in Congress

After almost nine months of frustration and disputes, President Bush signed the Honest Leadership and Open Government Act of 2007 into law on Sept.14. OMB Watch advocated for action to keep the 110th Congress true to their pledge of fundamental ethics and lobbying reform. The first step in the right direction came when the House overwhelmingly approved new gift and travel rules. After that, efforts to end the "culture of corruption" became much more problematic.

Building off a theme of transparency and disclosure, the Senate passed a package of ethics reform measures, the Legislative Transparency and Accountability Act (S. 1) during the first month of the 110th Congress.

Then focus turned to the House. Behind-the-scenes debate delayed introduction of a bill, but on May 24, the product was complete when the House passed the Honest Leadership and Open Government Act (H.R. 2316). The most contentious part was reconciling the differences between the House and Senate bills. As time passed, pressure mounted, but Republican senators continued to block the appointment of Senate conferees while seeking a guarantee that the conference would keep strong earmark disclosure provisions.

The solution was to pass identical bills in the House and Senate to avoid a conference. After much negotiation, Congress successfully passed the Honest Leadership and Open Government Act. While not an ideal set of reforms, the new law is the most significant

lobbying and ethics reform in a decade and should make important advances in increasing accountability and transparency in Washington.

Publication of *Seen but not Heard: Strengthening Nonprofit Advocacy*

The much anticipated book, *Seen but not Heard: Strengthening Nonprofit Advocacy*, written by Gary Bass, Kay Guinane and Matt Carter of OMB Watch, and David Arons, formerly of the Center for Lobbying in the Public Interest, was released in the fall. It offers a comprehensive analysis of advocacy by charities and provides recommendations for strengthening nonprofit policy participation. It is a vital piece of reading for any nonprofit that wants to increase their advocacy and ultimately get their issues heard. The book argues that lobbying must not be left to the well-heeled special interests. Unfortunately, many nonprofits are unaware of how much lobbying the law permits and often do not take advantage and lobby as much as they can or should.

As Gary Bass reiterated in an editorial titled "Advocacy Is Not a Dirty Word," "Americans have fought wars to defend our constitutional right to lobby. The First Amendment says it is 'the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.' It is among the most cherished of democratic principles: the right to organize and advocate for policy changes."

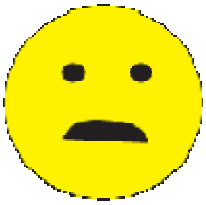
To buy a copy of the book, click here.

Nonprofit Voter Registration Efforts

Nonprofits have traditionally played a leadership role in working to register and mobilize voters, especially with low-income and minority populations. There have been some notable efforts in many states during the past few years to prevent nonpartisan, nonprofit organizations from conducting effective voter registration drives. The good news is that nonprofits are not standing idly by, but are challenging these voter registration laws. The. Department of Justice has been asked to reject a recently passed law in Florida that would discourage nonprofit voter registration drives by making it more difficult for third parties, including charities, to conduct such drives. And separately, a lawsuit was filed Sept. 18 challenging a requirement that all voter registration applications match Social Security or driver's license numbers. For more on nonprofits' electoral engagement, read the OMB Watch publication, *How Nonprofits Helped America Vote: 2006*.

The Bad

Grassroots Lobbying Disclosure Defeated



Although a significant lobbying and ethics bill became law, there was an unfortunate defeat when grassroots lobbying disclosure was not included.

During the early efforts to pass effective lobbying and ethics reform, OMB Watch diligently worked for inclusion of a federal grassroots lobbying disclosure requirement so the public could know who is behind big-dollar lobbying campaigns. Our educational efforts were met with vocal opposition from groups that felt disclosure would restrict free speech. We believed this increased transparency would help to level the political playing field and that it would not limit free speech.

An amendment sponsored by Sen. Bob Bennett☼ (R-UT) to strip grassroots lobbying disclosure from the Senate bill passed. Then, chances that grassroots lobbying disclosure would pass appeared better in the House. However, even though the House provision was slightly narrower, in the end, the same misinformation campaign continued to mislead many into believing the proposal was an effort to silence criticism of Congress.

