



An Attack on Nonprofit Speech: Death By a Thousand Cuts

by

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Summary

Perhaps nothing is as central to the nonprofit sector as protecting its right to speak out on issues. For example, when there were attacks on nonprofit advocacy in 1983 and 1995, the sector organized galvanizing responses to fend them off. Unfortunately, it appears that such attacks are again surfacing, but in ways that are broader yet much harder to fight back.

Instead of a single legislative or regulatory proposal that would limit nonprofit speech, the Bush administration and conservative allies have proposed or begun implementing a number of proposals that are akin to a “death by a thousand cuts.” These “cuts,” which have suddenly accelerated in the last year, come in three areas:

- Attacks on nonprofit advocacy, particularly when there are disagreements with Bush administration policies;
- Limits imposed by government on other nonprofit speech, particularly targeted to those working on issues-- such as reproductive rights, HIV/AIDS, and international development activities, where there may be ideological differences with the administration-- are particularly singled out as targets to control their speech; and
- Changes made by nonprofits resulting from fear of how laws such as the USA Patriot Act are being implemented.

There is now a growing litany of examples under each of these three categories, but because each proposal or action affects only limited numbers of nonprofits, they have not drawn significant attention. Yet the proposals and actions by the Bush administration and conservatives are already taking their toll. Even when proposals have been dropped, they leave a chill on speaking out on issues in their wake.

¹ With assistance from Tim Visser, an OMB Watch intern, who did research on the impact of the Patriot Act on nonprofits.



Taken together, they paint a mosaic that should cause great concern for every nonprofit – and should be a rallying cry for nonprofit sector leaders. This administration -- and its conservative allies – is stifling free expression and using the heavy hand of government to quash dissent.

This paper provides a review of recent proposals and actions limiting nonprofit speech that have taken place in each of the three areas described above. It does not address an important corollary concern – limitations on access to government information. Those limitations, coupled with increasing government control over the flow or type of information, will inevitably affect the ability of nonprofits to do their work.

For example, when the government stacks the deck of scientific advisory committees by selecting people with strong ideological biases to serve, it undermines the value of good science that our sector relies on. These stacked advisory committees also squelch the substantive work undertaken by many nonprofits.

I. An Attack on Nonprofit Advocacy

There appears to be a pattern emerging of the Bush administration and conservative allies in Congress promoting initiatives to limit the advocacy voice of nonprofits when that voice is in disagreement with the administration. This section provides several examples of initiatives that may leave a chilling legacy. Each effort was stopped, but may create an atmosphere that suggests to nonprofits that advocacy is the wrong thing to do.

To be certain, conservatives are playing hardball in their quest to limit nonprofit advocacy. For example, House Majority Leader Tom DeLay (R-TX) has admonished businesses that give corporate contributions to organizations that lobby against conservative issues. At the same time, when the advocacy is in support of an administration position, there is no hesitancy to encourage use of federal funds for that purpose. For example, Rep. Mark Souder (R-IN) introduced a bill that included a provision authorizing the Drug Czar to use federal funds “to take such actions as are necessary” to “oppose legalization of drugs.”²

This would have modified the bill’s prohibition on spending federal funds for “partisan political activity, or express advocacy support of or defeat to...any clearly identified legislative or regulatory proposal.” The effect of this language also would have exempted federally funded ads from a provision of the Communications Act of 1934 that requires identification of ad sponsors. While the Souder plan was dropped, it demonstrates that their efforts to limit nonprofit advocacy is largely ideologically driven.

Taken one by one, these examples do not mount to much. But taken together, they spell trouble for the nonprofit sector.

Head Start

Several months ago, the Bush administration proposed significant changes to Head Start, which was embodied in Rep. Michael Castle’s (R-DE) H.R. 2210, the School Readiness Act of 2003. The major elements of the bill have been strongly criticized by Head Start advocates. To head off broad opposition to the President’s plan and the subsequent bill, the Department of Health

2 See the National Drug Control Policy Reauthorization Act of 2003 (H.R. 2086)

and Human Services (HHS) sent a misleading, if not inaccurate, letter to Head Start grantees implying that they cannot lobby against the bill because they get federal funds.

Earlier this year, the National Head Start Association (NHSA) sent materials to Head Start grantees encouraging them to let parents know about the many problems with the President's proposal to reauthorize Head Start. NHSA was concerned about the President's plan to block grant the program, as well as not provide enough money. The impact on early childhood education could be profound, since the program has a wide reach, including 870,000 parent volunteers, 51,681 teachers, and serves over a million at-risk children. Head Start advocates oppose the block grant proposal because they fear it will result in lower standards and mean less commitment to health, nutrition and parent involvement. The materials sent from NHSA suggested that Head Start grantees should encourage parents to oppose the President's proposal.

In response to NHSA's materials, on May 8, 2003, the Head Start Bureau within HHS sent a letter to "Head Start Colleagues," which contained inaccurate, confusing and vague information about federal laws governing their right to lobby Congress, and threatened sanctions for programs that violate the law. The letter contained references to the Hatch Act, which deals with partisan political electioneering, and well-known rules that require federal grantees to use non-federal funds in their lobbying efforts, but did not mention that grantees can use non-federal funds to lobby. The letter implied that lobbying is a form of "political activities."

On May 28, NHSA sent a response to HHS, and called on the agency to clarify its position. NHSA objected to the letter's chilling effect on free speech rights of Head Start programs. After more than two weeks with no HHS response, NHSA filed a lawsuit on June 11, seeking a court order that would prohibit HHS from penalizing Head Start advocates that speak out against the administration's proposed overhaul of the program. The suit also asked that a copy of the Court order be sent to all Head Start programs in order to correct the chilling impact the letter had on the Head Start community's voice in the debate over the program's future.³

Representing NHSA, Edward T. Waters of Feldesman, Tucker, Leifer & Fedell told the court, "The legal problems with the Bush Administration letter are both obvious and severe. The letter exceeds the boundaries of any conceivably applicable statute or regulation..." The HHS letter warned against engaging in "political activities," invoking the Hatch Act's ban on campaigning for candidates on time paid for with government funds. However, the activity the HHS letter objected to was grassroots legislative lobbying communication, which has no reference to candidates or elections; hence, the Hatch Act does not even apply.