Small nonprofits cannot compete with the expensive mass media grassroots campaigns carried out by firms hired by private industry. Despite public support, grassroots lobbying disclosure was overwhelmingly defeated in 2007.

Violating Donor Privacy

The Federal Election Commission (FEC) decided to establish a rule to implement the Supreme Court's *WRTL* decision, issuing a proposal with two alternatives and a safe harbor for grassroots lobbying ads. One alternative would have required that the sponsors of the now exempt non-electoral broadcasts file disclosure reports on their funding sources to the FEC. The other approach would have amended the definition of electioneering communications to allow issue advocacy without requiring disclosure. OMB Watch submitted comments, and after considering all public comments, the FEC issued regulations that require donor disclosure for these non-electoral messages, violating donor privacy for issue advocacy unrelated to federal elections.

Donor disclosure has also been used as a "poison pill" to kill a Senate bill addressing transparency of campaign contributions. The chances that the Senate Campaign Disclosure Parity Act (S. 223) will pass have been greatly hurt by an incessant effort by one senator to block the measure. The good government bill would require campaigns for the U.S. Senate to file their campaign finance reports electronically, a procedure already employed in the House. There have been repeated attempts to derail the bill. First, there were two anonymous holds, and the latest effort came in the form of an amendment from Sen. John Ensign☼ (R-NV). It would require donor disclosure by groups that file ethics complaints, infringing on donor privacy rights. In response to this latest obstacle, a group of very diverse nonprofits sent a letter to Ensign asking that he drop his "poison pill" amendment. Ensign refuses to remove the controversial measure from the bipartisan bill, turning an effort to make Senate campaigns more transparent into one that would violate privacy guaranteed to donors by the Supreme Court long ago in *NAACP v. Alabama*.

Barriers to Citizens E-mailing Congress

Many congressional offices maintain certain barriers that prevent constituents' e-mail from getting through to their offices. The Congressional Management Foundation (CMF), a nonpartisan nonprofit organization, held a forum on communications with Congress to find ways to make it easier for citizens to effectively express their views. E-mailing Congress is a very common way for nonprofits to get people involved in a campaign and has enhanced grassroots advocacy. Unfortunately, a solution to this problem remains elusive.

The Ugly

Vague Rules and Laws Make Advocacy Communications Risky

The vagueness in the new FEC rule on electioneering communications means the FEC will rely on past examples to help determine whether an ad is permissible. This ad hoc approach could eventually develop the same kinds of problems charities and religious organizations experience with the Internal Revenue Service's (IRS) "facts and circumstances" standard for enforcing the tax code's ban on partisan intervention in elections. This "facts and circumstances" test allows the IRS to apply its interpretation of the standard on a case-by-case basis.

Since the 2004 election, the IRS has increased enforcement of the ban on partisan electoral activity by charities and religious organizations through a program called the Political Activities Compliance Initiative (PACI). In June, the IRS released a report on the 2006 PACI program and Rev. Rul. 2007-41, with further guidance to charities and religious organizations as to what is and is not permissible under the prohibition on partisan intervention. The ruling includes 21 examples with IRS commentary on why the IRS does or does not consider the situation described to constitute a violation. While the new guidance is helpful, it does not establish badly needed safe harbors or bright-line rules.

On Aug. 3, OMB Watch sponsored a panel discussion to address the pros and cons of creating a bright-line rule defining what is and is not prohibited partisan intervention in elections by charities and religious organizations. Action the nonprofit sector can take to propose and promote a bright-line test was also discussed. OMB Watch released a report after the panel titled *Overcaution and Confusion: The Impact of Ambiguous IRS Regulation of Political Activities by Charities and the Potential for Change*.