NHSA won the case on July 2. Leading up to that, HHS agreed to draft another letter. At a hearing on June 30th a federal court judge told HHS that the new letter was still inadequate and that another one needed to be written or face HHS would face a court order. HHS agreed; the agency withdrew the May 8 letter and sent a corrected letter to all Head Start programs.⁴

This story is very troubling because of the chilling impact the HHS action creates. HHS did not appear to be claiming that Head Start programs have used federal funds for lobbying, since

3 The NHSA case, *National Head Start Association v. Department of Health and Human Services*, was filed in the United States District Court for the District of Columbia on behalf of NHSA, its 1100 members and parents and staff.

4 A copy of the letter is available from OMB Watch at: <http://www.ombwatch.org/article/articleview/1631/1/41/>

there is no evidence for such allegations. Yet there can be no other reason for sending the letter. It was an unusual step, and not part of any larger series of communications meant to educate grantees on grant rules. Rather, it appears to be a heavy-handed approach to stop advocacy with non-federal funds when it runs counter to the administration's position.

It is unclear what impact the HHS letter will have. While NHTSA won the case and HHS sent a corrected letter, the incident creates confusion at best, and a chilling impact at the worst. Regardless of intent, the result is likely to be that fewer people concerned about Head Start will speak up on important program issues. In fact, while the House bill, which passed by one vote, limits the block grants to a pilot within eight states, it, nonetheless, has several troubling provisions.

Head Start experts highlight at least four concerns:

- Inadequate funding;
- Undermining the commitment to training and technical assistance, a key part of any strategy to improving program quality;
- Allowing religious discrimination by faith-based providers receiving Head Start money; and
- The block grant pilot does not apply current Head Start Performance Standards, adequate accountability, or sufficient coordination requirements.

Will Head Start advocates continue to speak out on the legislative proposals?

Parent Centers Serving Families of Children with Disabilities

Another Castle bill, one dealing with the reauthorization of the Individuals with Disabilities Education Act, created an uproar over a provision that would limit nonprofit advocacy.⁵ Language reminiscent of the 1995-96 Istook amendments was buried in Section 672 of the bill that would have restricted the advocacy voice of nonprofits that seek federal grants to run parent centers. After a rapid and strongly negative response from nonprofits across the country, Castle dropped the provision, but a chilling legacy may be left.

There are roughly 100 parent centers funded under IDEA with every state having at least one center. These centers serve families of children and young adults from birth to age 22 with all types of disabilities. They train and inform parents and professionals, help families obtain appropriate education and services for their children with disabilities, and work to improve education results for all children, which often means resolving problems between families and schools or other agencies and connecting children with disabilities to community resources that address their needs. Some parent centers see advocacy as a core part of implementing their mission.

The provision in the Castle bill would have made a nonprofit that does any type of "federal relations" – no matter how little and no matter whether it was paid for with private dollars – ineligible for these parent center grants. Moreover, a nonprofit would have been prohibited from receiving these grants if a board member engaged in any "federal relations" (even if not for the

⁵ H.R. 1350, the Improving Education Results for Children with Disabilities Act of 2003

parent center) or a paid staff of the parent center volunteered or served on the board of another organization that engaged in any “federal relations.” **We were told that Rep. Ernest Istook (R-OK), who spearheaded the 1995 attacks on nonprofit advocacy, was interested in pursuing this type of provision.**

Two factors added to the troubling nature of this provision. First, “federal relations” was not defined. The proposal specifically prohibited lobbying at the federal level on disability education issues, but added that “federal relations” would also have disqualified the organization from receiving grants. The inescapable conclusion is that “federal relations” must go beyond federal lobbying, and include activities like commenting on regulations or giving a Member of Congress a tour of a parent center. We cannot imagine what type of federal government interactions would *not* be considered “federal relations.” Second, when the bill was under consideration there were reports that a House staff member indicated that this model might be applied to grantees under other sections of IDEA. This would have affected an even broader set of nonprofits. It was clear that this was a slippery slope: If it was good for these grantees, why not for others?

A well-organized response, led by nonprofit infrastructure leaders and the disability community, resulted in Castle’s decision to drop the provision.⁶ It was never clear what forces were behind this anti-advocacy provision. Castle’s staff stated that he did not generate the provision. There were rumors that a Department of Education staffer, who previously worked for Congress, encouraged the language. This same individual acting on behalf of two different organizations, was associated with both a grantee and public criticism of the bill itself, as evidenced by two letters bearing their signature. **The first letter, from the grantee, contained information on program issues it claimed was impartial. The second letter, from another group, blasted a committee proposal. This set of relationships upset some other Republican members on Castle’s committee. The only certainty from this matter is that there are people in the Bush administration and Congress who want to silence the advocacy voice of nonprofits.**

IRS Selected Audits of Charities That Lobby

In early 2003, several 501(c)(3) organizations in the midwest were notified by the IRS that they would be audited in what appeared to be selective targeting of charities that elect to use the expenditure test to measure their allowable lobbying budgets. The Alliance for Justice, Charity Lobbying in the Public Interest and OMB Watch wrote IRS Tax Exempt and Government Entities Director Evelyn Petschek “to express our grave concern and dismay.”

The letter noted that the expenditure test, passed as Section 501(h) of the tax code, was intended to “provide clear standards for measuring permitted lobbying,” and that the IRS issued an information letter in 2000, stating “the Internal Revenue Manual specifically informs our examination personnel that making the election will not be the basis for initiating an examination.”

The IRS 2003 Workplan targets several “market segments” of exempt organizations for review in specific areas, including PACs and several other non-charitable types of exempt organizations. The IRS website states the purpose of the market segment studies is to “enable EO to accurately assess the risks of noncompliance; identify education and outreach needs;

⁶ The response from grassroots groups was amazing. For example, in roughly a 48-hour period, over 3,400 messages were sent to Committee members through the OMB Watch online alert system alone.

and more efficiently use IRS resources.” Organizations are selected by random sample, and asked about a variety of issues, including, but not limited to, lobbying.

Charity lobbying was not identified as a market segment. Instead, the audits appeared to be the result of a “Non-Compliance Indicator” project. The IRS Workplan states that, “The cases selected for examination under these projects will meet certain condition codes that are developed by Examination & Planning Programs and Classification.” IRS agents have reportedly been directed to look at non-compliance with lobbying restrictions using charity spending more than \$10,000 on lobbying as a trigger, raising substantial questions about the validity of the process used in the Non-Compliance Indicator Project. This is because expenditure limits on lobbying are based on a percentage of a group’s budget, not a set dollar amount.