An example of this unclear standard was highlighted in the case of a church that was investigated for two years. In September, All Saints Episcopal Church in Pasadena, CA, announced that the IRS will not revoke the church's tax-exempt status because of a 2004 anti-war, anti-poverty sermon delivered by its former pastor, Rev. George F. Regas, on the Sunday before the 2004 presidential election. However, to make the rules more confusing,

the IRS concluded that the church in fact intervened in the election. This seems at odds with the IRS finding that the NAACP did not violate the ban for a very similar speech. These mixed messages from the IRS are likely to have a chilling effect on organizations and their willingness to speak up about social issues. While it is good news that All Saints did not have its tax exemption revoked, the case increases uncertainty about what is and is not allowed for charities and religious organizations.

Surveillance of Nonprofits: Attempts to Suppress Dissent Continue

Information on the government surveillance of nonprofit, peace, anti-war, and other groups for counterterrorism purposes grew once again in 2007. Even though the Pentagon announced in August that the Threat and Local Observation Notice (TALON) anti-terrorism database was being shut down, the damage was still done, and any long-term ramifications are unknown. The worst case scenario would be the creation of a civil society where organizations become fearful of getting involved in public policy. Some news from 2007 reported that before the 2004 Republican National Convention in New York City, surveillance was conducted nationwide on groups planning lawful protests or events.

USAID Proposals: Restrictions to Grant Programs

The United States Agency for International Development (USAID) and the Department of Health and Human Services (HHS) issued guidelines on July 23 for grantees that require separate "management and governance" and complete physical separation "between an affiliate which expresses views on prostitution and sex-trafficking contrary to the government's message ..." and the grantee. The guidelines are even more restrictive than similar requirements for legal services programs that are the subject of a constitutional challenge. These draconian guidelines require an extraordinary amount of separation between the organization that receives federal funds and the privately funded affiliate.

These regulations appear to be an attempt to ruin a constitutional challenge to a requirement that all grantees in an HIV/AIDS prevention program adopt formal policies against sex trafficking. Passed by Congress in 2003, the Global AIDS Act requires all organizations receiving funds under the act to pledge they oppose prostitution. The government's approach benefits from a February federal appeals court ruling in *DKT International v. USAID*, in the U.S. Circuit Court for the District of Columbia, overturning a lower court's voiding of the pledge requirement.

The Impacts of the "War on Terror" on Charities

During 2007, nonprofits had no rights when accused of association with terrorists. This problem has become so "ugly" that we devoted an entirely separate article to the issue. Click here to learn more.

Charities and National Security: Growing Awareness of Need for Reform

In 2007, the effects of the ineffective and counterproductive legal regime governing counterterrorism programs and charities demonstrated that the current system, based on a short-term emergency response to the 9/11 attacks, needs to be reassessed and reformed for the long term.

Misleading Congress and the Public about Nonprofits

Grantmakers Without Borders Challenges Treasury's Senate Testimony June 26, 2007

In May, the Director of the Treasury Department's Office of Strategic Policy for Terrorist Financing and Financial Crimes told the Senate Homeland Security and Governmental Affairs Committee that Treasury's revised Voluntary Anti-Terrorist Financing Guidelines are "based on extensive consultation between Treasury and the charitable and Muslim communities." This is despite the fact that in December 2006, more than 40 U.S. charitable sector organizations called for withdrawal. Grantmakers Without Borders (Gw/oB) sent a letter to the committee leadership correcting Treasury's portrayal of its relationship with nonprofits. The letter noted that the committee had no non-governmental witnesses, although this would have provided a more accurate, complete description of the negative impact Treasury's counterterrorism procedures have had on charitable programs. The Guidelines remain in place despite consistent calls from the nonprofit sector for their withdrawal.

Treasury Posts Risk Matrix for Charities April 17, 2007

Further evidence of the inaccuracy of Treasury's claims to have close cooperation with the nonprofit sector is seen in its failure to respond to a June 2006 letter from nonprofits that asked for a public comment period on a risk matrix that was in development. Instead, in March, the Treasury's Office of Foreign Assets Control (OFAC) published the Risk Matrix for the Charitable Sector on its website, without public announcement or comment. The matrix has been criticized by groups such as Gw/oB, which has called for the matrix to be withdrawn because it stigmatizes international grantmaking.

Charities Respond to Treasury's Overbroad Allegations of Terrorist Ties June 12, 2007

In June, nonprofits challenged a report from the Treasury Inspector General for Tax Administration (TIGTA) that claimed charities are a "significant source of alleged terrorist activities." A group of charities called upon Treasury to retract this claim as lacking evidence, saying, "Treasury needs to recognize that charities are part of the solution and not part of the problem."

House Hearing on Nonprofits Sees the Positive Aug. 7, 2007

The House Ways and Means Subcommittee on Oversight held a hearing on tax-exempt charitable organizations in July, where Rep. Bill Pascrell☼ (D-NJ) challenged the Department of Treasury's assertion that charities are a "significant source of terrorist funding," observing that Treasury seems to be "painting the sector with a wide brush."

Seized Charitable Funds Remain Frozen Indefinitely

Nonprofits Call for Release of Frozen Funds

Treasury did not respond to a November 2006 letter from a group of 20 charities seeking a meeting to discuss releasing the frozen funds of shuttered charities to alternative charitable programs until a member of Congress expressed concern. It now appears a meeting will be held in January 2008.

Definition of Support for Terrorism Expands to Association, Non-listed Charities

New Executive Order on Iraq Expands Problems for Charities July 24, 2007 and Congress Misses Oversight Opportunity on Charities and Anti-terrorism Financing Laws Oct. 10, 2007

The range of activities and associations constituting illegal support for terrorism expanded in two instances. In both cases, clear definitions are lacking, and behavior far removed from the actual illegal act, such as charitable relief provided in disaster areas where terrorist groups operate, could result in criminal sanctions. First, Executive Orders on Iraq and Lebanon extended the criteria for sanctions to a "threat to national security."

Second, in October, Congress approved an amendment to the International Emergency Economic Powers Enhancement Act (IEEPA) that includes vaguely defined conspiracy and aiding and abetting language that could lead to unpredictable results for the unwary. Once again, there were no non-governmental witnesses in the Senate hearing on the bill, and the House did not hold a hearing.

Court Upholds Islamic American Relief Agency Asset Freeze Feb. 21, 2007

In February, a federal appeals court upheld OFAC's designation and asset seizure against the Islamic American Relief Agency because of the group's past relationship with a Sudanese group that was designated as a terrorist organization in 2004. There was no finding or allegation that the U.S. group used funds to support terrorist activities, and no criminal charges have been filed.

No Conviction, Mistrial for Holy Land Foundation Oct. 23, 2007

In October, a federal jury in Texas deadlocked on all charges against the Holy Land Foundation (HLF), most of the charges against five of its leaders, and acquitted another of

31 of 32 charges. The defendants were charged with money laundering, material support of terrorism and conspiracy. The prosecution did not claim HLF provided support to Hamas or paid for violent acts. Instead, it said the charitable aid was delivered in partnership with local charities that were controlled by Hamas, even though the government has never designated them as terrorist supporters.

A conviction on this legal theory would mean no U.S. charity could protect itself from prosecution by using government watchlists for guidance about who to work with. The government has indicated that it will retry the case.

Watchlists: Inaccuracies, Unintended Consequences

IRS Urged to Use Terror Watchlists to Check Nonprofits May 30, 2007

A May report by the TIGTA said the Internal Revenue Service (IRS) should check nonprofit tax filings against the FBI's Terrorist Screening Center's (TSC) consolidated watchlists, despite the fact that a 2005 Justice Department Inspector General report confirmed many deficiencies with the TSC.

The proposal could cause unnecessary damage if and when false positive matches are found. A report by the Lawyer's Committee for Civil Rights of San Francisco Bay Area (LCCR) demonstrates how use of watchlists by private companies has caused innocent people to be flagged as terrorists, creating problems with everything from buying a car to getting a job. The IRS has accepted the recommendations, including one that it meet with key stakeholders. However, to date, the sector has not heard of any organizations that have been solicited to provide input.