The letter to the IRS from the Alliance for Justice, Charity Lobbying in the Public Interest and OMB Watch requested a meeting to discuss “the implications of the situation and identify ways in which the Service can affirm that charities should make the 501(h) election and that it will not trigger an audit.” With close coordination, other nonprofit infrastructure leaders-- including the Council on Foundations, Independent Sector, the National Committee for Responsive Philanthropy, and the National Council of Nonprofit Associations-- sent a similar letter.

In late April the seven nonprofit leaders met with the IRS. IRS officials stated they were halting the program pending a review. However, they indicated that it was not examining organizations simply because they used the expenditure test, although lobbying had been a factor in selecting organizations for audit.

IRS Exempt Organizations Director Steve Miller said that lobbying was one of nearly 20 different sets of criteria the IRS had been testing to see if any could be used as “non-compliance indicators” – tests to identify organizations violating federal tax law. Forty-six organizations had already been audited under the lobbying criteria and another 50 to 100 organizations were pending some action. However, targeting groups that lobby did not uncover any significant violations of the law. The lobbying-related indicator the IRS used in this program “doesn’t seem to work,” according to Miller.

Miller stated that the IRS would halt this effort for the time being. No further organizations would be included in this program. Of the 50 to 100 audits still pending in the field under this program, IRS staff will complete any audits already begun and will review a Form 990 for any selected organization for which the audit has not yet begun. Unless this review suggests some problem with the return, IRS field agents will close the case without auditing the organization. The IRS is internally reviewing all of these cases to determine whether some enforcement effort around lobbying might be advisable in the future. In response to concerns about the chilling effect the audits might have, Miller agreed to consider additional public outreach to charities clarifying that lobbying within the legal limits is a legitimate activity.

The members of Congress who passed the expenditure test in 1976 appreciated the important policy role played by charities that lobby. As then-Senator Robert Dole put it, “Charities can be and should be important sources of information on legislative issues.”

Given the publicity that occurred over the IRS actions, it is uncertain what long-term impact this will have on nonprofits. Less than 4% of charities elect to fall under the expenditure test. The IRS actions may put a new damper on encouraging charities to elect. While the audit program

did not appear to be a deliberate attempt to discourage or prevent charities from lobbying, the manner in which it was carried out reflected a lack of sensitivity to their constitutional rights.

II. Government Control of Speech

The Bush administration has used the levers of power to control the speech and the activities of nonprofits in ways that have never been seen before. Many of the examples nonprofits describe are real; some are apocryphal; all have left a deep impression of distrust and hostility.

Perhaps those dealing with issues concerning reproductive rights and HIV/AIDS are voicing the harshest opinions. Many have described their differences with the Bush administration as falling on one side or the other of the “safe sex” versus “abstinence” debate. Some claim that targeted audits are occurring to those to disagree with the administration’s emphasis on “abstinence.” Others, who fall on the “safe sex” side of the debate claim that they are being told not to apply for new grants since resources will be going to faith-based organizations more consistent with administration policies. Some claim that there is a blacklist being developed by agencies, such as the U.S. Agency for International Development (USAID), to insure that certain organizations do not get grants.

Some of these sentiments are based on oral communication with those in USAID and other government agencies, but have not been documented in writing. Some derive from written communications, such as a December 2, 2002 “action cable” to USAID mission directors regarding “implementation of USAID policies and programs on HIV/AIDS and trafficking.” The final page of the action cable states “all operating units should ensure that USAID-funded programs and publications reflect appropriately the policies of the Bush administration.” It should be ensured that “USAID is not perceived as using U.S. taxpayer funds to support activities that contradict our laws or policies, including...abortion.”

The same action cable notes that “any websites fully or partially funded by USAID” must have materials reviewed before posting to the web. Many groups working on HIV/AIDS believe that USAID and others, such as NGO Watch (see below), are combing through websites to find code words and phrases that might lead to blacklisting. They say keywords, such as “condoms,” are triggers. If this process is occurring, it raises questions about whether federal agencies are properly applying cost allocation rules that grantees are required to follow.

Cost allocation rules, which were at the heart of the 1983 OMB Circular A-122 fight, state that activities deemed unallowable for federal reimbursement should be paid for with non-federal funds, but that grantees can properly allocate a portion of the allowable cost to the federal government.⁷ In this way, nonprofits do not need two copies, two offices, two executive directors, etc. However, the USAID action cable seems to suggest that if any federal funds are used for the website, then the entire website must follow federal standards. Thus, if a grantee, were to mention something about abortion or sexual activity it would “taint” the entire website, meaning no federal reimbursement would be allowed.

The following examples demonstrate the overtly political agenda being imposed by the Bush administration, particularly on those dealing with HIV/AIDS.

⁷ Unallowable costs may not be charged directly to a federal award, nor may they be included in an organization's indirect cost pool for calculating the indirect cost rate charged to a federal award.

Stop AIDS

Stop AIDS, a San Francisco-based nonprofit providing AIDS prevention programs, may prove to be experiencing what other nonprofits, particularly those with different viewpoints from the Bush administration, may also begin facing. HHS is applying a heavy hand that may make continued federal funding contingent on following HHS guidance on conferences and workshops to ensure that such events do not encourage sexual activity, even if those activities are funded with private dollars.

On June 13, 2003, the director of the Centers for Disease Control and Prevention, Julie Louise Gerberding, sent letters to Stop AIDS and the city of San Francisco's Department of Public Health warning that promotional materials for certain recent "workshops with titles and/or program descriptions" appear to encourage sexual activity in violation of Section 2500 of the Public Health Act.⁸ CDC has a cooperative agreement with Stop AIDS and the San Francisco Department of Public Health to conduct AIDS prevention education programs. The claim was made despite the fact that the promotional materials in question had been approved by a local review board mandated by CDC's guidelines for AIDS grantees. The CDC letter to Stop AIDS said continued use of the materials could result in "disallowance or discontinuation of federal funding." More disturbingly, HHS appears to be applying these standards to Stop AIDS's non-federally funded workshops.

In June 2002, CDC published interim final rules that require grantees to have materials approved by a review panel.⁹ Stop AIDS says it is using the same standards for current materials and workshop titles and descriptions as in the past.

Current guidelines and regulations governing grants and cooperative agreements do not apply to non-federal funds (except for matching funds). However, CDC has told Stop AIDS informally that the federal standards extend to all its programs, citing "federal accounting principles". But CDC has not provided any legal authority for this claim, and the department's "Uniform Administrative Requirements for Awards and Subawards" does not require specific procedures to separate federally funded activities from privately funded ones.¹⁰ Nor does it place limits on how private funds can be used.

The focus on Stop AIDS is not new. On February 13, 2003, Gerberding wrote to Rep. Mark Souder (R-IN), a chair of a key congressional oversight committee, telling him that CDC and the Inspector General of the Department of Health and Human Services each investigated past activities of the nonprofit.¹¹ Each review gave Stop AIDS a clean bill of health. Gerberding was

8 Copies of the letters sent to Stop AIDS and the San Francisco Department of Public Health are available on the OMB Watch site at <http://www.ombwatch.org/npadv/PDF/StopAIDSLetter.pdf> and <http://www.ombwatch.org/npadv/PDF/SFDHKatzLetter.pdf> respectively.

9 The rules were published June 15, 1992, 57 Federal Register 26742. See <http://www.cdc.gov/od/pgo/forms/hiv.htm>.

10 Available online at: http://www.access.gpo.gov/nara/cfr/waisidx_02/45cfr74_02.html.

11 Available online at: <http://www.ombwatch.org/npadv/PDF/CDCLettertoSouder.pdf>.

writing to Souder because he previously expressed concerns that Stop AIDS was engaging in improper behavior.

At the same time Gerberding sent the June 13 letter to Stop AIDS and the city, she sent another letter to Souder informing him that Stop AIDS has workshop titles and program descriptions “that involve, for example, advice on promoting relations with escorts and prostitutes, in my view, appear to violate Section 2500.”¹² In the letter, Gerberding tells Souder that CDC is instructing Stop AIDS to “refrain from using such program titles.” She also notes the CDC will notify other HIV prevention program grantees about existing restrictions, and will “intensify oversight of grantee activities,” including local review boards.

Stop AIDS staff expressed shock over the CDC letter. They note that the city of San Francisco, with its own funds, not used to match federal funds, supports the workshops. However, CDC claimed it is difficult to discern between private and federal funds used by Stop AIDS and so has “suggested” that the private funds should carry the same restrictions as the federal funds.

But an Inspector General’s report issued in February said “the Project’s new Finance Director installed a software package to track costs by departments and by grants, effective July 1, 2002, and was evaluating alternatives to implement an after-the-fact time and effort reporting system.”¹³ The Project’s comments to our draft report stated that its new time and effort reporting system had been implemented effective October 1, 2002.” This makes the recent CDC claim on accounting principles highly suspect.

The National Association of People With AIDS wrote to Gerberding objecting to the letter to Stop AIDS, saying “the chilling impact it has on community-based prevention efforts across the country is frightening and unacceptable.” The CDC’s letter to Stop AIDS and expected mass mailing to all its grantees notifying them about compliance with the June 2002 rules is similar to the letter HHS sent to Head Start grantees, threatening loss of funding for a grassroots lobbying effort to oppose the administration’s plan for reauthorizing Head Start. Although federal grantees can spend their non-federal funds on lobbying, the HHS letter did not make this clear. **It is hoped that the letter to grantees of AIDS prevention programs does a better job of explaining the law.**

The Stop AIDS episode is but one example the federal government’s attempts to control the speech and activities of an entire organization through continued harassment in the form of audits, inspections, and now implied control on use of private funds.

Targeting Protestors at the Barcelona AIDS Conference

Efforts to silence critics seem to focus on pet issues, including promotion of abstinence as an AIDS prevention measure. This was apparent when Republican House members encouraged the Department of Human Services to launch inquiries into the actions of groups that protested during a speech by HHS Secretary Tommy Thompson at the XIV International AIDS Conference in Barcelona, Spain in July, 2002.

12 Available online at: <http://www.ombwatch.org/npadv/PDF/SouderLetterJune03.pdf>.

13 Available online at: <http://www.oig.hhs.gov/oas/reports/region9/90201005.htm>.

On July 17, 2002, twelve House Republicans, lead by Rep. Robert Aderholt (R-AL) and including Rep. Mark Souder (R-IN), requested HHS provide a list of organizations that receive any federal funds, along with individuals in those organizations, that attended the Barcelona conference and participated in the protest.¹⁴ The Republicans were upset that Thompson was noisily heckled when he tried to give a speech at the conference.

AIDS activists, according to the *Washington Post*, “drowned out” Thompson's speech at the conference with angry chants criticizing the Bush administration for not pledging more money for international HIV/AIDS.¹⁵ Conference protesters handed out flyers signed by twelve U.S. organizations criticizing the U.S. for not spending enough money on AIDS in developing countries and helped lead the heckling. The protesters began blowing whistles and yelling “Shame! Shame!” and “No more lies!” as Thompson ascended to the podium.

The chanting continued until the end of his speech, rendering the address “virtually unintelligible to the audience,” according to the *Washington Post*. The protesters also carried placards stating, “Wanted: Bush and Thompson for murder and neglect of people with AIDS,” according to the Associated Press.¹⁶ Several hours after his speech, Thompson met with approximately 10 U.S. protesters, and one of the activists said that the Secretary seemed “pretty sympathetic,” according to an article in the Wall Street Journal on July 10, 2002.

The House Republican letter indicated the members were “very disappointed by the rude reception” Thompson received. They asked Thompson for the total amount of federal assistance that went toward the conference and for a list of individuals, and their affiliated organizations, who attended the conference with federal assistance. They emphatically noted that if the conference organizing committee cannot “guarantee the freedom of speech to U.S. representatives and discontinu[e] its discrimination against those of religious faith,” financial assistance to future conferences may be withheld or “redirect[ed].”

On the same day the letter was written, Roland Foster, a staff member for the Republican majority on the House Government Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources, sent an e-mail message to HHS' legislative affairs office asking how much federal funding the 12 U.S. AIDS organizations that helped organize the protest receive. Six days later, Foster expanded the number of organizations in the audit request from 12 organizations to 16.