Scrutiny of Anti-Terrorism Watchlists Increases Nov. 20, 2007

Both the House and the Senate have been paying increased attention to problems within the watchlist system. At a House Homeland Security Committee hearing in November, Chairman Bennie Thompson (D-MS) expressed concerns about the quality of watchlist data and the overall growth in the number of watchlist names. He said, "We can do better — and we have to do better..."

A draft report from the Council of Europe legal committee reviewed procedures similar to those in the U.S. It said the methods used for sanctioning individuals and organizations that do not include any "procedures for an independent review of decisions taken, and for compensation for infringements of rights" constitute a human rights violation.

USAID Temporarily Delays Implementation of Partner Vetting System

In July, the U.S. Agency for International Development (USAID) announced a new Partner Vetting System (PVS), that would "[ensure] that neither USAID funds nor USAID-funded activities inadvertently or otherwise provide support to entities or individuals associated

with terrorism." All nonprofits applying for grants would be required to collect and give the government highly detailed personal information about employees, executives, trustees, subcontractors and others associated with the organization. USAID would check the information against watch lists. Charities filed comments objecting to the program as unwarranted and asked that it be withdrawn.

InterAction, a coalition of U.S.-based foreign aid groups, including many that receive USAID funding, said the proposal could put international aid workers at increased risk, saying, "If they are perceived to be extension of the U.S. intelligence community, terrorist attacks against them can only increase." It also said there is no statutory basis for the PVS. Because USAID said it "cannot confirm or deny whether an individual 'passed' or 'failed' screening," OMB Watch submitted comments that said, "PVS will more than likely result in the creation of a secret USAID blacklist of ineligible grant applicants, based on PVS results."

The program was proposed without any consultation with relief and development organizations with experience in international aid. USAID temporarily delayed implementation of a new database but is moving forward with a pilot program for aid recipients working in the West Bank and the Gaza Strip.

The Right to Dissent: Chilling Impact of Counterterrorism Policies

Study Commission or Thought Police? Dec. 4, 2007

A proposal to create a commission and research center to study "violent radicalization" and "extremist belief systems" that can lead to homegrown terrorism passed the House in October and has been introduced in the Senate. The American Civil Liberties Union (ACLU) and other groups are raising concerns that its vague definitions, broad mandate and minimal oversight could lead to ethnic profiling and censorship based on personal, religious or political beliefs.

Since 9/11, the Federal Bureau of Investigation, Joint Terrorism Task Force and Department of Defense have been using anti-terrorism resources and databases to track and sometimes interfere with groups that publicly and vocally dissent from administration policies. Anti-war groups have suffered from these abuses the most, but it is not limited to them. See our companion article on nonprofit speech rights for details.

Reasons to Hope for Positive Changes

The State Department's *Guiding Principles on Non-Governmental Organizations*
December 2006

In early 2007, we learned that the State Department published a set of principles that set out ten standards for government treatment of nongovernmental organizations (NGOs). One of the standards says, "Criminal and civil legal actions brought by government against NGOs, like those brought against all individuals and organizations, should be based on

tenets of due process and equality before the law."

The principles recognize the essential role NGOs play in "ensuring accountable, democratic government" and cite the UN Universal Declaration of Human Rights and other international standards that support "the right of freedom of expression, peaceful assembly and association..." Nonprofits hope that in the future, this vision of the appropriate approach to counterterrorism and charities policy will prevail over the secrecy and lack of due process in the Treasury Department's procedures for shutting down charities.

What's Needed in 2008

In the coming year, Congress needs to provide more oversight over the current system and assess its negative consequences. The nonprofit sector itself needs to be ready with a consensus on reform proposals. Most importantly, millions of dollars in frozen funds must be used for charitable purposes.

Key questions for congressional oversight in 2008 include:

- How has Treasury treated charities under Bush's Patriot Act-era executive orders?
- Why does Treasury refuse to meet with charities about ways to release frozen funds for genuine charitable programs?
- Why is there no independent review of designation of charities?
- Why do charities get shut down, but companies like Chiquita pay fines that are small relative to their assets?

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