Claude Allen, Deputy Secretary of HHS, said the department did not want to engage in a witch hunt, but was quoted by the *Washington Post* saying that protestors “need to think twice before

14 The letter was signed by Reps. Robert Aderholt (R-AL), Jim DeMint (R-SC), Joe Pitts (R-PA), John Shadegg (R-AZ), Jim Ryun (R-KS), Todd Tiahrt (R-KS), John Sullivan (R-OK), Mark Souder (R-IN), John Doolittle (R-CA), Sue Myrick (R-NC), Sam Johnson (R-TX) and Jo Ann Davis (R-VA.)

15 “Amount of U.S. Spending on AIDS Decried,” David Brown, July 10, 2002; Page A02 at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A46267-2002Jul9¬Found=true>

16 “Protesters blast U.S. at AIDS conference,” by Emma Ross, Associated Press (courtesy of the Philadelphia Inquirer), July 10, 2002 at: <http://www.philly.com/mlid/inquirer/news/nation/3634027.htm>

preventing a Cabinet-level official" from speaking.¹⁷ According to the *Washington Post* article, HHS officials are "genuinely angry and are seeking to prevent what they view as disrespectful behavior in the future."

The audits of the AIDS prevention groups were the subject of an August 19, 2002 CNN Inside Politics discussion. Maria Echaveste, deputy chief of staff under former President Clinton, argued that the HHS inquiry is "a witch hunt. I think ... they're sending a signal that there may be retribution for people expressing their freedom of speech and it's just really shocking." On the other hand, Rich Lowry of the *National Review* said, "what the groups engaged in went well beyond expressing their opinions or even booing. They engaged in a 30-minute effort -- a successful effort -- to shut down and make it impossible to hear the HHS secretary give an address at an international conference. So if you're a member of one of these groups that, on the one hand, fattens itself on federal funds, and on the other hand, goes overseas to shout down U.S. officials, you should expect to get some blowback and some additional attention from Congress."

Nonprofits clearly see the HHS action as retaliatory – and believe it is intended to chill future advocacy. For example, Terje Anderson, Director of the National Association of People With AIDS, summed up this fear by telling the *Washington Post* "Groups that do advocacy and get public money are always concerned that there's an awkwardness in that situation. But I can't think of another time there's been talk of retaliation." And Mark Harrington, Executive Director of the Treatment Action Group, added, "Anybody who hears what's happened is going to think twice about signing another flier or planning another demonstration."

Fear of retaliatory audits, even if a grantee receives a clean bill of health like Stop AIDS did (see section above), can have a chilling effect on speech, since the time and expense of dealing with an audit are considerable. Whether one agrees or disagrees with heckling as a tactic, it is a form of constitutionally protected speech that should not, on its own, give rise to increased scrutiny, audit, or withholding of federal grants.

AIDS Programs in Africa and the Global Gag Order

This year, House Republicans included two religious amendments in the \$15 billion bill to help stop the spread of AIDS in Africa, which passed on May 1, 2003. The first would require one third of the money to be used to promote abstinence (a favorite cause of the religious right). The second provision would permit religious organizations that receive funding under the program to reject AIDS prevention strategies that they find objectionable (such as instruction in the use of condoms). This action, combined with the "global gag rule," creates a double standard in the degree of control the U.S. government seeks to assert over activities and speech that it does not fund.

The "global gag rule," also known as the Mexico City Policy, forbids any international family planning organization that receives federal funds from talking about abortion, counseling women on abortion, providing abortions, and advocating for changes in abortion law, *even with their own private funds*. President Ronald Reagan first imposed the global gag rule in 1984, and President Bill Clinton rescinded the policy in 1993. Soon after taking office, Bush reinstated it.

17 "HHS Studies Funding of AIDS Groups," by David Brown, August 19, 2002; Page A01 at <http://www.washingtonpost.com/wp-dyn/articles/A33900-2002Aug18.html>.

Giving federally-funded religious groups free reign to promote a religious viewpoint in the context of service delivery (by automatically rejecting a crucial AIDS control method) while banning groups that provide information on abortion (or express a viewpoint on abortion) contrary to administration policies from receiving grants for international family planning programs is hypocritical and unjust. The U.S. government can limit the use of its funds as it sees fit, but it should not seek to control statements or activities it does not fund. In this situation, the religious groups have an additional benefit -- the ability to import their sectarian viewpoint into the realm of government sponsored programs.

The global gag rule is similar in substance to the attacks on nonprofits lead by Ernest Istook (R-OK) in the mid 1990's, which would have banned "political activity," including lobbying, by any nonprofit that received even \$1 in federal funds. That proposal was rejected for domestic grantees.

This issue is far from settled. On July 9, 2003, the Senate voted 53-43 in favor of an amendment to the foreign aid bill that allows federal grantees doing international work to use non-grant funds to provide information about abortion or advocacy on abortion rights. The Senate amendment, sponsored by Sen. Barbara Boxer (D-CA), is the first step in removing the policy legislatively.¹⁸ However, the more conservative House is unlikely to approve the measure. Even if the bill gains House approval, Bush promised to veto the \$27 billion foreign aid package if it lifts the gag rule.

The Senate vote does not alter existing requirements that federal funds cannot be used for abortions. Nonetheless, the bill is being characterized as pro-abortion, with Sen. Sam Brownback (R-KS) reported by Reuters as saying, "It's about the use of taxpayer dollars to fund abortions overseas." Legislative efforts to do away with the rule have been ongoing since February 2001 when legislation was introduced in both the House and Senate to reverse the Bush administration's policy. Rep. Nita Lowey (D-NY) in the House and Sen. Boxer in the Senate sponsored the legislation-- the Global Democracy Promotion Act of 2001-- with several anti-abortion Republicans as cosponsors.

Iraq Reconstruction Efforts

International relief and development organizations have been facing new restrictions on their humanitarian service-related advocacy. Lead by renewed criticism of their increasingly recognized influence in global policymaking, the Bush administration and its conservative allies are taking steps to restrict speech of these groups.

On May 27, 2003, five non-governmental organizations (NGOs) were awarded a total of \$7 million under the Iraq Community Action Program administered by the United States Agency for International Development (USAID). The groups selected were the Agricultural Cooperative Development International & Volunteers in Overseas Cooperative Assistance (ACDI/VOCA), Cooperative Housing Foundation International, International Relief and Development, Inc., Mercy Corps, and Save the Children/US. According to USAID, they are to promote "diverse and representative citizen participation in and among communities throughout Iraq," and to identify, prioritize, and deliver "critical reconstruction and development needs."

¹⁸ See Senate Amendment #1141 to S. 925.

Left out of the official announcement was a condition that each grantee agree to clear any and all publicity or media-related matters tied to their funded-activities through USAID first, and to repeatedly and consistently publicize the U.S. government's funding of their efforts throughout each phase of their on-the-ground service delivery, reflecting the Administration's apparent belief that recipients of federal grants are agents of the U.S. government and its policies.¹⁹ This philosophy was most clearly articulated the week before the Iraq CAP grantee selection by Andrew Natsios, head of USAID, at the annual member forum for InterAction, a coalition of 160 international development and relief organizations.

On May 21, 2003, Natsios, former head of InterAction member World Vision (which, ironically, chose not to apply for Iraq relief funding under the CAP initiative), expressed his "irritation" that those served by US-funded humanitarian assistance do not understand or acknowledge the scope of government activity, and that the blame rests, in large part, with American NGOs that do not actively promote the beneficence of the federal government. He added that if a concerted effort were not made by NGOs to promote their organizations and their work as an extension of US foreign policy, he would, "personally tear up their contracts and find new partners... [NGOs] are an arm of the U.S. government."

As of this writing, two of the five recipients (ACDI/VOCA and International Relief and Development) agreed to the publicity clause. Mercy Corps and Save the Children were still in the process of negotiating clause language and considering whether or not to receive the funds.

Spotty and Unequal Enforcement of Disclosure Rule

A little known provision buried in a spending bill that deals with disclosure of federal grants may start having more of an impact – and may be a vehicle to begin implementing USAID objectives (as described above) as well as a tool to help NGO Watch do its monitoring of NGOs (see below).

Buried in a rider on the appropriations bill for the Departments of Labor, Health and Human Services and Education is a provision reportedly pushed by Sen. Ted Stevens (R-AK) back in 1988 to ensure that state and local governments gave the federal government full credit for federally funded programs they operate. The provision, Section 507, which has been included on and off in Labor-HHS appropriations bills since 1988, requires organizations receiving funding under the bill to disclose information about the amount and percentage of program costs paid for with federal funds.²⁰ The information must be made available on all statements, press releases, bid solicitations and other documents describing projects or programs funded in whole or in part with federal money. Section 507 is once again part of the FY 2004 House Labor-HHS appropriations bill in Section V of H.R. 2660.

¹⁹ OMB Watch does not oppose a requirement that an organization disclose it is receiving federal funds. In fact, such disclosure may help to demonstrate the important role government plays in our society since too many people do not know the extent to which government supports nonprofit, community-based services. However, such disclosure should not impose undue burdens on nonprofits, such as discussed in the next section regarding an appropriations rider affecting human services grantees. We also do not agree that a grant relationship makes the recipient an arm of the grantmaking institution.

²⁰ Because the provision is contained in an appropriations bill, it is applicable only during the federal fiscal year in question.

Since the rider covers all organizations receiving money under the bill – not just state and local government – conservatives thought it might be a tool to target nonprofits. For example, in 1996 former Rep. David McIntosh (R-IN) drew attention to the generally unenforced provision by writing letters to the Departments of Education, Labor, and Health and Human Services asking how it had been applied. His interest was in showing that nonprofit grantees that get federal funds are lobbying. The false assumption is that federal funds are fungible, thereby freeing up resources to do advocacy. Nothing ever came of the McIntosh effort.

Since that time it appears that the departments have begun making sure that the Section 507 requirements have been identified in grant requirements and letters of agreement. This year we received several inquiries about Section 507. Several grantees that do not concur with the administration's viewpoints on issues are being asked about compliance with Section 507. We believe this issue needs to be monitored to insure that there is uniform compliance with the law, and that it is not just be enforced with nonprofits in disfavor with the administration.

NGO Watch

The administration's conservative allies have joined the effort to attack the independent voice of nonprofits that work at the international level. A new effort to monitor the growing power and influence of NGOs engaged in multi-national activities and global governance activities, was formally launched on June 11, 2003. NGOWatch.org, sponsored by the American Enterprise Institute and the Federalist Society for Law and Public Policy Studies, aims to track the "unprecedented growth in the power and influence of [NGOs]," and to increase the level of accountability and promote transparency within the sector.

According to the organizers of the AEI-sponsored research symposium at which the website was announced, NGOs are mostly front groups for "liberal" ideology and anti-corporate activities. Further, AEU claims their participation in global decision making forums, including the United Nations and World Trade Organization, puts them in the de facto role of decision makers themselves, raising concerns as to their power over the sovereignty of other nations -- including the U.S. Their power, moreover, is growing in a framework without any system of accountability to any actors other than their funders and backers.

NGOWatch's primary goal is to provide increased scrutiny of groups, particularly those operating under the supposed "guise" of humanitarian assistance. It reflects a belief that NGOs are suddenly proliferating to an alarming degree in developing and developed nations, with a level of influence and visibility that extends far beyond their grassroots origins and organizational missions.

Though currently available only in preview form, the site will include background and reference resources on a list of groups, with links to their financial reports (through GuideStar), and discussion on sector-related trends in this area. As of this writing, neither AEI nor the Federalist Society -- both influential conservative nonprofits with a proven track record of ties to the Administration, Congress, and the courts -- are included on the proposed list of organizations to watch.

III. The USA PATRIOT Act

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, commonly called the USA PATRIOT Act or just the Patriot

Act²¹, could pose big problems for nonprofits, especially those that advocate changes in administration policy or provide social services to individuals that become targets of government investigations. In the international arena, the size and complexity of large relief efforts have made it possible for extremists to infiltrate charities, working at low levels in remote locations with legitimate relief workers. This makes separating the organization's actions from independent actions of employees extremely difficult. When an organization is infiltrated in this way, it can be branded as a terrorist group, even if it has no knowledge of or complicity in terrorist actions.

Congress rushed the Patriot Act through during the last week of October 2001, in a closed process that took place while congressional offices were shut down for anthrax testing. The House passed the bill 352-66 on October 24 and the Senate approved it the next day 98-1, after just three hours of debate. Sen. Russell Feingold (D-WI) was the only Senator to vote against it, saying it “does not strike the right balance between civil liberties and security.” There was no conference, since lawmakers worked out their differences in behind closed-door sessions prior to the votes. The process was so rushed that a final copy of the bill was not available to the public at the time the votes were taken.

President Bush signed the bill on Friday October 26th, having already signed Executive Order 13224 on September 24, 2001, declaring an emergency and allowing the Treasury Secretary to freeze assets of anyone who he or she determines “to assist in, or provide financial, material, or technological support for...” terrorism, “or to be otherwise associated with those persons...” listed in an “Annex.”²² The result is an ill-conceived and over-reaching law and set of administrative mechanisms that could negatively impact legitimate charities.

Attorney General John Ashcroft said the government will use discretion in applying the law, but it is impossible to know how extensively it has been applied, since much of the surveillance is done secretly. In fact, Rep. James Sensenbrenner (R-WI), the chair of the House Judiciary Committee, claims that the Justice Department has failed to share enough information on how the law is being implemented for a fair evaluation.

A central problem with the Patriot Act is a vague, overbroad definition of a new crime, “domestic terrorism.” (The attacks of September 11th are crimes under pre-Patriot Act law, making this provision unnecessary.) In addition, greatly expanded search and surveillance powers can be invoked under a lowered threshold, requiring only that investigators assert that information sought is relevant to a foreign intelligence investigation.

But the ability of the government to spy on citizens and nonprofits and search and seize records with little judicial oversight or regard for traditional Constitutional protections warrants a bit of a discussion. There are at least three reasons these new surveillance powers might concern nonprofits. First, the government can search and take records, such as computers and telephone logs, *without notice to the owner*. All the government needs to do is show a court a “reasonable necessity for the seizure.” Thus, a nonprofit could not object to a search since it might not know it is happening.

21 P.L. 107-56, 115 Stat. 272, Sect. 203 (2001).

22 Executive Order 13224, 66 Federal Register 49079 (2001), at Sec. 1(d)(i), (ii). The Annex to the E.O. identifies 27 persons and organizations.

Second, the government can search the records of an organization for activity by a third party and bar the organization from notifying anyone of that search. There is almost no restriction on the probable cause for the government to conduct the search, only that it cannot be “conducted *solely* upon the basis of activities protected by the first amendment of the Constitution.” (emphasis added) Thus, it could be conducted based *partly* on activities protected by the First Amendment. Just as there is a low threshold for probable cause, there is also no caveat on the gag. If the records of an organization were searched, presumably the executive director not only could not tell the affected party, but also the board of directors. Some have speculated that the executive director would be prohibited from consulting with legal counsel on the issue.

Third, the government can now “trap and trace” various types of Internet communications. The law does not permit the government to read our emails, but it does allow trapping the URLs of web searches along with email header information (which contains addresses, routing, and subject). This means that information emailed from and to an organization could be trapped and traced, as could visitors to an organization’s web site.

This type of surveillance, as described below in some examples, can be chilling. As with four charities based in the U.S. it can also lead to financial seizure and freezing of assets. These groups had no notice, no opportunity for a hearing, were given no information as to why the action was taken, and no opportunity to confront the evidence against them. Several have filed federal civil cases challenging the government’s action, but the lower courts have sided with the government, based on security considerations. Appeals are underway.

From Citizens to Nonprofits: Challenging Dissent

Ashcroft has been very clear: dissent equals disloyalty. As he told the Senate Judiciary Committee on December 6, 2001, *“To those who scare peace-loving people with phantoms of lost liberty, my message is this. Your tactics only aid terrorists for they erode our national unity and diminish our resolve.”*

With the Patriot Act and subsequent administrative orders, the government has a host of new powers to monitor people and organizations that are not suspected of any wrongdoing. To compound the situation, past initiatives like “Operation TIPS”²³ encouraged Americans to watch and inform on their neighbors. As a result, political dissenters, as well as many others, have felt the backlash. (It is unclear what impact the Terrorist Information Awareness, formerly Total Information Awareness, operated by the Defense Department, will have.)

Charlotte Wu, a Chinese-American college student, still doesn’t understand how the police knew to pay her a visit after she mentioned “planting bombs” on the telephone when referring to a videogame. And if peace activists Jan Adams and Rebecca Gordon were shocked to find their names on a secret government “no-fly” list when they arrived at the airport in San Francisco, they were even more troubled to find that nobody can tell them how to get their names off the list.

Shortly after 9/11, Barry Reingold, a 60 year old retired phone company worker, was visited by two FBI agents. “I have a speaker downstairs in my apartment building to let people in,” Reingold says as he tells his story. “One afternoon, someone buzzes. And I said, ‘Who’s there?’”

23 TIPS stands for Terrorism Information and Prevention System. TIPS was killed through legislation to create the Department of Homeland Security.

And they say, 'The FBI.' And I'm thinking, 'Why is the FBI here?'" He buzzed them into the building, met them in the hallway, and asked for ID, which the two flashed at him. "And so I asked them what this was all about," Reingold recalled. "And they asked me if I was a member of the gym [in San Francisco]. And I said yes. And then they said someone in the gym had reported that I had been talking about terrorism and Sept. 11, oil profits, capitalism and Afghanistan," Reingold said. "And I said, 'Oh, really.'"²⁴

In turns out, he and six or eight others were talking politics at a health club in downtown San Francisco. Somebody said, "that Osama bin Laden is an ...hole." Barry agreed, and said that what happened Sept. 11 was horrific. However, he added, "Bush is a bigger ...hole than bin Laden will ever be because he bombs people all over the world for oil profits." The next thing... the FBI is at the door.

More recently, the Secret Service acknowledged it is investigating a political cartoon Michael Ramirez did for the July 20, 2003 edition of the Los Angeles Times. The cartoon is based on Eddie Adams's Pulitzer Prize-winning 1968 photograph, "Murder of A Vietcong by Saigon Police Chief", which shows the summary execution of a Vietcong prisoner with a gun pointed at his head and hands tied behind his back. Ramirez's cartoon depicts Bush with a gun to his head and his hands behind his back as a man labeled "Politics" prepares to shoot him in the head against a cityscape background called "Iraq."

An unnamed Secret Service official said, "The Secret Service does take threats against all of their protectees very seriously and they have an obligation to look into any threat that's made against any of their protectees." The official did not elaborate. John Gill, Secret Service spokesman, added, "We're aware of the image and we're in the process of determining what action if any can be taken." The irony is that Ramirez did that cartoon in support of Bush, calling attention to the unjust "political assassination" over his Iraq policy.

The list of examples where political dissent is challenged seems to be growing. There are also examples involving people who are participating in nonprofit-led initiatives. A Jewish-American woman, Kate Raphael, was threatened with an FBI subpoena related to her peace protest participation with Women in Black, a worldwide network of women committed to peace with justice and actively opposed to war and other forms of violence. Women in Black was nominated for a Nobel Peace Prize. The FBI asked her to "name names," and then threatened her with a subpoena. When the National Lawyers Guild got involved, the FBI backed off. As former White House press secretary Ari Fleisher noted, Americans must "watch what they say, watch what they do."

The Chilling Impact on Nonprofits

There are at least three reasons nonprofits should be deeply concerned: concern for the privacy of the people we serve; concern over the potential of seizing assets or key resources within the organization; and concern over the concern we have, which chills participation.

24 "The FBI's House Calls," by Emil Guillermo, December 18, 2001, San Francisco Chronicle at <http://www.commondreams.org/views01/1218-07.htm>

On the first point, libraries have been very troubled by the Patriot Act. The FBI has been visiting libraries to find out what people are reading, even in the absence of suspicion of a crime. A nationwide survey of 1,020 public libraries conducted by the University of Illinois in January and February 2002, found that 85 – or 8.3 percent – had been asked for information about patrons related to 9/11. Of equal worry is that the librarians may not even know that the activities of patrons are being followed (as described above under new surveillance powers). The government has issued subpoenas to Internet Service Providers for hundreds of thousands of customer records²⁵, and the FBI can use various types of tracking software to monitor library Internet use (the new “trap and trace” powers). Unbelievably, the FBI is not required to tell the library or the patron any monitoring is happening.

The Patriot Act also prohibits libraries and others from notifying patrons and others that an investigation is ongoing. At least one library has tried a solution to “beat the system” by regularly informing the board of directors that there are no investigations. If the director does not notify the Board that there are no investigations, it can serve as a clue that something may be happening.

On the second point, more and more nonprofits are worried about actions that may result in harming the operations of the organization. Recent guidelines on “best practices” published by the Treasury Department have heightened this concern. The “Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities”, were issued by the Office of Foreign Assets Control (OFAC) without public comment in November 2002. For the most part they are overbroad, confusing and have little or no direct or likely bearing on prevention of terrorist activity. Many are inconsistent with IRS charity regulations and state charity laws regulating charities. To make matters worse, they apply to all U.S. charities, whether private foundations or public charities, and regardless of whether the group makes grants or does international work.

Given the broad discretion the Treasury Department has to shut down organizations, few perceive the Guidelines to be “voluntary.” By claiming to be “best practices” the Guidelines stray into an area that should be left to the nonprofit sector itself, possibly with consultation from the experts on exempt organizations within the IRS. “Best practices” go beyond legal requirements and are aimed at achieving a high level of managerial and programmatic success. By intruding into this area the Office of Foreign Assets Control is tampering with the basic functioning of nonprofits, without any reasonable connection to potential diversion of assets to terrorism. The IRS has issued a call for public comments on the Guidelines, and several organizations-- including OMB Watch, Independent Sector, and the Council on Foundations-- have called on the Treasury Department to withdraw them.

This all ties to the third point – the chilling impact on nonprofit activity. OMB Watch’s board has sought legal counsel about our operations to identify the potential impact of the Patriot Act on our activities. One conclusion in the memo states: “In our view, these governmental powers [granted under the Patriot Act] are so broad that the government could undertake them against [the organization] – or almost anyone else, for that matter – with little or no cause.” We are told that other legal assessments come to a similar conclusion, leaving many nonprofits scratching their heads and asking, “What should be done about the new Patriot Act?” While our Board has

25 “In the name of Homeland Security, Telecom Firms are Deluged With Subpoenas,” Miles Benson, Newhouse News Service, 04/10/02; online at: <http://www.newhouse.com/archive/story1a041002.html>

steadfastly supported the work we do, we hear stories of other organizations that may cut back on programs and services they offer for fear of actions by the Justice Department.

One national environmental organization, for example, has questioned whether they should be doing work with maps that have implications for climate change; another organization also questioned whether they should be doing research about nuclear facilities and posting maps. In addition, a library in a metropolitan area privately disclosed that it is purging all Internet records immediately so the government cannot seize anything-- despite the knowledge that computer experts most likely have their own tracking system.

Because of the Patriot Act, nonprofit behavior is changing. Staff and Board members are devoting less time and fewer resources on their missions, and nonprofits performing legitimate work and delivering important services fear investigation, harassment, or seizures of equipment or other assets.

IV. Conclusion

Nonprofits have sought a level playing field in the public policy arena through campaign finance reform, disclosure laws, civic education and other programs. In theory, if everyone has to follow the same rules, everyone will have the same chance to prevail. The Bush administration along with some conservative interests appear, however, to be moving towards the closing off of debate on important issues-- ranging from the structure of the social safety net through programs like Head Start and education for disabled children, health and safety regulations, AIDS education and outreach, humanitarian assistance, and international development.

According to the *New Nonprofit Almanac in Brief* there are 1,626,000 tax-exempt organizations in the United States. Of these, the vast majority, 67%, are charities or religious organizations exempt under Section 501(c)(3) of the tax code.²⁶ In 1997, the latest year for which data is available, 31.3%, of nonprofit revenues came from government; that is nearly \$1 in every \$3 comes from government grants, contracts, and reimbursements.

Given these statistics and the increased control of speech exerted by the Bush administration, the potential for damage to the overall quality of public debate on important policy issues is huge. Nonprofit policy participation and public debate are absolutely essential to a functioning democracy. As former Senator Timothy Wirth said in a recent speech to the Global Philanthropy Forum, "...in the ebb and flow of public debate, a free society needs the tension and testing of conflicting ideas, and is stronger as a result."

It is to be expected that a President will push his or her policy agenda and use the tools at hand to do so. However, it is not appropriate for a President to attempt to silence those that disagree with him. The administration needs to change its tack, and cease its efforts to control the public, independent voice of nonprofit grantees. In a democracy, the issues should be decided on the merits, and not on the basis of one-sided, unanswered facts or analyses. The more the public and our elected representatives hear from the nonprofit sector, including views from right to left, the better the resulting decisions.

26 See <http://www.independentsector.org/PDFs/inbrief.pdf>,